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CALCUTTA SECTION.

Vol. 1.

into consideration that the Evidence Act extends over the whole of India, would a statement made to him in the latter place be inadmissible under s. 25 as being made to a Police officer? No, it is submitted it would not. The intention was to prevent confessions from being extorted by intimidation. The Commissioner and Deputy Commissioner are not Police officers; the language of Beng. Act IV of 1866 is inconsistent with their being so: they have not to perform any of the duties of a Police constable; the only officers of Police are those enumerated in the schedule to the Act, Form (A). The Commissioner of Police performs or did perform until a late date, much the same duties as were performed by a Magistrate of a District: Justices of the Peace exercised the executive portion of the work of a Magistrate of a District, but were not to exercise his [212] judicial functions. Persons in the position of a Commissioner and Deputy Commissioner of Police, are not persons who are generally considered Police officers. [PONTIFEX, J.] If a Police officer were to hear a confession as a private individual in his private house, he would be bound to take notice of it, showing that you cannot separate his private and Police capacities: why then should you be able to separate his Police and magisterial capacities. Then again it must be taken into consideration how Mr. Lambert lives: here he lives as a Police officer among Police, not as a Magistrate. It is submitted his Police functions are merged in his magisterial ones: his duties and functions are magisterial and judicial; in this case he issued a search warrant, which is a magisterial act. Under the old Criminal Procedure Code, Act XXV of 1861, the Commissioner of Police had to exercise judicial functions; see s. 84 which provides procedure to be adopted on the arrest within the local limits of the jurisdiction of the Supreme Court of a person against whom a warrant is issued by a Magistrate. Under that section, if the argument of the other side is to prevail, if a prisoner were taken before a Magistrate of Police, a confession made by him would be admissible; but if he were taken before the Commissioner of Police, it would not; see also s. 87. Sections 84 to 100, taken with ss. 148 and 149 show what were the Police officers meant by the latter sections which are in the same terms as ss. 25 and 26 of the Evidence Act. If Mr. Lambert were only a Justice of the Peace he would still be a Magistrate within the meaning of s. 26 of the Evidence Act; any person, who was a Justice of the Peace, would come under that meaning. A confession as in this case made to him in both characters must be taken to have been made to him as a Magistrate, his character as a Police officer being merged in that of Magistrate.

GARTH, C.J., intimated that the Court was of opinion that the statement was not admissible in evidence and ought to have been rejected but that

Confession made to a Police officer shall not be used as evidence. [Sec. 148.—No confession or admission of guilt made to a Police officer shall be used as evidence against a person accused of any offence.]

Confession made while the accused is in custody of the Police shall not be used as evidence. [Sec. 149.—No confession or admission of guilt made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be used as evidence against such person.]

†[Sec. 25 :—No confession made to a Police officer shall be proved as against a person accused of any offence.]

Sec. 26.—No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation.—In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or in Burma or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.]

MACPHERSON, J., had given a certificate that without the statement there was sufficient evidence to justify the conviction.

Mr. Jackson then contended that if the statement had been [213] improperly received in evidence, the prisoner was entitled to an acquittal. The case cannot be sent back, but under s. 26 of the Letters Patent must now be decided by this Court, if at all. But it cannot be decided at all: s. 167 of the Evidence Act, which provides that "the improper admission or rejection of evidence shall not be ground of itself for the reversal of any decision in any case," does not apply to a criminal case tried by a jury, but only to cases where the matter has been decided by a Judge without a jury. The Criminal Procedure Code, Act X of 1872, makes special provisions as to the improper admission of evidence in trials by jury: see s. 283. And s. 280 gives the Appellate Court power to pass any order it thinks fit: s. 283 was unnecessary if s. 167 of the Evidence Act applied. In *Reg. v. Narayan Dadabhai* (9 Bom. H. C. R., 358), the applicability of s. 167 to such cases as this was raised, but the question was only fully gone into by one of the Judges, BAYLEY, J., and was not made a ground of their decision by SARJENT, C.J., and GREEN, J., though they adverted to it. BAYLEY, J., gave a strong opinion that the section was not applicable to such a case as this. The word 'decision' in that section is inapplicable to the verdict of a jury. It seems to have been admitted that the Court of Review was the proper Court to decide on the sufficiency or otherwise of the evidence. [GARTH, C. J.—That point was not raised.] No, but it was not suggested that the Court before whom it was argued was not the proper Court after long argument on all points. PONTIFEX, J.—It appears to me clear the other way, viz., that the Court in s. 167 means the Court that tried the case. GARTH, C. J.—In that case the Judge who tried the case was one of the three Judges before whom the case was heard on review. Yes, and he delivered a fresh judgment as one of the Court of Review. This case differs in that it is one certified by the Advocate-General, not reserved by the Court. It is submitted that s. 167 does not apply to criminal trials at all: the section is identical with s. 57 of Act II of 1855, which has never been applied to criminal trials. The words are "the Court before which such objection is" not "was raised." It does not apply to cases tried by a jury: it would be impossible to say what the [214] result on the minds of the jury would have been, if the evidence improperly admitted had not been before them. The prisoner ought to be discharged.

Mr. Allen followed on the same side.

The Court took time to consider their judgment, and on a subsequent day called on Mr. Ingram, who then appeared with the *Standing Counsel* for the Crown, on the point as to s. 167 of the Evidence Act, but the learned Counsel said he thought it was unnecessary for him to argue the point.

The following judgments were delivered:—

Garth, C. J.—In this case, the prisoner Hurribole Chunder Ghose was tried and convicted, at the February Sessions of the High Court, for using

* [Sec. 57:—The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall

No new trial for rejection or improper reception of evidence.

appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision or that if the rejected evidence had been received, it ought not to have varied the decision.]

certain forged documents, and sentenced to ten years' transportation. At the trial before MACPHERSON, J., it was proposed on the part of the prosecution to put in a confession made by the prisoner. The confession was made, in the first instance, to two policemen, and taken down in writing, and the prisoner was then brought before the Deputy Commissioner of Police, Mr. Lambert, at the Police Office in Calcutta, where he again affirmed the truth of his former statement to Mr. Lambert, and Mr. Lambert, in his capacity of a Magistrate, received and attested the statement.

Upon this confession being tendered in evidence, it was objected to by the prisoner's Counsel, upon the ground that it was a confession made by the prisoner to a police officer, and therefore not admissible, by reason of the 25th section of the Evidence Act (1 of 1872). In answer to this objection, it was urged on the part of the prosecution, *1st*, that Mr. Lambert was not a "police officer" within the meaning of the section, *2nd*, that, if he were, the statement was made to him as a Magistrate, and not as a police officer, and that the 26th section was intended to qualify the 25th, so as to make a statement even to a police officer admissible, if made in the presence of a Magistrate. The learned Judge at the trial admitted the evidence, and declined to reserve the point; but the Advocate-General having since given a certificate, under s. 26 of the [215] Letters Patent of the High Court, that the point was a proper one to be considered, it has been brought before this Court, for review, and has been well and fully argued before us.

It was urged by Mr. Jackson, for the prisoner, that the terms of s. 25 are imperative, that a confession made to a police officer, *under any circumstances* is not admissible in evidence against him, and that the 26th section is not intended to qualify the 25th, but means that no confession made by a prisoner in custody, to any person other than a police officer, shall be admissible, unless made in the presence of a Magistrate. I am of opinion that this is the true meaning of the 25th section. Its humane object is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them. It is an enactment to which the Court should give the fullest effect, and I see no sufficient reason for reading the 26th section so as to qualify the plain meaning of the 25th.

But then comes the question whether Mr. Lambert was a police officer within the meaning of s. 25. It was argued, and with some force, that the term "police officer" did not mean a Deputy Commissioner of Police; that it comprised only that class of persons who are called in the Bengal Police Act (Bengal Act IV of 1866) "members of the Police Force;" and that the object of the Evidence Act was not to prevent a gentleman in Mr. Lambert's position from taking a confession, but only ordinary members of the Police Force, who are personally and constantly engaged in the detection of crime and the apprehension of offenders.

There is no doubt that, looking at the various sections of Bengal Act IV of 1866, the Deputy Commissioner of Police is not a member of the Police Force within the meaning of that Act, and, moreover, on looking back to the Police Act of 1861, it will be found that the term "police officer," as used in that Act, has generally the same meanings as a member of the Police Force in the Act of 1866; but, in construing the 25th section of the Evidence Act of 1872, I consider that the term "police officer" should be read not in any strict technical sense, but according to its more comprehensive and popular meaning. [216] In common parlance and amongst the generality of people, the Commissioner and Deputy Commissioner of Police are understood to be officers of police,

or in other words "police officers," quite as much as the more ordinary members of the force; and, although in the case of a gentleman in Mr. Lambert's position, there would not be, of course, the same danger of a confession being extorted from a prisoner by any undue means, there is no doubt that Mr. Lambert's official character, and the very place where he sits as Deputy Commissioner, is not without its terrors in the eyes of an accused person, and I think it better in construing a section such as the 25th, which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification.

I am of opinion, therefore, that the confession made by the prisoner in this case ought not to have been admitted at the trial.

But then comes the further very important question, what should be the effect of this improper admission of evidence on the proceedings? The 167th section of the Evidence Act provides that "the improper admission of evidence shall not be ground of itself for the reversal of any decision in any case if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision;" and I was certainly disposed to think, before hearing Mr. Jackson's argument, not only that this section applied to criminal as well as civil cases, but that the Court which had to determine whether, independently of the evidence objected to, there were sufficient materials to justify a conviction, was the Court below, before which the case was originally tried, and, upon this assumption, my learned colleague and I consulted MACPHERSON J., who certified that there was ample evidence in the Court below, independently of the admission, to justify the conviction in this case.

Mr. Jackson, however, desired to be heard upon the effect of s. 167, and he had urged upon us, *first*, that the section does not apply at all to criminal cases, and *secondly*, that, if it does, the Court to determine whether the conviction ought to stand, is not the Court which tried the case, but the Court [217] before whom the point of the admissibility of the evidence was argued. Mr. Jackson insisted that the word "decision" used in s. 167 was one inapplicable to a criminal case tried on the original side of this Court, and that it never could have been intended by the Legislature that a case triable by a jury, and of the facts of which a jury alone are the proper judges should be virtually re-tried by any Court not consisting of a jury, and in aid of his argument, he cited the case of *Reg. v. Nairagi Dadabhai* (9 Bom. H.C.R., 358).

I am unable, however, to discover any sufficient reason why the 167th section of the Evidence Act should not apply to criminal as well as civil cases. It is perfectly true that the word "decision" is more generally used as applicable to civil proceedings, but it is by no means inappropriate to criminal cases; and, if it was the intention of the Legislature to use an expression which would apply equally to civil as to criminal proceedings, there is probably no other word which would have answered their purpose better. Many other provisions of the Evidence Act apply equally to all judicial enquiries, and, if the nature of the mischief which the section was intended to remedy is considered there is at least as much reason why it should apply to criminal as to civil proceedings. The Court have no power in a criminal case to order a new trial, and, if, in each instance, where evidence is improperly admitted or rejected, the conviction is to be quashed, a lamentable failure of justice would often be the consequence.

I am of opinion therefore that s. 167 does apply to criminal cases, but, upon consideration, I think that the Court mentioned in that section which is

to decide upon the sufficiency of the evidence to support the conviction is the Court of Review, and not the Court below. The point is certainly "raised," properly speaking, in the Court below, but it is both raised and argued in the Court of Appeal, and we think that the proper course of proceeding is for the Court of Appeal to decide upon the case, upon being informed from the Judge's notes, and, if necessary by the Judge himself, of the evidence adduced at the trial.

[218] Apart, however, from s. 167 of the Evidence Act, I think that, under s. 26 of the Letters Patent, by virtue of which this case has been submitted to us for review, we have a right either to quash or to confirm the conviction, as we may think proper. The section enables the Court, after deciding upon the point reserved or certified, to pass such judgment or sentence as it may think right. If, therefore, upon reviewing the whole case, we are of opinion that, upon the evidence properly received, there is sufficient ground to convict the prisoner, I consider that we ought to allow the conviction to stand. In the present case, therefore, we have obtained copies of the Judge's notes at the trial, and have also obtained information from the Judge as to what particular portion of the evidence applied to the prisoner Hurrihole Chunder Ghose, and we are now prepared to hear the case argued upon its merits, as to whether there is sufficient evidence, apart from that improperly admitted, to support the conviction.

Pontifex, J.—I also am of opinion that the confession made by the prisoner in Mr. Lambert's presence ought not to have been admitted at the trial. Without going so far as to say that s. 25 of the Evidence Act renders inadmissible a confession made to any person connected with the police, for there are cases in which a person holding high judicial office has control over and is the nominal head of the police in his district, I think that, in the present case, it was impossible for Mr. Lambert, residing in the house allotted to him as Deputy Commissioner of Police, and surrounded by police immediately under his control, to divest himself of his character of a police officer. I also agree that, under cl. 26 of the Letters Patent, which clause deals with cases tried before a jury, we are bound to consider the admissible evidence in this case, and to pass such judgment and sentence as we shall think right, and I come to this conclusion without reference to s. 167 of the Evidence Act.

I agree that such last mentioned section is applicable to criminal trials, but I have some doubt whether, if we were proceeding under it alone, we should be the proper Court to [219] consider the sufficiency or insufficiency of the evidence in relation to the verdict. (The counsel for the prisoner then went through the evidence to show that it was insufficient, apart from the confession, to justify the conviction being upheld. A certificate by a majority of the jury who tried the case, to the effect that if the confession had not been in evidence they would have given a verdict of acquittal, was tendered, but was rejected by the Court. The Court took time to consider their judgment, and eventually upheld the conviction on the evidence).

Attorney for the Crown: *The Government Solicitor, Mr. Sanderson.*

Attorney for the prisoner: *Mr. Carruthers.*

NOTES.

[CONFESSION—SEC. 25 OF THE EVIDENCE ACT—POLICE OFFICER.

I. The expression *Police Officer* in Sec. 25 of the Evidence Act is not restricted to—

(a) an officer of the Regular Police Force but to every Police Officer (chowkidar included):—(1899) 26 Cal., 569.

(b) an officer of Native States :—(1896) 22 Bom., 235.

(c) a police patel :—(1892) 17 Bom., 485.

II. *Admissibility of Confessions* :—

(a) Confession made by one accused may be received as evidence in favour of another tried together :—(1877) 2 Bom., 61.

(b) Admission made to a Police Officer before arrest is admissible :—(1881) 6 Cal., 530.

III. When a verdict is set aside on the ground of inadmissible evidence having been let in, the High Court is not bound to order retrial. —(1898) 25 Cal., 711.

See also (1877) 2 Bom., 61; 10 M.L.J., 147 and 9 Bom. L. R., 789.]

[1 Cal. 219]

APPELLATE CRIMINAL.

The 23rd March, 1876.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE L. S. JACKSON,
MR. JUSTICE MACPHERSON, MR. JUSTICE PONTIFEX AND
MR. JUSTICE MORRIS.

The Queen

versus

Zuhiruddin and others.

*Criminal Procedure Code (Act X of 1872), s. 64 -Power of Judge acting in
English Department.*

An application for the transfer of a case under s. 64 * of the Criminal Procedure Code should be made, not by letter to the English Department of the High Court, but before the Court in its judicial capacity, and should be supported by affidavits, or affirmation in the usual way.

THE Assistant Magistrate of Patna by an order dated the 10th of February 1876, committed the accused for trial by the Sessions Judge of Patna, on the charge of having on the 5th of June 1875 committed murder and cognate offences, alleging in the order of commitment that the delay in bringing them to justice was caused by the undue influence exercised by the accused in the district. On this ground he applied, through the District Magistrate, to the High Court for an order under s. 64 of Act X of 1872 transferring the case to some other district. A copy of the grounds of commitment was furnished [220] to the accused on the 20th of February. The application to the High Court to

*[Sec. 64 :—Whenever it appears to the High Court that such order will promote the ends of justice, or tend to the general convenience of the parties or witnesses, it may direct the transfer of any particular criminal case, or appeal, or class of cases or appeals from a Criminal Court, subordinate to its authority, to any other such Criminal Court of equal or superior jurisdiction,

or may order that any offence shall be inquired into or tried in any district or division of a district, other than that in which the offence has been committed, or that it shall be tried before itself. If the High Court withdraws any case from any other Court for trial before itself, it shall observe the same procedure which that Court would have observed if the case had not been so withdrawn.

Provided that the orders issued under this section shall not be repugnant to orders issued by the Local Government under the last preceding section.]

transfer the case was made by the District Magistrate by letter directed to the Registrar of the High Court, who placed it before JACKSON, J., sitting in the English Department, who thereupon, without notice to the accused, made an order transferring the case from the Sessions Judge of Patna to the Sessions Judge of Shahabad. The trial before the Sessions Judge of Patna would have been by a jury, while that at the Sessions Court at Shahabad would be by the Judge with assessors.

On the above facts, Mr. Evans applied for a rule calling on the Crown to show cause why the order should not be quashed on the ground that it had been made without jurisdiction, and was not a valid exercise of any power vested in the Court, and moreover was made without notice to the accused, and without any proper application to the High Court on proper and sufficient grounds.

The application was made before GARTH, C.J., and PONTIFEX, J., who ordered a rule to be issued in terms of the application.

Mr. Macrae (The Junior Government Pleader, Baboo Juggodanund Mookerjee with him) on behalf of the Crown now appeared to show cause, and contended that there was no necessity for giving any notice to the accused before making the order, no such procedure having been suggested by the Legislature: and after referring to s. 297* of the Criminal Procedure Code (Act X of 1872), which

* [Sec. 297.—If, in any case either called for by itself or reported for orders or which comes to its knowledge, it appears to the High Court that there has been a material error in any judicial proceedings of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit.

Powers of revision.

If it considers that an accused person has been improperly discharged, it may order him to be tried, or to be committed for trial.

If it considers that the charge has been inconveniently framed and that the facts of the case show that the prisoner ought to have been convicted, of an offence other than that of which he was convicted it shall pass sentence for the offence of which he ought to have been convicted;

Provided that if the error in the charge appears materially to have misled and prejudiced the accused person in his defence, the High Court shall annul the conviction and remand the case to the Court below with an amended charge, and the Court below shall thereupon proceed as if it had itself amended such charge.

If the High Court considers that any person convicted by a Magistrate has committed an offence not triable by such Magistrate, it may annul the trial and order a new trial before a competent Court.

If it considers that the sentence passed on the accused person is one which cannot legally be passed for the offence of which the accused person has been convicted or might have been legally convicted upon the facts of the case it shall annul such sentence and pass a sentence in accordance with law.

If it considers that the sentence passed is too severe, it may pass any lesser sentence warranted by law; if it considers that the sentence is inadequate, it may pass a proper sentence.

The High Court may, whenever it thinks fit, order that the sentence in any case coming before it as a Court of Revision, be suspended; and that any person imprisoned under such sentence be released on bail if the offence for which such person has been imprisoned be bailable.

Except as provided in sections three hundred and twenty eight and three hundred and ninety-eight no Court other than the High Court, shall alter any sentence or order of any Subordinate Court except upon appeal by the parties concerned.

No person has any right to be heard before any High Court, in the exercise of its powers of revision, either personally or by agent but the High Court may, if it thinks fit, hear such person either personally or by agent.]

Optional with Court to hear parties.

Powers of revision confined to High Court.

authorizes the High Court to commit for trial an accused person improperly discharged when such matter should "come to its knowledge" when such person had not the right to be heard, argued, that it might fairly be contended that the High Court having such large powers, the Legislature did not require notice to be given in the lesser matter of transferring cases. [GARTH, C.J.—When an order, if made, will affect an accused person, I certainly think he should have notice before it is made. PONTIFEX, J.—In cases coming before the High Court under s. 297 of the Criminal Procedure Code, the evidence has at a former stage already been taken in the presence of the [221] accused person.] The learned Counsel further argued from the fact, that the power of transferring cases under ss. 63 and 64 was possessed by the Governor-General in Council and by the Lieutenant-Governor, for whom it would be impossible to follow the procedure demanded on behalf of the prisoners, the transfer was made administratively. By s. 13 of the Charter Act, the powers of the High Court may be exercised by one Judge under the rules of 4th June 1867; see Broughton's Civil Procedure Code, p. 704. Therefore, if the matter be non-judicial and affecting the administrative and executive authority only, such a Judge has power to dispose of it himself. PONTIFEX, J.—Will cl. 36 of Letters Patent enable a single Judge to perform functions under s. 64 of Act X of 1872? Cl. 13 confers judicial powers on the High Court; cl. 15 confers administrative power; the power to transfer cases is conferred by the latter section as belonging to the administrative rather than judicial acts of the Court.

Mr. Woodroffe (Mr. Evans and Moonshree Mahomed Yusoof with him) in support of the rule.—Even if in point of form the letter sent by the Registrar be an order of the High Court, the High Court cannot issue an order administratively, and if it could so issue it, the English Department has not the power to issue such an order; the High Court, when it makes an order under s. 64, acts judicially and not administratively. The Legislature could not have intended to confer power of such an unparalleled character as to allow it in certain cases to act both administratively and judicially. Section 520 of the Criminal Procedure Code is the only section under which the High Court has power to make an order not judicial. The considerations which would move the Governor-General in Council are different from those which would move the High Court. No argument can be deduced from ss. 63 and 64A to support the contention that the powers exercised by the High Court are other than judicial proceedings. There is nothing to show that an order under s. 64, made by High Court, is anything other than a judicial order. Any person liable to be prejudicially affected by an act of the Legislature has the right to have an opportunity of defending himself, unless such right has been expressly restricted; see [222] Maxwell on the Interpretation of Statutes, p. 325. The powers of revision given to the High Court by s. 297 are with reference to matters judicial; see *The Queen v. Bundoo* (22 W. R., Cr., 67). The Court can only act on matter brought before the Court in the regular way by the prosecution or by the defence; not on information obtained from other sources, as newspapers, letters, etc. Applications in other cases have been made by the accused for transfer of cases, but these have always been treated judicially. Some of them have been so treated by MACPHERSON, J., and PONTIFEX, J. We have not been able to discover a single instance of an application such as this being made by the accused person to the English Department. [JACKSON, J., referred to three cases in which the application was made on behalf of the accused to the English Department.] Those are cases where the applications were made possibly in the interest of

the accused, but not by him, but by the Magistrate on account of his being connected with the case as either a witness or prosecutor. The learned counsel referred to the *Queen v. Pogose* (not reported), a case in which an application made by the Judge of Dacca to the English Department to transfer the case from that district had been refused on the ground that it could not be dealt with administratively, and asked the Court to send for the papers in the case.

On the re-assembling of the Court on the following day, the following judgments were delivered :—

Garth, C. J.—I am happy to say that, since last evening, some papers have been discovered, which will render any further discussion of this rule unnecessary.

It appears that, in 1869, in a case which, in its circumstances, very closely resembled the present, it was decided by no less than nine Judges of this Court, that the proper course was to apply to the Court sitting in its judicial capacity upon affidavits in the usual way; and I am extremely glad to find that no less distinguished a Judge than Mr. Justice LOUIS JACKSON was one of the Judges who took part in that decision. (This was the case of *The Queen v. Pogose* referred to by Mr. Woodhoffs.) [223] An application in that case was made by Mr. Herschel, the Officiating Sessions Judge of Dacca, to the Registrar of this Court, suggesting that an order should be obtained for the transfer of the proceedings to the High Court for trial. I will read his letter, dated the 11th of June 1869.

"I have the honour to request that you will lay before the Hon'ble Judges of the High Court the following circumstances and solicit orders thereon for me. The Magistrate of Dacca has committed the four principal Armenian residents of this city on a charge of misappropriating a large sum of money, the property of the wealthiest Armenian of Dacca, on his decease. The charge is brought on behalf of Government on the motion of the Educational Department, who claim the money as intended for a school. Technically the Government is prosecutor also under s. 68. The case is as important a case as well could occur in the eyes of the educated classes of Dacca; and the decision of it is naturally looked forward to with great interest. But it appears to me advisable that it should be tried at Calcutta, and not here. My jury list is very ill-adapted for such a case. (The letter then went into details to show the difficulty of obtaining a proper jury in the district to try the case, and suggested that the case should be transferred to the file of the High Court.)"

Upon this letter being received by the Registrar, it appears to have been laid before the Chief Justice, Sir BARNES PEACOCK, who recorded upon it the following minute:—"It appears to me that the Court ought not to interfere upon the application of the Sessions Judge made by letter. If Government (or the prosecutor, if the case is not prosecuted by Government), or any of the accused think fit to apply to the Court by motion supported by affidavit or affirmation, the Court will decide what ought to be done.—June 16th, 1869. (Signed) B. Peacock." This view of the learned Chief Justice was concurred in by the Judges of the Court as under: "I agree with the Chief Justice."—J. P. Norman. "And I."—C. Hobhouse.—G. Loch.—H. V. Bayley. "I agree."—D. N. Mitter. "Seen."—W. Markby.—E. Jackson. And further it was agreed to, as I have [224] already mentioned, by my learned colleague, Mr. Justice LOUIS JACKSON.

This decision having been arrived at in 1869, it appears to us to set the matter at rest; and I think that Mr. Macrae, on the part of Government, will feel that he cannot with propriety contest the point further.

Mr. *Macrae* assented.

Jackson, J.—I wish to add a few words by way of explanation of what seems to be an inconsistency on my part.

My acquiescence in the course taken on that occasion was in this decree marked, that while the other Judges had merely attached their initials in token of their concurrence, I wrote a separate note, and that note is in these words : "I quite agree with the Chief Justice that such an application could only be entertained, if made in the way stated by him. I take the opportunity of pointing out that it has been a very common practice for Sessions Judges to make recommendations for the transfer of cases from one district to another by letter, and that cases have often been so removed by a mere letter based on such recommendations. It may be worth considering, whether some rule ought not to be laid down for dealing with such applications. The same thing also happens in respect of civil cases."

It would seem, therefore, that I not only concurred in that view, but considered it desirable that the Court should lay down a formal rule, which should regulate the procedure in such cases, and should be a notice and a guidance to Judges and Magistrates when they should think fit to make such references in future. Immediately afterwards I left the country and was absent for four or five months, during which time no one took any steps in the matter. The result was that no formal rule was made, and this case appears to have passed out of sight. Two years afterwards I had the honour to succeed to the charge of the English Department, and found that, notwithstanding this case, the practice continued to be such as it had formerly been, and therefore the course I took in this case was [225] in strict conformity to the old practice which had not been departed from, notwithstanding this case.

I do not hesitate to say that the procedure suggested by Sir B. PEACOCK is the proper one when there are parties concerned : but the practice being such as I have stated, I consider myself justified in making the order which I did.

Garth, C. J.—I desire to add that I personally do not regret that this matter has been thoroughly ventilated and discussed in open Court. It is extremely desirable that the public should fully understand that in this country there is the same law for the Government as for the subject ; and that there is not one course of practice for the Crown, and another for the prisoner. Wherever the rights of the subject are concerned, it is quite right that the matter should be dealt with by us in open Court in our judicial capacity, and that each application should be made, supported by affidavit or affirmation, in the regular way.

In the present case the rule will be made absolute to set aside the order complained of, and the Crown will be at liberty, if so advised, to make a substantive application to the Court for the transfer of the case to some other district.

Macpherson, J.—I concur in thinking that the Crown has shown no good cause against the rule ; and that the rule should be made absolute.

Pontifex, J.—I also agree.

Morris, J.—I also agree.

Rule absolute.

NOTES.

[This case was held not applicable in (1881) 8 Cal. 63.]

[226] PRIVY COUNCIL.

The 15th and 16th December, 1875 and the 1st February, 1876.

PRESENT :

SIR J. W. COLVILLE, SIR M. E. SMITH AND SIR J. BYLES.

Phoolbas Koonwur.....Plaintiff

*versus**

Lalla Jogeshur Sahoy and others.....Defendants.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law - Mitakshara - Undivided Share of Joint Family Property—Succession - Decree in Suit against Widow - Limitation—Act VIII of 1859, s. 246—Disability under ss. 11 and 12, Act XIV of 1859—Misjoinder—Questions of Law referred to a Full Bench.

The limitation of one year, provided by s. 246 of Act VIII of 1859, is subject in the case of a minor, to be modified by ss. 11 and 12 of Act XIV of 1859.

Mahomed Bahadur Khan v The Collector of Bareilly (13 B. L. R., 292) distinguished, on the ground that it was decided on an Act of a very special nature.

The benefit of ss. 11 and 12 of Act XIV of 1859 is not limited to the period when the disability of minority has ceased, but applies also to the period during which the disability continues; and therefore, during the latter period, it is open to the minor to sue by his guardian.

On the death without issue of a member of a Hindu family joint in estate and subject to the Mitakshara law, his undivided share in the joint family property passes to the surviving members of the joint family and not to his widows, and cannot be made liable for his debts under decrees obtained against his widows as his representatives.

Quære, where a member of a joint Hindu family governed by the Mitakshara law without the consent of his co-sharers, and in order to raise money on his own account, and not for the benefit of the joint family, mortgages in his lifetime his undivided share in a portion of the joint family property, can the other members of the joint family, on his death, recover from the mortgagee the mortgaged share, or any portion of it, without redeeming?

A suit by a surviving member of a joint Hindu family subject to the Mitakshara law, to recover a moiety of the undivided share of a deceased member of the family in the joint family property, ought not to be dismissed on the ground that all the members of the family have not joined in bringing the suit, where it appears that the only other surviving member of the family has already sued for and recovered his moiety of the property, and disclaims all further interest, and is joined as a co-defendant in the suit.

[227] Where a Division Bench of a High Court refers a question of law for the consideration of the Full Bench, and the answer of the Full Bench is not framed as a decree or as an interlocutory order, and an appeal is brought to Her Majesty in Council, it is open to the respondent, without a cross-appeal, to object to the correctness of the answer given by the Full Bench on the question of law referred.

APPEAL from eleven decrees of a Division Bench of the Calcutta High Court (KEMP and MARKBY, JJ.), dated the 18th November 1870, whereby decrees of the Principal Sudder Ameen of Sarun, dated the 27th March and the 9th April 1866, were reversed or modified.

The facts of the case were the following:—Dukhin, Sheogobind, Kasheenath and Mukkun, the four sons of Bhunjun Sahoo, were, with their cousin Ajoodhya Pershad, members of a joint Hindu family holding joint family property subject to the Mitakshara law. Under an arrangement into which they entered, all the

property which had been acquired by the family in the name of any of its members before the year 1846 was to remain joint family property, but all subsequent acquisitions were to be regarded as separately acquired. Ajoodhya Pershad and Mukkun Sahoo died without issue, the former leaving a widow. Sheogobind died leaving a son Bhugwan Lall, who died in the year 1860, without issue, but leaving two widows. At the time of Bhugwan Lall's death the only male members of the joint family then surviving were Sudaburt Pershad the son of Dukhin, and Hureenath Pershad the son of Kasheenath. In the year 1861, Sudaburt Pershad instituted a suit in the Zilla Court of Sarun against the widow of Ajoodhya Pershad, the widows of Bhugwan, and other defendants, in which he claimed a moiety of the joint family property, admitting that the remaining moiety belonged to his cousin Hureenath, who with his mother Phoolbas Koonwur was joined as a co-defendant in the suit. In that suit Sudaburt sought to set aside certain conveyances of the joint family property which had been executed by Mukkun and Bhugwan Lall and by the widows of the latter. The suit was contested, but no objection was taken to its form as having been brought by one member of a joint family. The principal issue raised [228] was whether the family generally was joint or separate in estate. The Judge decided that in accordance with the arrangement above referred to the family was joint in respect of all property acquired prior to 1846, and separate as to property acquired since that time. With reference to alienations of the joint property under deeds executed by Mukkun and Bhugwan Lall the Judge held that these were valid, but alienations by the widows of Bhugwan were void, and he gave Sudaburt a decree for a moiety of the family property as it had stood prior to the year 1846, excluding such portions as had been sold by Bhugwan Lall or any of the other co-sharers, or had been sold on account of their debts. A list of the lands in respect of which Sudaburt was declared entitled to a moiety, and another list of lands purchased after 1846, in respect of which he was declared to have no title, were annexed to the judgment. The decision of the Judge was affirmed by the High Court on appeal on the 10th March 1863. (The judgment of the High Court in Sudaburt's suit is reported in 2 Hay, p. 315.) Subsequently to the date of the final decision in Sudaburt's suit, various persons who had obtained decrees against the widows of Bhugwan Lall as his representatives, attached and sold the remaining moiety of the joint property in execution of their decrees. In addition to the claims set up by the auction-purchasers under the sales, certain other persons alleged rights in respect of the properties in question under usufructuary mortgages from Mukkun and Bhugwan and under conveyances from the widows of the latter.

On the 10th April 1865, the present suit was instituted in the Court of the Principal Sudder Ameen of Sarun by the appellant Phoolbas Koonwur as mother and guardian of the minor Hureenath Pershad, against the widows of Bhugwan and the various persons claiming the property as auction-purchasers, or otherwise. Sudaburt Pershad and the widow of Ajoodhya Pershad were joined as co-defendants in the suit. In her plaint, the plaintiff relied on the decision in Sudaburt's suit as establishing against the widows Hureenath's right to the remaining moiety of the lands which had been declared to be [229] joint family property. The defence taken by the widows does not appear on the record. Sudaburt filed a written statement, in which he admitted the plaintiff's title and disclaimed any interest in the litigation, having already recovered in his own suit the moiety of the family property to which he was entitled. The statements filed by the defendants, the auction-purchasers, were to the effect that Kasheenath, the father of Hureenath, had separated in estate from the other members of the family more than twelve years before the institution of

this suit, which was consequently barred by limitation ; that the lands which they had purchased were the separate property of Bhugwan, and had properly been made liable for his debts in suits against his widows ; that on the lands being seized in execution of the decrees in these suits, the plaintiff had applied for their release, and that the present suit not having been brought within one year from the date when that application was rejected was out of time under the provisions of s. 246^c, Act VIII of 1859. Other pleas of limitation were also taken under cls. 3, 5, and 7 of s. 1, Act XIV of 1859, and under s. 257^d, Act VIII of 1859. Those of the defendants who claimed to hold under mortgages from Mukkun and Bhugwan Lall contended that the suit could not be brought till the mortgage debts had been paid off. The defendants who claimed under conveyances from the widows alleged that the latter had sold in order to discharge Bhugwan's just debts.

The general effect of the Principal Sudder Ameen's decision in the suit was to overrule the various defences set up and to find that the property in suit was joint family property to which the plaintiff had established her son's right. But in respect of particular portions of the lands claimed, for reasons expressed in his judgment, he disallowed a part of the plaintiff's demand.

From this part of his decision an appeal, No. 170 of 1866, was presented to the High Court on behalf of the plaintiff, and numerous appeals were at the same time preferred on behalf of the defendants. Of these, the appeals Nos. 224, 234, 235, 237, 238, 239, 240, 243, 244 and 245 are brought under consideration in the present appeal.

* [Sec. 246:—In the event of any claim being referred to, or objection offered against the

How claims and objections to the sale of attached property are to be investigated.

sale of lands or any other unmoveable or moveable property which may have been attached in execution of a decree or under any order for attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in section 220. And if it shall appear to the satisfaction of the Court that the land or other unmoveable or moveable property was not in the possession of the party against whom execution is sought, or of some other person in trust for him, or in the occupancy of ryots or cultivators or other person paying rent to him at the time when the property was attached, or that, being in the possession of the party himself at such time, it was so in his possession not on his own account or as his own property, but on account of or in trust for some other person, the Court shall pass an order for releasing the said property from attachment. But if it shall appear to the satisfaction of the Court that the land or other unmoveable or moveable property was in possession of the party against whom execution is sought, as his own property, and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him at the time when the property was attached, the Court shall disallow the claim. The order which may be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order.]

† [Sec. 257:—If no such application as is mentioned in the last preceding section be

The sale if not objected to for irregularity, or if the objection is disallowed, shall become absolute.

made, or if such application be made, and the objection be disallowed, the Court shall pass an order confirming the sale ; and, in like manner, if such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale for irregularity. If the objection be allowed, the order made to set aside the sale shall be final ; if the objection be disallowed, the order confirming the sale shall be open to appeal ; and such order, unless appealed from, and if appealed from, then the order passed on the appeal, shall be final ; and the party against whom the same has been given shall be precluded from bringing a suit for establishing his claim.]

[230] The Division Bench of the High Court, before which the appeals came, conceiving that they involved points of law on which the authorities were conflicting, referred the following questions for the consideration of a Full Bench :—

1. Bhugwan Lall, a member of a Hindu family living under the Mitakshara law, and having joint family property, died entitled to an undivided share in such property, and leaving two widows him surviving. After the death of Bhugwan Lall, his widows were sued in their representative capacity in respect of debts incurred by him in his lifetime on his own account, and not for the benefit of the joint family, and decrees were obtained against the widows in that capacity. In execution of one or more of these decrees, an interest in certain portions of the joint family property, to the extent of the share to which Bhugwan Lall was entitled in his lifetime, has been sold by auction, and the purchasers have taken possession. Can the nephew of Bhugwan Lall, who is one of the surviving members of the joint family, recover from the purchasers possession of the interests which they have purchased, or any part of them ?

2. Bhugwan Lall, in his lifetime, executed an ordinary zuripeshgi mortgage in respect of his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family. Can the nephew of Bhugwan Lall recover from the mortgagee, without redeeming the same, possession of the mortgaged share, or any portion of it ?

The first of these questions the Full Bench unanimously answered in the affirmative. The result of their opinions is thus expressed by the Chief Justice, Sir BARNES PEACOCK, at the close of his judgment :—“I think, therefore, that this property, not being the property of the widows, and not being the property of the heirs of the deceased, could not be made available under the decree against the widows : that if it could be made available at all for payment of the debts of the deceased, it must be in a suit against the survivors to charge the share of the deceased in the joint estate with the payment of the decree, by suing the survivors for the debt, and asking to have the deceased's share of the estate made available in the hands of [231] the survivors to the same extent as that to which it would have been made available if the deceased had left a son and the estate had gone to him by inheritance, instead of to the survivors by survivorship. I think, then, that the question must be answered in the affirmative : that the plaintiff has a right to sue the purchaser under the decree to recover back the estate, inasmuch as the property belongs to him, and the title of the purchaser under the decree against the widows is an invalid title.”

Upon the second and more difficult question the Chief Justice, after reviewing the authorities, came to the conclusion that according to the law of the Mitakshara, as settled by authority in the Presidency of Bengal, Bhugwan Lall had no authority, without the consent of his co-sharers, to mortgage his undivided share in the joint family property in order to raise money on his own account, and not for the benefit of the family. He further observed that the facts were not sufficiently stated to enable the Full Bench to say whether the nephew of Bhugwan Lall could recover from the mortgagee, without redeeming the same, possession of the mortgaged share, or any portion of it. The other members of the Full Bench concurred in this opinion.

The appeals, the parties not consenting to have them decided by the Full Bench, went back to the Division Bench, and were thus dealt with. MARKBY, J., after going through the facts in each case, held that Nos. 170, 224, 235, 238, 239, 240, 243, 244, and 245 were wholly governed by the answer of the Full

Bench to the first question, inasmuch as in each the title of the defendant depended entirely on the validity of his purchase at a sale had in execution of a decree against the widows, and was consequently defective.

In No. 243 it was alleged by the then appellant that the property claimed, Mouza Telpakhoord, was subject to a zuripeshgi, lease, executed by Mukhun Sahoo, a member of the joint family, who predeceased Bhugwan Lall. MARKBY, J., however found that the title of the appellant did not depend on this alleged zuripeshgi, from which he had been ousted, but on a purchase at a sale in execution of the decree which he had [232] obtained against the widows; and consequently that this case was not distinguishable from No. 170.

In No. 234, however, the property in question was clearly subject to a subsisting zuripeshgi lease created by Bhugwan Lall; and in this case, therefore, there arose the further question, whether the plaintiff could recover this parcel of land without redeeming the mortgage on it. And the learned Judge, accepting, apparently against his own judgment, the principle affirmed by the answer of the Full Bench to the second question, held that it would entitle him to do so. MARKBY, J., however, proceeded to lay down a principle which governed all the cases, and which he held justified the dismissal of the plaintiff's suit.

The grounds on which he so held are stated as follows in the judgment of MARKBY, J. :—

"The defendants have failed to prove their titles, and as the properties claimed are all portions of the joint family property, and the plaintiff's title to a 4-anna share in the family property is not disputed, the plaintiff claims a decree for possession to that extent. But it seems to me that the answer given by the Full Bench to the second of the two questions which we propounded precludes us from giving any such decree. As I have said, whether or no I concur in the principles laid down by those answers, I feel bound to apply them to the cases before us, and so doing, it seems to me impossible to give the plaintiff the decree which he claims, which is a separate decree for possession for his 1-anna share. I do not see how it is possible if that decision be correct that such decree should be executed. And I think that if the Full Bench decision be right, to attempt to execute it would be to do the very thing which the Full Bench say cannot be done, namely, to create a separation otherwise than by a partition. Had Hureenath been of age when this suit was brought, the fact that his brother had been joined in it and had assented to the claim might have been taken as creating a partition by consent. I do not say this would be so; even that might hardly be consistent with the Full Bench decision, but it is unnecessary to consider it because Hureenath being a minor, no such arrangement can be inferred. There has been no enquiry whether a partition would be for the benefit of the minor, nor indeed was it ever suggested until the last moment that such an inference was possible. The truth [233] appears to me to be that this suit has been brought just as Sudaburt's suit was brought under the notion that a member of the Mitakshara family, like a member of a Bengal family, may act to a certain extent independently in reference to his share. Whether or no such a notion is correct, I think at any rate, it has been not uncommon to bring such suits as the present one, that is to say, for one member to sue separately for his share; but this is obviously inconsistent with the very strict principles laid down by the Full Bench.

"I arrived at this conclusion upon an independent consideration of the answer of the Full Bench to the second question; and I am confirmed in thinking that I have rightly applied that decision by the case of *Rajaram Tewary v. Luchman Prasad*. (4 B. L. R., A. C., 118, see pp. 130, 131), decided very shortly after it. There, PEACOCK, C. J. (who also delivered the judgment in the Full Bench case) says, 'the plaintiffs as two only of the members of a joint family which does not appear to have been separated, and as two only of the owners of the joint property which does not appear to have been partitioned, are not entitled to any definite share for which they can sue alone; see *Appovier v. Rama Subba Aiyar* (11 Moore's I. A.,

'75). The right of action has been misconceived, and the proper persons have not been made parties. The suit should have been brought by all the joint owners to set aside the deed as to the charge created by Oodit as well as to the charge created by Jetun, and the suit should have been brought by all the members of the joint family and not by two of them alone who before partition have no definite share. If the deed were to be set aside it would be impossible by the decree to define the share which the plaintiffs are entitled to recover.' I cannot distinguish this from the present case. The plaintiff here also sues separately to recover possession of his share, and it seems to me just as impossible to define the plaintiff's share in this case as it was in that. As I have said before it again comes to this. It would only be possible to execute the decree which is asked for either by treating this suit as constituting a partition or by treating the plaintiff as having at least some independent rights over his share, but, according to the Full Bench decision, there not having been a partition according to one of the modes known to the law, this cannot be done. It seems to me therefore that, applying consistently the decision of the Full Bench, the plaintiff cannot have the decree which he asks for."

[234] MARKBY, J., further held that in Appeals Nos. 238, 240 and 245, the plaintiff's claim was barred by limitation. In dealing with the first of these three appeals, in all of which the facts were similar, he said:—

"The property to which this appeal relates was sold in execution of a decree obtained by one Nundlal Bhuggut whilst the property was under attachment; and before sale the plaintiff, through his present guardian, filed a claim under s. 246, and that claim was rejected on the 6th April 1864. This suit was not commenced until more than a year had elapsed from that date, and it is contended that it is consequently barred by the concluding words of s. 246. It seems to have been finally adopted as the view of this Court that a person who considers his property has been wrongly seized and sold in execution, has the choice whether he will make a claim under s. 246, or not. If he makes no claim, he can bring his suit to recover the property at any time subject to the general law of limitation; but if he does make a claim and his claim is heard and rejected, then he must bring what is called his regular suit to establish his title within the year. In other words, by making the claim under s. 246, he lays himself open to the special law of limitation. This view of the law was not contested by the pleader for the plaintiff, respondent, but he relies on the fact that the plaintiff, when the claim under s. 246 was filed, was and still is, a minor. He therefore claims the benefit of ss. 11* and 12† of Act XIV of 1859, and contends that, by the operation of those sections, the minor will have one year after he comes of age, to bring his suit under s. 246; and he argues that if he may bring the suit after he comes of age, *a fortiori* he may bring the suit before he comes of age, and, therefore, that he is not barred. This argument involves several contested propositions:—*First*, that ss. 11 and 12 of Act XIV of 1859 apply to s. 246 of Act VIII of 1859; *secondly*, that the appellant is under disability within the meaning of those sections; *thirdly*, that the benefit of those sections applies as well to the period during which the disability continues as to the period when the disability has ceased.

* [Sec. 11:—If at the time when the right to bring an action first accrues the person to whom the right accrues is under a legal disability, the action may be brought by such person or his representative within the same time after the disability shall have ceased as would otherwise have been allowed from the time when the cause of action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased; but if, at the time when the cause of action accrues to any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him.]

† What persons to be deemed to be under legal disability under preceding section.

[Sec. 12:—The following persons shall be deemed to be under legal disability within the meaning of the last preceding section—married women in cases to be decided by English law, minors, idiots, and lunatics.]

"With regard to the first proposition, it is to be observed that the terms of ss. 11 and 12 of Act XIV of 1859 are general, and the change of expression in ss. 13 and 14,* where somewhat similar provisions are expressly confined to the periods of limitation prescribed by the Act itself, is remarkable. On the other hand, as pointed out, s. 3 provides 'that when by any law now or hereafter in force [235] a shorter period of limitation than that prescribed by this Act is especially prescribed for the institution of a particular suit, such shorter limitation shall be applied notwithstanding this Act.' Now, the words 'notwithstanding this Act' might be considered to indicate the intention of the Legislature to exclude any effect of this Act whatever in relaxing any special period of limitation elsewhere provided. But they might also be meant only to preserve such special rules of limitation from being by implication altogether repealed, while all rules of limitation, both those under the Act and those existing under any other Statutes were to be subject to such general relaxations as are contained in ss. 11 and 12, or in ss. 9 and 10†, for these sections do not, when properly viewed, give an extended period of limitation, but rather modify the operation of the ordinary rules of limitation.

"On the whole, I think that, looking to the general words of ss. 11 and 12, the intention was to lay down for all cases a rule of greater precision with regard to disability than that which is stated by s. 14 of Reg. III of 1793.‡ It can hardly be contended that this part of the

Computation of period of limitation in case of absence of defendant.

* [Sec. 13:—In computing any period of limitation prescribed by this Act, the time during which the defendant shall have been absent out of the British territories in India shall be excluded from such computation unless service of a summons to appear and answer in the suit can during the absence of such defendant be made in any mode prescribed by law.]

Sec. 14:—In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bono fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction of other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation.]

† [Sec. 9:—If a person entitled to a right of action shall by means of fraud have been kept from the knowledge of his having such right or of the title upon which it is founded, or if any document necessary for establishing such right shall have been fraudulently concealed, the time limited for commencing the action against the person guilty of the fraud or accessory thereto, or against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be reckoned from the time when the fraud first became known to the person injuriously affected by it or when he first had the means of producing or compelling the production of the concealed document.]

‡ [Sec. 9:—If a person entitled to a right of action shall by means of fraud have been kept from the knowledge of his having such right or of the title upon which it is founded, or if any document necessary for establishing such right shall have been fraudulently concealed, the time limited for commencing the action against the person guilty of the fraud or accessory thereto, or against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be reckoned from the time when the fraud first became known to the person injuriously affected by it or when he first had the means of producing or compelling the production of the concealed document.]

Sec. 10. —In suits in which the cause of action is founded on fraud, the cause of action shall be deemed to have first arisen at the time at which such fraud shall have been first known by the party wronged.]

Computation of period of limitation in suits where the cause of action is founded on fraud.

§ [Sec. 14:—The Zillah

Courts not to try the merits of any suit when the cause of action shall have arisen before 12th August 1765.

Nor any suit where the cause of action shall have arisen twelve years before a suit shall have been commenced for it.

and City Courts are prohibited from hearing, trying or determining the merits of any suit whatever, against any person or persons, if the cause of action shall have arisen previous to the 12th of August 1765; or any suit whatever against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it; unless the complainant can shew by clear and positive proof, that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money; or that he directly proffered his claim within that period for the matters in dispute, to a Court of competent jurisdiction to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit; or shall prove that either from minority, or other good and sufficient cause, he had been precluded from obtaining redress.]

old Regulation is now in force; and if not, this can only be because the provisions of ss. 11 and 12 of Act XIV of 1850 have been substituted for it. But if so, the argument that these sections are confined in their operation to Act XIV itself falls to the ground, and the provisions must be held to be perfectly general. So far, therefore, I think the plaintiff's contention is good, and that the rules contained in Act XIV, as to disability, are of general application and are not confined to the period of limitation provided for by that Act.

"The next question is whether the plaintiff was under disability within the meaning of s. 11. It is said that he was not, because he had a guardian who might have brought the suit. Here again I think it is desirable to compare the language of the section with that of the previous Regulation. Under the Regulation, by the section already referred to, the plaintiff, in order to avoid the application of the rule, would have to show that "either from minority, or other good and sufficient cause, he had been precluded from obtaining redress." Under Act XIV, a minor would certainly not have to show anything of the kind, but he would be presumably entitled to the benefit of these sections. And the words of s. 12 are such as would seem to make the presumption conclusive, and to preclude all enquiry as to whether, under the particular circumstances of each case, the infant was, in fact, disabled. It can hardly be supposed that the Legislature did not advert to the fact that an infant may take proceedings through [236] his guardian, and, if it had adverted to that fact, it would surely not have stated the disability of the infant in such absolute terms and yet have intended that this disability was to be after all only a modified one. Of course, also the Legislature must have had before it the terms of s. 14 of the Regulation of 1793, which seems to have been framed expressly to meet such cases as the present, and to give to the minor the benefit of a modified disability only. The change of expression seems almost expressly to show that under the new law the disability was to be considered absolute. On this point also, therefore, I think the plaintiff's contention is right.

"But I think his argument fails on the last point. I think that on one point at any rate, the words of s. 11 are clear and express, namely that whatever benefit the minor is to have is to accrue to him not during the disability, but when the disability ceases. Indeed, making the sweeping presumption which I think the Legislature has done as to the disability of infants, it could not consistently entertain the notion that any advantage could be taken of its provisions by a minor during his minority. In fact the Legislature has thought fit to lay out of consideration altogether the possibility of an infant bringing a suit by his guardian, which the framers of the old regulation had contemplated. If any consideration arising out of guardianship were to be imported into the construction of these sections, I fear we should introduce the greatest confusion. Nor does it seem to me that the introduction of such considerations would be decisive in favour of the plaintiff. If we modify the words of s. 11, we must modify the words of s. 12 also, and the question whether a minor who has had a guardian appointed is to be considered under disability will present itself in a very different shape. But I think that reading the words of the Act in their ordinary and natural meaning, the plaintiff is under disability, but can derive no advantage from that disability until he comes of age. . . . The result is, that as against the defendants who are parties to this appeal, the plaintiff's suit, in whatever way it is disposed of on the other point, ought to be dismissed with costs in both Courts on the ground that it was not brought within the year prescribed by s. 246. Whether or no, the plaintiff will be in a better position on his coming of age does not now arise, and I express no opinion on it."

Kemp, J., thought it unnecessary to express any opinion on the question of limitation discussed by **MARKBY, J.**, but agreed that the plaintiff's claim must be rejected in all the appeals [237] on the ground that as there had been no partition of the joint family in respect of the property sought to be recovered, the plaintiff could not sue alone for a separate share.

Decrees were accordingly made in favour of the defendants in all the cases, and from those decrees the plaintiff brought the present appeal to Her Majesty in Council. The respondents not appearing, the case was heard *ex parte*.

Mr. Cowie, Q. C., and Mr. J. D. Bell for the Appellant.—The view of the Division Bench that the plaintiff could not maintain this suit alone, is not warranted by the answer of the Full Bench to the questions referred for their consideration, and is erroneous. Sudaburt Pershad, the only other person interested as a joint member of the family, has already in a separate suit obtained possession of a half share of the joint property. The result of Sudaburt's suit has been to effect a severance. In that suit it might have been a good answer that there had been no partition, and that there was another member of the joint family who ought to be joined as a plaintiff. But when that suit was decreed, and Sudaburt recovered his half share, there was in fact a partition. See *Mussamat Anundee Koonwar v. Khedoo Lall* (14 Moore's I. A., 412). Had Sudaburt been joined as a plaintiff in the present suit, it would have been objected that he had already sued, and had his rights awarded. He has no interest, and disclaims all interest in the present suit, but he has in fact been made a party to it in the only way the plaintiff could make him a party, that is, as a defendant. [SIR J. COLVILLE.—I see that in the judgment cited by MARKBY, J., there is a passage which he has not noticed, in which it is said that "if the other members of the joint family refused to join as plaintiffs, they might have been made defendants in the suit" (See 4 B. L. R., A. C., 131).] That is the view which we contend is right, and on which we have acted.

As regards the point of limitation on which appeals Nos. 238, 240 and 245 have been declared to be barred, we submit, that the rules in ss. 11 and 12, Act XIV of 1859, which give an extension of the time for suing in cases of disability, will apply to and modify the provisions of s. 246, Act VIII [238] of 1859. The judgment of the Privy Council in the case of *Mohammed Bahadoor Khan v. The Collector of Barrilly* (L. R., 1 Ind. Ap., 167; see at p. 176; s.c., 13 B. L. R., 392), in which it was held that the provisions of Act XIV could not be imported into Act IX of 1859, relating to forfeiture for rebellion, rested on the special character of that Act as a criminal law of a highly exceptional nature. [SIR M. SMITH.—Even if we had applied the provisions of Act XIV in the case you refer to, the suit would not have been in time.] It is not to be inferred from that judgment that the provisions of Act XIV, which is a law of general application regulating civil procedure, shall not be applicable to another general law *in part materia*. The Calcutta High Court has so applied them in the case of *Huro Soonduree Chowdhram v. Anundnath Roy Chowdhry* (3 W. R., 8). The view taken by MARKBY, J., that the minor is not to have the benefit of his disability till it is ended, is not in accordance with other decisions of the Calcutta High Court. See *Ram Chunder Roy v. Umbica Dosser* (7 W. R., 161), *Ram Ghose v. Greedhur Ghose* (14 W. R., 429) and *Suffurounnissa Beebee v. Noorul Hossein* (17 W. R., 119).

In appeal No. 234, the second question referred to the Full Bench of the High Court is raised. The Division Bench has held that the answer returned by the Full Bench negatives the defendant's title. Since there has been no cross-appeal on behalf of the defendants from the answer given by the Full Bench that answer must, for the purposes of the suit, be regarded as final.

In case No. 237 as there seems room to doubt whether the property claimed was in fact a part of the joint family property, we withdraw our appeal.

Their Lordships took time to consider their Judgment, which was delivered by

Sir J. W. Colville.—The suit out of which this appeal has arisen concerns a moiety of the undivided share of one [239] Bhugwan Lall Sahoo, in certain immoveable property situate in Zilla Sarun. Bhugwan Lall Sahoo,

who died in 1860, was a member of a Hindu family, which was descended from a common ancestor named Deepa Sahoo, and which was governed by the law of the Mitakshara, the general law of the province in which it was domiciled. He died childless, but left two widows, Moheshee and Parbuttee. They therefore would have been his general heirs had he been wholly separate in estate; and were in any case entitled to such part of his succession as had been acquired, or was held by him as separate estate. On the other hand, if the status of the family continued at the time of his death to be that of a joint and undivided Hindu family, his interest in the joint family property survived to his male coparceners. The only persons who answered that description were Sudaburt Pershad and the plaintiff Hurreenath Pershad. They, in some of the proceedings, are called his nephews, but according to the pedigree set out in the appellant's case, and apparently proved in the cause, they were his first cousins, the sons of two different uncles.

It must now be taken to have been conclusively determined that Bhugwan, at the time of his death, though entitled to certain subsequent acquisitions as separate estate, was, as to all the properties acquired by the family in the name of any of its members before the year 1846, joint in estate with Sudaburt and Hurreenath, and accordingly that his share in those properties became vested by survivorship in them. This question was first litigated in a suit brought by Sudaburt in 1861. The principal defendants to that suit were the widows. The judgment of the Zilla Judge, confirmed on appeal by the High Court on the 10th of March 1863 (2 May, 1865), made the distinction above stated between the properties acquired before, and those acquired subsequently to, 1846, affirming the title of the surviving male members of the joint family to the former. It unfortunately, however, happened that owing either to the frame of this suit, or to the manner in which the decree made in it was executed, the result of this earlier litigation was only to put Sudaburt into [240] possession of one moiety of Bhugwan's share in the joint family property.

Subsequently the remaining half-share of Bhugwan in portions of the joint family property appears to have been seized and sold in execution of various decrees obtained against his widows as his representatives. And on the 10th of April 1865, the present suit was instituted by the mother and guardian of Hurreenath in order to recover possession, and to have his name entered as proprietor, of his moiety of Bhugwan's share in the joint properties, and to cancel and set aside the execution sales under the decrees against the widows. The defendants to that suit were the widows, the different purchasers under the execution sales, and, under the description of "Precautionary defendants," the widow of another deceased member of the joint family, as to whom there is now no question, and Sudaburt Pershad, the plaintiff in the former suit. As such defendant Sudaburt filed a written statement, in which he disclaimed all interest in the suit, on the ground that under the decree in his own suit he had been put in possession of his share in the property in dispute. The cause was tried between the plaintiff and the other defendants, and a decree was made by the Principal Sudder Ameen on the 9th of April 1866, which, in so far as it related to the particular properties which are the subject of the present appeal, was in favour of the plaintiff. Against this decree the parties defendants, who were affected by it, appealed to the High Court. Their appeals were necessarily separate, inasmuch as the suit was so framed as to embrace interests, not only dependent on different titles, but confined to particular portions of the property in dispute. The High Court decided many of these appeals in favour of the defendants, upon grounds of which some will be afterwards considered. This appeal to Her Majesty in Council originally embraced only eleven of the separate

decrees so made. And of these Mr. Cowie has given up one—*viz.*, No. 237. Accordingly their Lordships have now only to deal with the questions involved in the ten appeals, numbered respectively 170, 224, 235, 239, 244, 234, 243, 238, 240, and 245.

The course of proceeding in the High Court with respect to [241] these appeals was as follows. (After detailing the course of proceedings in the High Court, and the decision in the various cases as set out, *ante*, pp. 230 & 231, his Lordship proceeded) :—

Their Lordships propose in the first instance to consider whether the appeals Nos. 238, 240, and 245 have been rightly disposed of on the ground of limitation. The facts proved are, that in each of these cases the plaintiff, through his guardian, preferred a claim to the property, when attached, under the 246th section of Act VIII of 1859; that that claim was rejected; and that the present suit was not brought within one year from the date of the order of rejection. This objection would have been fatal to the suit, had the party preferring the claim been an adult; and the only question to be determined was whether the plaintiff, being under the disability of infancy, could claim the benefit of the 11th section of Act XIV of 1859, which empowers him or his representative to bring a regular suit within the same time after the cesser of the disability as would otherwise have been allowed from the time when the cause of action accrued. This question, MARKBY, J., observed, involved several contested propositions, *viz.* :—

1. That ss. 11 and 12 of Act XIV of 1859 apply to s. 246 of Act VIII of 1859.

2. That the plaintiff is under disability within the meaning of these sections.

3. That the benefit of these sections applies as well to the period during which the disability continues, as to the period when the disability has ceased.

Upon the two first propositions, his opinion was in favour of the plaintiff; upon the third he held that whatever benefit the minor was to have, was to accrue to him not during the disability, but when the disability might cease; and accordingly that the present suit being brought by him, whilst still a minor, through his guardian, must fail.

Upon the second of the propositions stated by MARKBY, J., their Lordships cannot see how, in face of the plain language of the 12th section, there can be any room for doubt.

Upon the first they also agree with the learned Judge that [242] ss. 11 and 12 of Act XIV of 1859 do apply to the 246th section of the Act VIII of 1859.

The two Statutes were passed in the same year, the assent of the Governor-General being given to Act VIII on the 22nd of March, to Act XIV on the 4th of May 1859. The object of the first was to enact a general Code of Procedure for the Courts of Civil Judicature not established by Royal Charter. The object of the second was to establish a general Law of Limitation in supersession both of the Regulations which had governed those Courts and of the English Statutes which had regulated the practice of the Courts established by Royal Charter. Looking to the fifth sub-section of the first section, and the 3rd and 11th sections of Act XIV of 1859, their Lordships have no doubt that the intention of the Legislature was that the period of limitation resulting from the 246th section of Act VIII should, in the case of a minor, be modified by the operation of the 11th section of Act XIV; and that this construction has

obtained in the Courts of India appears from the case of *Huro Soonduree Chowdhraim v. Anundnath Roy Chowdhry* (3 W. R., 8).

In coming to this conclusion, their Lordships have not failed to consider the recent decision of this Board in the case of *Mahomed Bahadur Khan v. The Collector of Bareilly* (13 B. L. R., 292; s.c., L. R., 1 Ind. Ap., 167). That case, however, they think, is distinguishable from the present. It arose upon a very special statute, and upon that ground the judgment rests. Their Lordships there said: "It was argued that the clauses in the general statute, Act XIV, 1859, relating to disabilities, might be imported into this Act, but this cannot properly be done. Act XIV is a Code of Limitation of general application. This Act is of a special kind, and does not admit of those enactments being annexed to it." And they proceeded to observe that the application of the Statute (if it did apply) would not assist the appellants, who would not even in that case have brought their suit in proper time.

This being so, the only other point to be considered on this [243] question of limitation is whether the learned Judge was right in holding that an infant cannot after the expiration of the year bring a suit by his guardian whilst the disability of infancy continues. Their Lordships cannot agree in this construction, which, it would appear from the cases cited by Mr. BELL—*Ramchunder Roy v. Umbica Dosser* (7 W. R., 161), *Ram Ghose v. Greedhur Ghose* (14 W. R., 429), and *Sufuroonissa Beebe v. Noorul Hossein* (17 W. R., 419)—has not been accepted or followed by the Courts in India. It is unreasonable in itself, since it implies that the infant's claim, which is admittedly not barred, was asserted too soon rather than too late, and it cannot be the policy of the law to postpone the trial of claims. Again, to render such a construction imperative, the phraseology of the 11th section must be altered by making the words "after the disability shall have ceased" precede, instead of follow, as they do, the words "within the same time." Their Lordships are, therefore, of opinion that the plaintiff's suit is not open to the objection that, in so far as it concerns the properties in question in Nos. 238, 240, and 245, it has not been brought within the proper time.

The next point to be considered is whether the High Court was right in allowing all the ten appeals, and in dismissing the plaintiff's suit as to those portions of the joint family estate which were the subject of them, on the ground that the suit was wrongly framed.

It is to be observed that the objection taken by the Division Bench to the frame of the suit, assumes the correctness of the answer given by the Full Bench to the second of the questions referred to it, and is in the nature of a corollary from the proposition therein affirmed. The learned Judges of the Division Bench argue that if it be true that a member of a joint and undivided Hindu family cannot alienate his undivided share in the joint family property without the consent of his co-shareers, it follows that he cannot alone sue for his separate share. And they rely upon a decision in the case of *Rajaram Tewari v. Luchmun Pershad* (4 B. L. R., A.C., 118), in which it was ruled that two only of the members of a joint and undivided family could [244] not sue to set aside a charge created by one member of the family, and to recover their particular shares in the property charged, but that the suit must be brought by or on behalf of all the members of the joint family. Their Lordships do not mean in any way to impugn the authority of that case, or to dispute the general principle affirmed by it. They do not, however, think that the principle is applicable to the peculiar circumstances of, or ought to govern, the present case.

In this case Sudaburt, the only other member of this joint family, has, under the practice which was then allowed to prevail in the Courts of India,

succeeded in recovering, and has been put into possession, of his share of the joint family property. He cannot be said to have any beneficial interest in respect of which he could now sue as plaintiff; and supposing him to have an interest, the present plaintiff has made him a party to this suit in the only way in which a person who is unwilling or unable to be joined as plaintiff can be brought before the Court, i.e., by joining him as a defendant. In that character Sudaburt has disclaimed all interest in the subject-matter of the litigation, alleging that he has already been put into possession of all to which he is entitled. Again, in most, if not all, of the appeals the title of the substantial defendants is founded on execution sales confined to that moiety of Bhugwan's share which, on a partition, would now fall to the plaintiff. The objection to the frame of the suit was not taken by the substantial defendants; it seems to have originated with the Judges of the Appellate Court. It is one of form rather than substance: for it cannot be said that if it does not prevail, the defendants (Sudaburt being a party to this litigation and admitting that he is in possession of his share) can be harassed by any second suit. On the other hand, if the objection prevails, the defendants will remain in possession of property to which, after full trial, they have been found to have no title, and the plaintiff will be left to the chances of another suit, in which he may be met by objections well or ill founded on the lapse of time, or the effect of the decrees under appeal as *res judicata*. Their Lordships are of opinion that [245] they ought not to allow the objection to prevail against the substantial justice of the case.

What has been said is sufficient to determine this appeal in favour of the appellant, so far as it relates to the decrees of the High Court in the nine appeals numbered respectively 170, 224, 235, 239, 243, 244, 238, 210, and 245.

There is, however, as has been already stated, a further question as to the appeal numbered 234, and at the hearing it occurred to their Lordships, who have unfortunately to determine this appeal *ex parte*, that if the respondents had appeared, they might, without a cross-appeal, have contested the correctness of the answers given by the Full Bench to the questions referred to them--answers which are not in the form of a decree, or even of an interlocutory order. To the answer to the first question their Lordships think no objections could have been urged successfully. The second question, however, involves a point of Hindu law, upon which the authorities are not altogether consistent, nor are their Lordships satisfied that the principle laid down by the Full Bench would, if correct, govern this particular case, of which they will now proceed to examine the circumstances somewhat more in detail.

The property to which it relates is thus described in the schedule to the plaint. The village is specified as Tulmanpore Bhada in two kalams (items). The share of the joint family is stated to be one of ten annas and eight pie. Of this five annas and four pie are deducted as the share of Sudaburt Pershad, which reduces the share claimed by the plaintiff to five annas and four pie. The column of remarks contains the following statement: "This mouza was held in zuripeshgi lease under a zuripeshgi deed executed by Saligram Sahay and Ramruchea Sahay. It was sold at an auction on the 18th of November 1862, and purchased by the defendant Bikramajeet Lall for 3 rupees. The zuripeshgi and lease are fit to be cancelled."

Bikramajeet Lall and another defendant were the appellants in No. 238, which seems to have covered the whole of the five annas and four pie share of Tulmanpore Bhada with other portions of the property in dispute. From what [246] has been stated above it follows that their title, resting as it does upon a purchase at a sale in execution of a decree against the widows, is defective; that the right of the plaintiff to impeach it is proved, and accordingly their

appeal ought to have been dismissed. This, however, does not determine the rights of the plaintiff as against the zuripeshgidars. He may be entitled either to recover so much of the property as is covered by the zuripeshgi by setting aside the zuripeshgi lease, or merely to stand in the shoes of the nominal mortgagor. But the nature and extent of his right can only be determined in appeal No. 237.

The appellants on that appeal were the original zuripeshgidars, Saligram Sahoy and Ramruchea Sahoy. The zuripeshgi deed appears to have covered originally only 5 annas and 4 pie of the entire 16 annas of Mouza Tulmanpore Bhada. If then it be true that Sudaburt Pershad has succeeded in recovering one moiety of this, the subject of the dispute on this appeal is the remaining moiety or a 2-anna and 8-pie share. And this appears to have been the view of the High Court, for their decree on this appeal is limited to a 2-anna and 8-pie share. If, on the other hand, Sudaburt has not succeeded in his suit in setting aside the zuripeshgi as against him, or in otherwise wresting possession of his share from the zuripeshgidars, it follows that the question of the validity of this zuripeshgi remains to be determined between the latter on the one side, and him and the present plaintiff on the other.

The plaint in this suit alleged no special grounds for setting aside the zuripeshgi of the 9th December 1859, and indeed contained no special mention of it. The written statement of the defendants Saligram and Ramruchea set up that deed, and insisted on their rights under it. But none of the issues are specially pointed to the validity of the deed. Nor do the judgment or the decree of the Principal Sudder Ameen deal with that question. All that they decide with respect to the share claimed in Tulmanpore Bhada is that "plaintiff be put in possession thereof in the manner in which possession has been given by the decree of the 5th of April 1862" (to Sudaburt).

[247] This reference to the suit of Sudaburt makes it material to consider whether there really was any adjudication upon this question in that suit. The suit, it will be remembered, involved the right of succession to the whole of the property of which Bhugwan Lall died possessed as between his widows and the surviving members of the joint family. The plaint in that suit contains no specific statement touching the zuripeshgi deed of the 9th of December 1859, unless it be in the schedule where in the columns of remarks it is said, "the deed to the extent of plaintiff's share ought to be amended." The judgment of the Zilla Judge put the share in Tulmanpore Bhada into the first parcel, which it found to be joint family property. So far it affirmed the title of Sudaburt and Hurreenath, and negatived the title of the widows, to whatever interest in it belonged to Bhugwan Lall at the time of his death. But in answer to the 11th issue it expressly found that the deeds executed by Mukkun, Bhugwan, or the other partners were valid. The decree was a general decree for possession over the properties in the first list. The High Court, on appeal, simply affirmed this judgment and decree of the Zilla Court. Can it be said that this judgment and decree import any adjudication touching the invalidity of the deed of the 9th of December 1859, as against the surviving members of the joint family, even if the plaintiff in this suit could claim the benefit of such an adjudication. The judgment, so far as it goes, is on the face of it the other way. The terms of the decree may import only that the plaintiff Sudaburt was, so far as his share was concerned, to be put into possession of the rights of Bhugwan. If in the execution of that decree, he has contrived, it may be wrongfully, to dispossess to the extent of his share the zuripeshgidars, that circumstance cannot give title to the plaintiff.

Again, what has been found by the High Court with respect to this appeal? The answer of the Full Bench expressly stated that the facts were not sufficiently stated to enable them to say whether the nephew of Bhugwan Lall could recover from the mortgagee, without redeeming the same, possession of the mortgaged share or any portion of it. That statement, taken in connection with the general principle [248] affirmed by them, imports that there was no *constat* that the execution by Bhugwan of the deed was without the consent of his co-sharers, or not for the benefit of the family. MARKBY, J., does not consider this latter question, but simply says "As no objection was made to the reference to the Full Bench, I think we ought to accept its decision for the purposes of this case, and to hold that the appellants have failed to establish their title"

In these circumstances there appears to have been no real trial of the question between the plaintiff and the then appellants in No. 234; and therefore, assuming the principle enunciated by the Full Bench in its answer to the second question to be strictly correct, their Lordships do not feel themselves at liberty to reverse the decree in favour of the then appellants, and to make a decree in favour of the plaintiff. This being so, they abstain from pronouncing any opinion upon the grave question of Hindu law involved in the answer of the Full Bench to the second point referred to them, a question which, the appeal coming on *ex parte*, could not be fully or properly argued before them. That question must continue to stand, as it now stands, upon the authorities, unaffected by the judgment on this appeal.

Their Lordships have felt some doubt as to the form of the order which ought to be made on appeal No. 234. The plaintiff has failed to establish his title to recover the land against the zuripeshgidars. He might, however, have established such a title even in this suit, had a proper issue been framed and determined. On the other hand, he has established his title to the property, subject to the zuripeshgi. His rights may be prejudiced by the decree as it stands. The suit is an example of the inconvenience of embracing in one suit titles to various parcels of land, which, although having a common foundation, are different in many particulars, and are to be asserted against defendants having no common interest. Their Lordships have come to the conclusion, that the dismissal of the present suit against the appellants (in the High Court) in No. 234 ought to stand, but that the decree of the High Court on that appeal ought to be varied by adding a declaration, that it is to be without prejudice to the right of the plaintiff to [249] recover the lands in question on satisfaction of the zuripeshgi. This appeal, so far as it relates to No. 237 (the case given up by Mr. Cowie) must be dismissed, and the decree made by the High Court in that case affirmed. In the other nine cases, the decrees of the High Court must be reversed, and an order made, dismissing in each case the appeal to the High Court, with the costs of the appeal in that Court, and affirming the decree of the Principal Sudder Ameen as to the parcels of property which are the subjects of those appeals. The above will be the substance of the order which their Lordships will humbly recommend Her Majesty to make. •

Their Lordships think that there should be no order as to the costs of this appeal.

Appeal dismissed in No. 237.

Decree varied in 234.

Appeal allowed in the other cases.

Agents for the appellant: Messrs. *Lawford and Waterhouse.*

NOTES.

[I.—LIMITATION—SAYING IN FAVOUR OF MINOR :—

The benefit of it is applicable to applications by guardians also :—(1896) 23 Cal. 374 ; (1887) 9 All. 441 ; (1882) 9 Cal. 181.

The benefit of it can be availed of even though others through whom the minor does not claim and who are similarly affected are barred :—(1899) 22 All. 33 F. B. ; see also (1884) 10 Cal. 748.

II. LIMITATION IN SPECIAL ACTS WHEN OVERRIDES THE GENERAL ACTS :—

Minor not entitled to fresh period of limitation under Beng. Act VIII of 1869 (suit for rent) :—(1889) 47 Cal. 263.

Nor under Registration Act III of 1877, sec. 77, suit for directing a document to be registered :—(1894) 18 Mad. 99.

III. ALIENABILITY OF THE INTEREST OF A HINDU COPARCENER IN THE BENARES SCHOOL :—

Voluntary alienation even for consideration, not for family benefit nor with consent of the others is forbidden, the Full Bench decision of *Sadabart Prasad's* case settling the law.

Involuntary alienations are permitted :—(1877) 3 Cal. 198 P. C

But the proceedings should have sufficiently advanced during the life of the debtor ; otherwise the right of survivorship might intervene .—(1890) 18 Cal. 157 P. C. ; (1886) 8 All. 495 ; see also 5 Cal. 148.

As for the equities arising in favour of the alienee, see Notes to *Sadabart Prasad's* case, 3 B.L.R., F.B., 31, in our Law Reports Reprint of the B. L. R.]

ORIGINAL CIVIL.

The 29th and 30th March and 2nd May, 1876.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

The Delhi and London Bank... Plaintiffs

versus

Wordie and others.....Defendants.

Jurisdiction—Suit for land—Letters Patent, 1865, cl. 12—Deed of Trust giving Trustees Power of Sale of Land in the Mofussil—Suit by

• Creditor to have Trusts carried out.

M and *L* were the joint absolute owners of certain land in the mofussil, *M* having a 14-anna share, and *L* the remaining 2-anna share therein. During the absence of *L* in England, *M* executed, on behalf of himself and *L*, a deed of assignment of the whole of the property to trustees, for the benefit of the creditors of the estate, which was heavily encumbered, on trust to sell the land and distribute the assets to the creditors. The trustees accepted the trust, but difficulties afterwards arose in carrying them out. A suit was thereupon instituted by the plaintiff, a creditor, on behalf of himself and the other creditors, the plaint in which alleged that the trustees were desirous of being [230] discharged, and prayed that the trusts might be carried into effect : that the trustees might be removed ; and that a Receiver might be appointed to carry out the trusts. To this suit the trustees and *M* and *L* were made defendants. *L*, who was in England, denied any power in *M* to execute the deed on his behalf : the trustees and *M* were personally subject to the jurisdiction. *Held per* PHEAR, J., in the Court below, that the plaint disclosed a good cause of action, as the Court, if it had jurisdiction, would have power to make a declaration binding against *L* as to the validity of the deed of trust, to appoint a Receiver of the estate, and to direct a sale which would be binding on *M* and *L* ; but that the suit being one "for land" within the meaning of cl. 12 of the Letters Patent, the Court had no jurisdiction to try it.

Held on appeal, that the suit, having for its object to compel a sale of the whole of the land, including *L's* share, the title to which was disputed, was a "suit for land" within the meaning of cl. 12 of the Letters Patent, and that the Court had no jurisdiction to try it.

APPEAL from a decision of PHEAR, J., dated 2nd February 1876.

The suit was brought to carry out the trusts of a certain deed which had been executed for the benefit of the creditors of W. E. Morrell and H. N. Lightfoot, and which related to certain immoveable property situated outside the local limits of the jurisdiction of the High Court. The plaintiff Bank represented the creditors interested in the deed, and the original defendants were T. H. Wordie and T. Longmuir, the trustees, who were both resident in Calcutta.

The plaint stated that Morrell and Lightfoot were co-partners in the property to which the trust deed related, the former having a 14-anna share, and the latter a 2-anna share in the property; that the property was, prior to the execution of the trust deed, heavily encumbered, the plaintiff Bank being creditors of Morrell and Lightfoot and mortgagees of certain portions of the property; that on the 14th of May 1875, Morrell on his own behalf, and as attorney for Lightfoot, who was then absent in England, executed a deed by which all their property, subject to the encumbrances, was assigned to the defendants upon certain trusts, among which was one to the effect that the trustees should call in and collect such part of the estate as consisted of money, and sell and convert into money the landed property, and should, out of the assets, so far [231] as they were sufficient for the purpose, discharge the liabilities of the debtors; that the defendants accepted the trusts of the deed and appointed Morrell to manage the property; but subsequently, by reason of certain complications which arose in carrying out the trusts, the defendants became desirous that they should be relieved from carrying them out, and that a Receiver should be appointed to collect and distribute the assets. The plaint prayed that the trusts of the deed might be carried into effect, that the defendants might be removed and relieved from further carrying out the trusts, and that a Receiver might be appointed to carry out the trusts of the deed.

The defendants Wordie and Longmuir filed a written statement, in which they stated that they were desirous of relinquishing the trusts, but were willing to carry them out under the direction of the Court. On the case coming on for settlement of issues, PHEAR, J., ordered on the application of Morrell to be made a party to the suit, that Morrell and Lightfoot should be made defendants in the suit, and appointed the Receiver of the Court to take possession of the property and carry out the trusts of the deed.

The defendant Morrell submitted (*inter alia*) that as the estates referred to in the deed were situated beyond the local limits of the Court, the Court had no jurisdiction to entertain the suit. The defendant Lightfoot, who resided in England, filed a written statement, in which he denied that Morrell had any authority to execute the deed of assignment on his behalf and submitted that he was not bound thereby, but that the deed was void and inoperative as against him.

The only issues material to this report were *first* "whether the plaint discloses any cause of action," and *second* "whether the Court has jurisdiction in the matter of the suit, the immoveable property mentioned in the plaint being admittedly out of the jurisdiction, when the defendant Lightfoot denies the execution of the deed of assignment comprising such estate, and is not personally subject to the jurisdiction."

Phear, J.—The first issue, which I am called upon to decide, is in these words, "whether the plaint discloses any sufficient [252] cause of action;" and

I feel no difficulty in answering it in the affirmative. This Court as a Court of Equity, with the powers of the Court of Chancery, will, at the instance of a *cestui-que* trust, when necessary, compel an inactive trustee to do his duty, or facilitate a trustee's doing his duty by making declarations of fact or law, which shall bind parties properly brought before the Court for that purpose, or by acting directly upon parties before it who have control and power over the subject of the trust, and making them perform any obligations with respect to it which they may be under towards the trustee or to the *cestui-que* trust, and so on.

Now, in the present suit, the case made in the plaint is shortly as follows :—

In the events which have happened, the defendant Morrell has become sole and absolute owner of several specified grants of land in the districts of Backergunge and Jessore, subject to the charge thereon of certain small legacies, and the defendant Lightfoot is a partner with him in these grants and in the management and profits thereof to the extent of a two-anna share under a certain deed of partnership. Previous to and in July 1873, three large parcels of this property, which may be conveniently designated by the letters A, B, and C, respectively, and which constituted all the property that was of any considerable value, were so heavily encumbered, that the net income derivable from them was insufficient to keep down the interest on the debt. Afterwards these three parcels of the property were still further encumbered by two additional mortgages for sums of money amounting in the aggregate to Rs. 44,000. The total of the encumbrances on these three parcels was thus brought up to the sum of Rs. 5,73,000, the plaintiff Bank out of this sum being creditor for Rs. 28,000 on the security of a fifth mortgage on parcel A, a fourth mortgage on parcel B, and a third mortgage on parcel C, and being besides unsecured creditor for Rs. 3,329 on a bill of exchange.

In this state of things on the 14th May 1875, the defendant Lightfoot being then absent from India, the defendant Morrell, not only acting for himself, but also professing to act for Lightfoot under a power-of-attorney enabling him so to do, executed [253] in Calcutta a deed, by which he assigned *all* the above-mentioned property, subject to the encumbrances just spoken of, and also all other property whatever of himself and Lightfoot, to the defendants Wordie and Longmuir on trust, among other things, to collect and call in all such part of the property assigned as should consist of money, and to sell and convert into money all the rest of the property, and out of the money so to be realized to pay the creditors of Morrell and Lightfoot in full, or rateably, so far as the money would go. The defendants Wordie and Longmuir took upon themselves the trusts of the deed, and appointed Morrell their agent to manage the property until sale, and to collect arrears of rent, &c., under their directions. In pursuance of this arrangement, the defendant Morrell who up to the date of the execution of the deed of trust, and during the absence of Lightfoot from this country had been in sole possession and management of the immoveable property assigned, took over charge of the same from himself as owner to himself as the trustee's agent. But he found or made difficulty in the matter of collecting the rents, and mofussil creditors having instituted suits in the local Courts against Morrell and Lightfoot procured attachments before judgment to be placed on that property, or considerable portions of it. The defendant Lightfoot, also, upon learning of the transaction, repudiated Morrell's act on his behalf, and giving notice of his repudiation to the trustees, forbade them to deal in any way with his share of the property assigned to them in trust. Under these circumstances, the defendants Wordie and Longmuir are unwilling to proceed further in the matter of the deed of the 14th May 1875,

and are desirous of being discharged from the trusts thereof, though, in their written statement, they express themselves ready to effect a sale of the property, provided the directions and assistance of this Court for that purpose can be obtained.

The plaintiff Bank is one of the creditors, in whose favour the deed of trust purports to have been made, and it seems to me plain that, if the substance of the case set up in the plaint is established, it would be accordant with the principles which govern the action of this Court that it should afford him a remedy for the inactivity and weakness of the trustees by [254] making a declaration as to the validity of the deed of trust, which would be binding on Lightfoot as a party who has appeared before the Court in this suit and by appointing a Receiver of the rents and profits of the immoveable property, which is the subject of the trust, and further by directing a sale of the property which would be binding on Morrell and Lightfoot, and would therefore pass a title, which they could not dispute. The plaintiff has therefore shown a right to seek the intervention of this Court, in other words a good cause of action.

The second issue questions the jurisdiction of this Court to entertain this suit on a somewhat complex ground, and I think it will be convenient at first to separate one of the ingredients of the issue from the rest, and to consider whether or not the suit is in its nature a "suit for land" within the meaning of the twelfth clause of the Letters Patent.

Now, the cause of action in this suit, as we have just seen, does not, at any rate in any material degree, proceed from the trustees. The plaintiff wants to have a sale of the property effected, and for that purpose to have the obstacles which arise from the conduct of Morrell and Lightfoot, and otherwise than from the trustees, removed by the Court. So far as the substance of this suit is concerned, the plaintiff's case is the same as if the trustees were out of the way, and Morrell and Lightfoot had bound themselves by covenant on sufficient consideration to sell the property and to divide the proceeds, according to the terms of the deed of 14th May 1875, among their creditors, of whom the plaintiff is one. The like transaction with the plaintiff as the sole creditor would manifestly be of the nature of a mortgage, and a suit by the plaintiff on the footing of it to obtain a realization of the charge by sale would be a suit for land within cl. 12 of the Letters Patent. It follows, I think, that the present suit also is a suit for land. Or to put it in another way, if the object of the suit had been to procure or sanction an immediate transfer of the land from the defendants Morrell and Lightfoot to the plaintiff, there could have been no question on the point. That the actual object is to procure the transfer of the land to a third person, who is to be [235] subsequently ascertained by auction-sale, and of the benefit of the consideration-money to the plaintiff and others, does not I think essentially alter the matter.

In this view, the second issue must be answered adversely to the plaintiffs, and the suit must be dismissed.

The plaintiff Bank appealed from this decision, on the ground that the Judge was wrong in holding that the suit was a suit for land within cl. 12 of the Letters Patent, and that he consequently had no jurisdiction to try it.

The *Advocate-General*, offg. (Mr. Paul) and Mr. Evans for the appellants.

Mr. Branson for the respondents Wordie and Longmuir.

Mr. Woodroffe and Mr. Macrae for the respondent Lightfoot.

Mr. Macrae and Mr. Macgregor for the respondent Morrell.

The *Advocate-General*.—The Court has power to grant the relief prayed for in this suit: it is not a suit for land within the meaning of the Letters Patent. From the frame of the suit, the relief prayed for may be given, either by directing the trustee defendants to carry out the trusts of the deed, or by discharging the trustees and appointing a Receiver to carry them out. Neither of these orders would be beyond the jurisdiction of the Court. The Supreme Court had the power of dealing in the same way with land out of its jurisdiction as the Court of Chancery has: and the High Court, on its Original Side has, by s. 9 of 24 and 25 Vict., c. 104, the same power in this respect as the Supreme Court, except so far as it has been altered by cl. 12 of the Letters Patent. If not excluded by the words of that clause this suit will lie. It is submitted that "suit for land" means "suit for possession of land." Suits in which a Court of Equity makes orders *in personam*, though the subject-matter of the suit is out of the jurisdiction, are not considered suits for land—*Penn v. Lord Baltimore* (1 Ves. Sen., 444: s.c., 2 White and Tudor's Eq. Cas., 4th Ed., 923). So an order for carrying [236] out the trusts of the deeds in this suit would not be a suit for land. [GARTH, C. J. —Refers to *Abbott v. Abbott* (L. R., 6 P. C., 220), where it was held that an order directing a Receiver to sell land out of the jurisdiction was not *ultra vires*.] The latest case is *Juggodumba Dossee v. Puddomoney Dossee* (15 B. L. R., 318). All these cases show that merely because a declaration is made with respect to land in a suit, that does not make it a suit for land—there are suits in which such declarations may be made which are not suits for land. As to the cases here this Court has held it has power to declare a trust in respect of lands in the mofussil—*Bagram v. Moses* (1 Hyde, 284). Suits for foreclosure and redemption are not suits for land, though there have been decisions the other way. See *Bibee Jann v. Meerza Mahomed Hader* (1 I. J., N. S., 40) and *S. M. Lalumoney Dossee v. Juddonath Shur* (1 I. J., N. S., 319). The latest English decision however holds that such suits are not suits for land—*Paquet v. Fide* (L. R., 18 Eq., 118). And where there is no prayer for possession, as if the mortgagee is in possession, a suit for foreclosure is not a suit for land—*Blaguerie v. Ramdhone Doss* (Bourke, 319). The decisions of the Courts here as to such suits must not be considered conclusive. [GARTH, C. J. —Have there been any cases here in which the Court has decreed specific performance of contracts relating to land?] Yes, in *Ramdhone Shur v. S. M. Nohumoney Dossee* (Bourke, 218), such a suit was entertained where the parties were resident in the jurisdiction. [PONTIFEX, J.—Refers to *Carteret v. Petty* (2 Swanst., 323 note), where a partition of lands out of the jurisdiction of the

* Court of Chancery was refused.] A decree for an account however was given in that case, see also *Hoaditch v. Donegal* (8 Bligh., 301), and Seton on Decrees, p. 1038. It is submitted then that the Court has power to order the trustees to carry out the trusts of the deed. But the plaintiff contends further that the Court has power to remove the trustees and appoint a manager to carry out the trusts. The words of the Charter do not deprive the Court of jurisdiction it had previous to the Charter, nor has such jurisdiction [237] been otherwise taken away. The Supreme Court had power to make such orders where the land was out of the jurisdiction—*Doe d. Bampton v. Petumber Mullick* (1 Bignell, 24), *Doe d. Muddoosudun Dass v. Mohenderlall Khan* (2 Boul., 40), *Doe d. Chultoo Sick Jamadar v. Subbessur Sein* (2 Boul., 151), and *Tarramoney Dossee v. Kishuogovind Sein* (2 Morley's Digest, 61). [GARTH, C. J.—I have some doubt at present whether a "suit for land" means more than a suit for possession of land, and whether it includes suits relating to or concerning land. Here however you ask for possession. I can understand a Receiver being appointed to receive rents where another person is in possession: but here you want the Receiver put in possession.] It is not a question of

getting an order for possession; the trustees might be discharged conditionally on their putting the Receiver in possession. The plaintiff does not want the trustees removed at all, unless they are desirous of being discharged.

As to the defendant Lightfoot being out of the jurisdiction, that does not prevent the suit from proceeding. See *per* PEACOCK, C.J., in *Sterling v. Cochrane* (1 B. L. R., O. C., 125-127). On the ground of convenience the arguments in favour of the suit being tried in this Court are unanswerable. A mofussil Court could not carry out the trusts, or give the plaintiff the relief he prays for.

Mr. *Evans* on the same side referred to several cases in which the Court had made orders with respect to land out of the jurisdiction—*Macrae v. Macneill*, decided by MACPHERSON, J., on 14th May 1873. It was attempted in that case to distinguish it from *Bagram v. Moses* (1 Hyde, 284), inasmuch as in the latter case the defendant was personally subject to the jurisdiction, whereas in *Macrae v. Macneill* he was not. MACPHERSON, J., there dealt with the question of the title to the land, but refused to give possession. *Macdonald v. Scott*, 15th September 1873, decided by MACPHERSON, J., in which a right was decided as to a share of a tea garden in Assam, and a case of the same name before PONTIFEX, J. [238] PONTIFEX, J.—There the point was not taken.] No, but land out of the jurisdiction was dealt with—*In re the Tagore estate*, where the old trustees were removed, and the Official Trustee was appointed trustee of lands at Rungpore. The Bombay High Court has held that a suit for the rent of lands in one district may be brought in another district where the defendant resides, although the plaintiff's title to the lands may incidentally come into question—(*Chintaman Narayan v. Madhavrao Venkatesh* (6 Bom. H. C., A. C., 29).

Mr. *Macrae* for the respondents Morrell and Lightfoot.—The cases cited by Mr. *Evans* are distinguishable in that the primary object of those suits was not for land. They come within the principle of the case of *Penn v. Lord Baltimore* (1 Ves. Sen., 444), which we do not dispute. The person suing here is identical with the trustees: the plaint is verified by one of the defendants. Longmuir, the agent of the plaintiff Bank, is suing himself as one of the trustees. The trusts the plaintiff seeks to have carried out in this suit are such as are calculated to give the trustees in an indirect way beneficial possession of the land: that is the real scope and intention of the trust deed. [PONTIFEX, J.—Cannot we make a declaration of trust?] Not at any rate until the deed has been proved to be valid against Lightfoot: that is one of the questions raised by him. The whole case must be taken as stated in the pleadings. As in a recent case—*The East Indian Railway Company v. The Bengal Coal Company* (1. L. R., 1 Cal., 95)—the plaint may, on the face of it, show jurisdiction; but, when the defence is disclosed, it may appear to be a suit for land. [GARTH, C.J.—Suppose it were proved that Lightfoot is bound by the deed, would not the Court have jurisdiction to give what is asked for?] No, not to carry out the trusts of the deed: because to carry them out would be dealing with land in a way which is prohibited by the words of cl. 12 of the Letters Patent, *i.e.*, entertaining a suit for land out of the jurisdiction. [GARTH, C.J.—If Lightfoot is bound his interest is in the trustees, and the Court might make an order that the trustees should [239] carry out the trusts of the deed.] If Lightfoot were not a party to the suit, it would be a different suit: as it is, the real object is to obtain a declaration that a portion of the land is not Lightfoot's, but belongs to the trustees, on the allegation that Lightfoot transferred it to them.

The words of cl. 12 "suit for land" are, no doubt, vague, but a long course of decisions has interpreted them as meaning more than "suit for possession of land." There is no need to go back to see what the jurisdiction of the Supreme

Court was, as it brings us to the same question as to whether it is a suit for land. The latest case is *The East Indian Railway Company v. The Bengal Coal Company* (I. L. R., 1 Cal., 95), the object of which was to settle disputed boundaries. [GARTH, C.J.—That was clearly a suit for land. Is a suit for trespass to land a suit for land? It is so in England, for it is often brought admittedly to try title to land. *The Advocate-General.—Rajmohun Bose v. The East Indian Railway Company* (10 B. L. R., 241) decided that a suit for trespass to land was not a suit for land.] That was the case of a nuisance, not of trespass to land. In *In re Leslie* (9 B. L. R., 171), it was held that a suit on a mortgage for a decree for the amount due on it, or in default of payment for sale of land, was a suit for land; and see the cases referred to by MARKBY, J., in that case at page 177. In *Denonath Sreemany v. Hogg* (1 Hyde, 141), it was held that the Court could not deal with land in the mofussil, even though it was in the possession of the Court Receiver. *Juggodumba Dossee v. Puddomoney Dossee* (15 B. L. R., 318) was decided on the ground that the deed gave none of the parties any beneficial interest in the land: besides there all the parties were personally subject to the jurisdiction. *Bagram v. Moses* (1 Hyde, 284) decided that the Court had jurisdiction to declare that a party held land subject to a trust. We don't wish to question that. But more than that is wanted in this case. In *Ramdhone Shaw v. Nobumoney Dossee* (Bourke, 218), the contract was made within the jurisdiction. *Sterling v. Cochrane* (1 B. L. R., O. C., 125) on the facts [260] does not uphold the position it was cited to support. Whenever the main object of the suit is the possession of land, the suit is a suit for land. That was not the object in *Abbott v. Abbott* (L. R., 6 P. C., 220), and therefore the Court held it had jurisdiction to make an order as to the land. The main object of this suit is to take land from Lightfoot and Morrell, and vest it in the trustees. It is submitted it must be held to be a suit for land.

Mr. Branson rose to address the Court for the trustees, but on the objection of Mr. Woodroffe that he ought not to be heard at this stage, the plaintiff Bank and the trustees being in the same interest, the Court refused to hear him.

Mr. Evans in reply pointed out that there was no identity between the plaintiff Bank, and Longmuir as a trustee. The Bank was a creditor, but nothing was due to Longmuir. The other side say they don't desire to question the decision in *Bagram v. Moses* (1 Hyde, 284). Now here the trustees are in absolute possession of at any rate fourteen-sixteenths of this property and of the other two-sixteenths as partnership assets. Cannot the Court make a declaration of trust, which can be carried out? [GARTH, C.J. — But they have not possession of the two-sixteenths if Morrell had no power to transfer it to them.] Morrell transferred it to them for his partner. If the Court has jurisdiction, is that jurisdiction to be ousted because a third person comes in and claims a portion? If our allegation that Lightfoot joined in transferring his interest gives the Court's jurisdiction, traversing that allegation does not take away the jurisdiction, but the issue should be tried whether or not he did transfer his interest. [GARTH, C.J.—It appears to me that as to the two-sixteenths it is a suit for land, and even as to the rest, I have great doubt whether it is not. What do you say as to Lightfoot's share?] It is vested in the trustees as a part of the partnership assets, the assignment of which might give Lightfoot a right to dissolve, or perhaps create a dissolution. If there is some portion of the land in the possession of the trustees, [261] as to which the suit is not a suit for land, then it is submitted the Court has jurisdiction, although the title to another portion arises incidentally — *Chintaman Narayan v. Madhavray Venkatesh* (6 Bom. H. C., A. C., 29).

[PONTIFEX, J.—I am by no means certain that as to the fourteen-sixteenths it is not a suit for land.] The trustees have accepted the trust, the assignor admits that they are trustees, and that he has assigned to them, and they are admittedly in possession of that portion. That is the case of *Bagram v. Moses* (1 Hyde, 284), an admitted trust by persons in the jurisdiction. Can the Court then not make a personal order on the trustees? [PONTIFEX, J.—In the case of *Juggodumba Dossee v. Puddomoney Dossee* (15 B. L. R., 318), express care was taken in the decision to make it plain that there was not in any of the parties any beneficial interest in the land.* In that case, there was a claim to manage the land against parties who were in possession. Management of land implies practically possession of land. The order made in that case was one which made a change in the management or possession of land, and was therefore one affecting land. If cl. 12 is to paralyse the Court's action in every case in which there happens to be a piece of land out of the jurisdiction, great inconvenience will arise: for there is no other Court which could try such suits, or which can give us the relief we ask for in this. The mere existence of a trust is a sufficient cause of action to enable the *cestui-que* trust to ask a Court of Equity to administer it. On the decisions of this Court, it is clear the Court has power to deal with a suit, even though a question of title to land out of the jurisdiction should arise incidentally. Here there is a good trust as to a large portion of the property. The principle of *Bagram v. Moses* (1 Hyde, 284) is the proper one to apply to such a case as this.

Cur. adv. vult.

The **Judgment** of the Court was delivered by

Garth, C. J.—In this case, we think that the judgment of the Court below should be affirmed, upon the ground that the Court had no jurisdiction to entertain the suit.

[262] The plaintiffs were, at the commencement of the year 1875, creditors of the defendants Morrell and Lightfoot to a very large amount. Morrell and Lightfoot were the owners at that time of certain land in the districts of Backergunge and Jessore, Morrell being entitled to a 14-anna share, and Lightfoot to a 2-anna share, in those lands. Morrell and Lightfoot were indebted, at that time, to several creditors, and the defendant Lightfoot, had left this country, and given Morrell certain powers-of-attorney to act for him during his absence. In this state of things, on the 14th of May 1875, Morrell, acting not only for himself, but professing to act for Lightfoot also, under the powers-of-attorney, executed in Calcutta a deed by which he conveyed the said lands (amongst other property) to the defendants Wordie and Longmuir, in trust, to call in such part of the property as consisted of money, and to sell and convert into money all the rest of the property, including the said lands; and, out of the money so to be realised, to pay the creditors of Morrell and Lightfoot, either in full or rateably, as far as the money would go.

The defendants Wordie and Longmuir took upon themselves the trusts of the deed, and appointed Morrell their agent, to manage the property until the sale under their direction. The trustees, however, found considerable difficulty in carrying out the trusts; and the defendant Lightfoot, upon hearing of the deed, repudiated the transaction altogether, and denied, and still denies, Morrell's authority to deal thus with his share of the property under the powers-of-attorney. Upon this, Wordie and Longmuir were unwilling to proceed any further in the execution of the trusts, and were desirous of being discharged from their responsibilities under the trust deed: whereupon the plaintiffs, as

creditors largely interested under that deed, instituted this suit, praying that the trusts of the deed might be carried into effect, that the trustees might be relieved from the execution of the trusts, and that a Receiver or Manager might be appointed to carry out the trusts under the order of this Court.

To this suit an objection has been raised, on behalf of the defendants Morrell and Lightfoot, that the Court has no power to entertain such a suit, inasmuch as it is a "suit for land" [263] within the meaning of the 12th clause of the Charter, the land being situated in the mofussil.

The plaintiffs contend that this is not so; that the lands, which are sought to be affected, are only a portion of certain partnership properties belonging to Morrell and Lightfoot; and that the object of the suit is merely to enforce the carrying out of a trust created by Morrell for the joint benefit of Lightfoot and himself, and in order to effect a beneficial arrangement with their joint creditors.

In support of this view, several authorities have been cited on behalf of the appellants, all founded more or less upon the principle laid down by Lord HARDWICKE in *Penn v. Lord Baltimore* (2 White and Tudor's Eq. Cas., 4th Ed., 923), and in the notes upon that case, that Courts of Equity will exercise their powers *in personam*, in the case of trustees and others resident within their jurisdiction, to oblige such persons to perform trusts, to carry out contracts, and to obey the rules of equity, even where the subject-matter of the trust, or contract, or equity, may be land situate out of their jurisdiction: see *Baqram v. Moses* (1 Hyde, 284) and *Paget v. Ede* (L. R., 18 Eq., 118).

But those cases are all more or less distinguishable from the present, which depends not so much upon the jurisdiction generally exercised by Courts of Equity, as upon whether this suit is brought substantially "for land;" that is, for the purpose of acquiring title to, or control over, land, within the meaning of a particular clause in the Charter: and we think, having regard to what is the real object of the suit, and to what are the rights and contentions of the respective parties, it is impossible to say that this is not substantially a suit for land.

The express purpose of the suit is to compel the sale of the whole of the land conveyed by the trust deed, including Lightfoot's share. But then Lightfoot objects that his share is not subject to the trust at all, because Morrell had no power, or authority, to deal with it, and, therefore, one of the main points which the plaintiffs seek to establish, and which they ask the Court to decide, is the title of the trustees to Lightfoot's share. Surely, in that respect the suit is, strictly speaking, one "for land."

[264] But then the plaintiffs say that is not the sole, or primary, object of the suit: and that, as regards Morrell's share in the property, which is by far the largest portion of it, there is no question as to the trustees' title. But it was repeatedly, during the argument, put to the learned Counsel for the plaintiffs, and distinctly admitted by them, that it would be impossible for the Court to deal effectually with the case, unless Lightfoot's share were included, as well as Morrell's.

That being so, and the suit being confessedly instituted for the purpose of dealing with the lands in their entirety, and these lands being by far the larger portion of the partnership assets, we are of opinion that this is in substance a suit for land within the meaning of the clause in question, and that the judgment of the Court below was perfectly correct.

The appeal will therefore be dismissed with costs on scale No. 2.

Appeal dismissed.

Attorney for the Appellants : Mr. *Adkin*.

Attorneys for the Respondents : Mr. *Knowles*, Mr. *Upton*, and Messrs. *Dignam* and *Robinson*.

NOTES.

[JURISDICTION, OF COURTS—SUIT FOR LAND:—CL. 12 OF THE LETTERS PATENT.

- I. In the following cases it was held that the suits are *not* "suits for land" within cl. 12 of the Letters Patent and as such need not be brought only in Courts within whose jurisdiction the land, subject of the suit, is situate. --
 - (a) In (1877) 2 Cal. 445 (463, 465), the suit was in Calcutta to file an award in respect of a tea garden at Darjeeling and it was held that it was not a suit for acquiring possession of or establishing a title to, or an interest in, immoveable property.
 - (b) (1890) 14 Bom. 358, the suit was for specific performance of an agreement made in Bombay relating to land outside it and for realizing a mortgage debt by sale of that land. As such suits can be entertained by Courts of Equity in England, held this suit can be maintained in India, where all Courts are Courts of Equity as well.
 - (c) In (1892) 19 Cal. 388, the suit was for specific performance of a contract to sell land and for damages in the alternative.
 - (d) In (1898) 22 Bom. 701, the suit was for foreclosure and was held to be not a "suit for land."
 - (e) In (1906) 33 Cal. 1065 (1075) 4 C. L. J. 238, the suit was for specific performance of an agreement to lease certain land, portion of which was situate within the jurisdiction of the Court. Held that the suit was maintainable under cl. d, s. 16 of C. P. C.
- II. In the following cases, it was held that the suits were "suits for land" within the meaning of cl. 12 of the Letters Patent.
 - (a) In (1880) 4 Bom. 482, the suit was for partition of moveable and immoveable property, the latter alone not being within the jurisdiction of the Court. Held suit could be brought only in the Court within which the immoveable property is situate.
 - (b) In (1901) 29 Cal. 315, the suit was for a declaration and for immediate possession of property under a will. Held it was a "Suit for land".
 - (c) In (1903) 27 Mad. 157, the suit was for sale of land equitably mortgaged by deposit of title-deeds.]

The 15th March and 2nd May, 1876.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Cohen and another.....Plaintiffs

versus

Cassim Nana.....Defendant.

Damages, Measure of Action for Breach of Contract - Collateral Contract.

The defendant entered into a contract with the plaintiffs to purchase from them a quantity of gunny bags, of which the defendant was to take delivery at certain stated times. On failure by the defendant to take delivery, the plaintiffs brought a suit for breach of the contract, estimating the damages at the difference between the contract price and the market prices on the days when the defendant ought to have taken delivery. It was proved that the plaintiffs never had the goods in their possession, but that they could have obtained them under a contract they had with a third person, and it was found that the plaintiffs were ready and willing to deliver them at the time contracted for. The lower Court held that the measure of damages was the difference between the contract price of the bags, and the amount which it cost the plaintiffs under their collateral contract to procure and deliver them.

[265] *Held*, reversing the decision of the Court below, that the proper measure of damages was the difference between the contract price and the market prices at the dates of failure by the defendant to take delivery.

APPEAL from a decision of PHEAR, J., dated the 19th July 1875.

The suit was brought to recover Rs. 3,900 as damages for breach of contract in not taking delivery of certain gunny bags. On the 5th June 1874, the defendant entered into a contract with the plaintiffs to purchase from them 3,60,000 Borneo gunny bags, at Rs. 29 per hundred bags : 30,000 to be delivered each month from January to December 1875, half the quantity to be given and taken by the 15th, and half by the end of each month; each instalment to be paid for on delivery. The defendant failing to take delivery of the bags, which ought, according to the contract, to have been taken on 28th February, 15th March, and 31st March respectively, the plaintiffs brought this suit, estimating their damages at the difference between the contract price and the market prices on the days on which the defendant ought to have taken delivery.

The defence was, that the plaintiffs were not ready and willing to deliver the gunny bags according to the contract, and that the plaintiffs had not sustained the damages alleged. From the evidence it appeared that the plaintiffs were, in June 1874, under contract with the Barnagore Jute Factory, to take a certain quantity of bags from them monthly, and it was from this supply that the plaintiffs proposed to deliver bags to the defendant in accordance with their contract. Evidence was given also of the market price of gunny bags of the kind contracted for as having been at the end of February 1875 from Rs. 20 to Rs. 21 per 100 : at the middle of March, Rs. 20 ; and at the end of March, Rs. 19.

The decision of PHEAR, J., was as follows :—

Phear, J.—I have already expressed the opinion that the plaintiffs had the means of performing the contract according to its terms, had they been asked to do so by the defendant, and that the defendant committed a breach of contract

by not asking for and taking delivery of the number of bags which are the subject of suit at the times mentioned in the plaint.

[266] The defendant is, therefore, bound to pay to the plaintiffs by way of damages such an amount of money as will place them pecuniarily in the same position as they would have been in had the contract been duly carried out in the particulars complained of. And it is plain that if the plaintiffs, at the times mentioned, had the bags in their hands ready to deliver, and with the full right to sell to whom they chose, they could, on the defendant making default, have sold the bags in the market, and therefore the bags being left on their hands, as a consequence of the defendant's breach, must be taken to be worth to them the market price of the day, and the damages which would give them the same benefit as the contract would be the difference between the market price and the contract price. In delivering the judgment of the Court of Exchequer Chamber in *Barrow v. Arnaut* (8 Q. B., 605) LORD CHIEF JUSTICE TINDAL said: "Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser having the money in hand may go into the market and buy. So if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them." But this measure of damages is obviously only applicable to suits of the present kind, i.e., suits where the vendor is plaintiff, when the effect of the defendant's default is to leave the subject of the contract at the plaintiff's disposal and possessed of a market value. In other cases the principle which led to it must be directly applied. See *Cort v. Amburgate Railway Company* (20 L. J., Q. B., 460).

In the present case, the plaintiffs never at any time had bags in their possession or at their disposal as owners independently of the defendant: their means of performing their contract was furnished by a, so to speak, collateral contract, which they could call upon the Barnagore Company to carry out, provided the defendant paid cash on delivery: for Mr. Landale said he would have sent down to Calcutta the required number of gunny bags on condition only of the shipping order being left in his hands until [267] payment. And the failure of the defendant to ask for and take delivery of the specified number of bags did not leave these bags at the plaintiffs' disposal and bearing a market value, but only rendered the plaintiffs less able than before to complete their own contract with the Barnagore Company.

We must therefore enquire, what would have been the pecuniary position of the plaintiffs in the matter of the bags at the specified times if the defendant had remained true to the contract. They would, I suppose, have put into their pocket as profit the difference between the contract price of the bags and the amount of money which it cost them under their contract with the Barnagore Company to procure and deliver the bags. In the events which have happened, I understand from the evidence that the plaintiffs have been obliged to pay to the Barnagore Company compensation for not having been able to carry out their general contract with the Company. So much of this compensation, if any, as can be traced directly to the defendant's default, is, as matters stand, actual loss occasioned thereby, but as to what it amounts to I have no means whatever of forming an estimate.

In the argument which I have had the advantage of hearing since I threw out the above view at the termination of the trial, Mr. Jackson for the plaintiffs cited some well-known cases to establish, as he contended, that it is a rule of

law in all suits for breach of contract of sale by either party that the damages should be measured by the difference between the market price and the contract price at time of breach, unless the defendant proved this measure to be erroneous. But all of these were cases in which either the purchaser sued the vendor for non-delivery, or the vendor having the goods in his hands ready to deliver and a market to sell in, sued the purchaser for non-acceptance, and in each of these classes the difference between the market price and the contract price undoubtedly represents, as has been already remarked, the amount of money required to put the plaintiff in the same position as he would have been in if the contract had not been broken.

In particular, Mr. Jackson relied upon *Roper v. Johnson* (L. R., 8 C. P., 167), [268] but that was a suit by a purchaser of goods against a vendor for breach of contract before the day named for delivery, and the only question was, what was the date to which the damages were to be referred. Mr. Justice BRETT puts the peculiarity of the case thus (p. 180): "The general rule as to damages for the breach of a contract is, that the plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed. In the ordinary case of a contract to deliver marketable goods on a given day, the measure of damages would be the difference between the contract price and the market price on that day. Now, although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of the breach." And the Court held that the damages were to be estimated as of the day appointed for delivery, not as of the day of breach. I do not find anything in the case which can serve as a guide in the present.

Mr. Jackson also urged, that it must be taken that the plaintiffs, whatever their contract with the Barnagore Company, could at any rate have supplied themselves with the means of carrying out their contract with the defendant by purchasing in the bazaar at the price of the day, and that, if they had done so, their profit, which they have lost, by reason of the defendant's default, would have been the difference between that market price and the defendant's contract price.

But this seems to me fallacious. It appeared on the evidence before the Court that the plaintiffs had *not* the means of purchasing the requisite number of gunny bags in the bazaar, and had it not been for their contract with the Barnagore Company, and the evidence of Mr. Landale as to the peculiar terms on which he would have furnished them for delivery to defendant, I could not possibly have found that the plaintiffs were ready to deliver so as to entitle them to claim damages from the defendant for non-acceptance. The plaintiffs' readiness and ability to deliver is inseparable from their contract with the Barnagore Company, which in itself has not been [269] performed. Without some knowledge therefore of the terms of this contract, it is impossible to estimate what the position of the plaintiffs would have been, if the defendant had not committed the breach for which he is sued. Had the Barnagore contract been performed, and the plaintiffs so got their bags in hand, of course the case would have been different, and the market price measure would have been applicable.

Mr. Jackson then asks me to assume that the plaintiffs could get their bags from the Barnagore Company at the time when delivery on their part was needed at the market price of that date, but there is no evidence whatever to warrant this assumption. On the contrary, I suppose it certain that they could

not have got them there at any other price than that at which they contracted to take them, and although this price is not disclosed, it is more than probable that it was higher than the market prices at the times of the defendant's breach.

Lastly, Mr. Jackson appealed to Sedgwick on Damages, 4th ed., page 320 : "Where, however, the plaintiff has not the goods that he agrees to sell, but makes a side contract with another party to furnish them, he will only be allowed to recover the difference between the original contract price and the market price at the time of the offer with interest."

Unfortunately, the authorities referred to in this passage are not accessible to us ; but I imagine if they could be examined they would be found to deal with cases in which the side contract had been executed, and the vendor plaintiff either had at his disposal the goods which he sued the defendant for not taking, or at any rate that as against the defendant it could be taken that he was ready and willing to deliver in the ordinary sense. And probably, judging from the phraseology of the text, the decisions merely ruled as against the plaintiff that the market price was the lower limit of the measure of damages, even though the side contract price had been lower still, and so the plaintiff's actual loss of profit greater than the measure.

In the circumstances of the present case, it appears to me that the market price at the times appointed in the contract for delivery bears no relation, and affords no clue, to the amount of damage or loss which the plaintiffs have in fact sustained [270] by reason of the defendant's default, and there is nothing in the decided cases to give it the arbitrary value for this purpose, which Mr. Jackson contends for.

And when I endeavour to ascertain from the evidence what the plaintiffs' loss really was, I find no materials in the evidence for forming an opinion. I have not the slightest means of judging what it would have cost them to procure and deliver the bags to the defendant had the latter been ready to take and pay for them at the times appointed therefor, and consequently I cannot arrive at any definite estimate of the amount of profit which they would have derived from a proper performance of the contract by the defendant and which they have lost by his default, neither can I tell how much or what amount of the money out of pocket which they have paid by way of compensation to the Barnagore Company for their own shortcomings is directly attributable to the defendant's failure to carry out this present contract. At the same time I am satisfied that the plaintiffs have sustained some loss, whatever it may be, under both heads : and I think, on a view of all the facts of the case, that I cannot be wrong in awarding them Rs. 500 in respect of it, though I admit that my grounds for taking this round sum in preference to any other are of the most general kind. In cases such in character as the present evidently is, there is special need for care that no damages be given which cannot be placed upon a sound basis.

Decree for damages Rs. 500, and costs No. 2.

From this decision, the plaintiffs appealed, on the ground that the damages ought to have been estimated at the difference between the contract price of the goods and the market prices at the time when delivery ought to have been taken.

Mr. Jackson (Mr. *Woodroffe* with him) for the Appellants.

Mr. Macrae for the Respondent.

Mr. Jackson contended that the usual principle as to estimating the damages was to be applied in the present case: that principle applied not only when the party complaining of the [271] breach has the goods in his possession, or at his disposal, but also to cases where he could have procured them. Here the plaintiffs could have obtained the bags by reason of the contract with the Barnagore Company: it is found in the Court below that they were ready and willing to deliver them. There was evidence of the market rate at the date of the failure of the defendant to take delivery, and the measure of damages should be the difference between the market price at that time and the contract price—this would be the amount sued for. The learned Counsel referred to *Roper v. Johnson* (L. R., 8 C. P., 167), Sedgwick on Damages, 4th ed., p. 320, § 283, and the cases there cited, and Act IX of 1872, s. 73, Explanation (h).^{*}

Mr. Macrae for the Respondent.—The plaintiffs to entitle them to recover must show actual loss: here they have not suffered any: damages awarded them would be an actual profit, without their having undergone any corresponding risk. Apart from the contract with the Barnagore Company, the plaintiffs could not have procured bags like those contracted for in the market on the days they ought to have been delivered. If so their proper course was on breach by the defendant to go into the market and sell the bags: they did not do this, because they had not then got the bags, and therefore could not have been ready to deliver them. *Roper v. Johnson* (L. R., 8 C. P., 167) was a case different from the present: that was an action by the purchaser against the vendor for non-delivery. In a case like the present by a vendor against a purchaser for non-acceptance, the plaintiff still has the goods, assuming his readiness to perform his contract, and might afterwards sell them at a profit. [PONTIFEX, J. —If your contention is right, the plaintiff, in every case of breach of contract, would have to show, not only his ability to perform his contract, but also have to prove every contract he had entered into to enable him to carry out the contract he is suing upon.] No, I do not contend that: but the plaintiffs must show they have sustained some loss by the breach of the contract. S. 73 of Act IX of 1872 makes provision for compensation for loss sustained [272] by the plaintiff by breach of a contract; here they have suffered no loss. The market price of Borneo gunny bags is no proof of the price of bags of the size contracted for, inasmuch as no Company sells only one kind of bag: it is submitted there is no reliable evidence of the market price.

* [Sec. 73:—When a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.

When an obligation resembling those created by contract has been incurred, and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it, and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

ILLUSTRATIONS.

(h) A contracts to supply B with a certain quantity of shot at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract-price of the iron and the sum for which A could have obtained and delivered it.]

Mr. Jackson in reply.—There is evidence of the market price of bags of “this quality :” that means “of the kind contracted for.” The plaintiffs are entitled to the amount by which the contract price exceeds that which they could have obtained when the defendant failed to take delivery. See s. 73, Act IX of 1872, Explanation (c). The case of *Cort v. Ambergate Railway Company* (20 L.J., Q. B., 460; s.c., 17 Q. B., 127), referred to by PHEAR, J., is, it is submitted, in the plaintiffs’ favour; see *per* CAMPBELL, C.J., at page 144. On breach of a contract for sale of goods, the purchaser is not bound to buy other goods, nor is the vendor bound to sell at once in the market.*

Cur. adv. vult.

The judgment of the Court was delivered by

Garth, C.J. (after shortly stating the contract, his Lordship continued) :—There is no doubt in this case as to the plaintiffs’ right to recover; and the only question is as to the amount to which they are entitled.

It is admitted that the defendant refused to accept the bags, which were to have been delivered on the 28th February, and on the 15th and 31st March 1875; and it was found as a fact by the learned Judge in the Court below, and we entirely agree with him in so finding, that the plaintiffs were ready and willing to deliver the bags on these above dates.

It was proved, on the part of the plaintiffs, that these gunny bags were marketable articles in Calcutta; and Mr. Alexander Landale, who is a broker, stated that the greater portion of the gunny bag business passed through his hands, and that, in the month of February 1875, the price of Borneo gunny bags was from Rs. 20 to Rs. 21 per 100; at the middle of March, Rs. 20; and at the end of March, Rs. 19 per 100. [273] This witness does not appear to have been cross-examined, and no evidence was offered by the defendant to contradict or qualify his statement.

Here then we have a contract, by which the plaintiffs agreed to supply the defendant with certain marketable goods at specified periods, and a breach of that contract by the defendant in not accepting the goods, which the plaintiffs were prepared to deliver at three of those periods. What then is the measure of damages to which the plaintiffs are entitled?

According to the ordinary and well-established rule, they would, under such circumstances, be entitled to recover the difference between the contract price of the goods and the market price at the time of the breach: see the judgment of the Exchequer Chamber in *Barrow v. Arnaud* (8 Q. B., 605). But the learned Judge in the Court below has considered that, in this particular case, the ordinary rule did not apply, and for this reason: The plaintiffs, although prepared to deliver the goods in accordance with the contract, never had them in their actual possession, nor could they have procured them in the general market. Their only means of obtaining them was under a contract which they had entered into with the Barnagore Company, upon the terms (amongst others) that they should pay for them in cash, which cash they looked to obtain on each delivery from the defendant. Mr. D. G. Landale, the Manager of the Company, stated in evidence, that he was quite ready to supply the bags upon either receiving cash or holding the shipping documents as security. These circumstances appear to have led the learned Judge to the conclusion that in this case the ordinary rule for assessing the damages did not apply; and that the proper course was to endeavour to ascertain the extent of the plaintiffs’ actual loss, having regard to the terms of his contract with the

Barnagore Company. He then proceeds to say in his judgment that he finds no materials in the evidence which enable him to form an opinion of the plaintiffs' actual loss ; and in the result, he awards them Rs. 500, avowing at the same time that he arrives at that sum upon no particular principle or estimate.

[274] We cannot think that this is a correct or legal mode of assessing the amount of damages ; and we are unable to discover any good reason why the terms of the plaintiffs' contract with the Barnagore Company should affect the question of damages, or why the ordinary rule of assessment should not be adopted in this case. It was undoubtedly quite right to enquire into the arrangement between the plaintiffs and the Barnagore Company in order to ascertain whether the plaintiffs were ready and willing to deliver the bags on the days specified ; but that question having been decided in the plaintiffs' favour, it is difficult to see how the terms of that arrangement could possibly affect the question of damages as between the parties to this suit. As long as the plaintiffs were prepared to deliver the goods, it appears to us immaterial how and where they obtained them, or at what price. Whether they cost the plaintiffs much or little, they were entitled to receive from the defendant the contract price, and in the event of the defendant's non-acceptance, they had a right to charge him with the difference between that price and the market price at the time of the breach. In contracts for the supply of large quantities of marketable goods, more especially when the goods are to be delivered from time to time over a long period, it rarely happens that the seller has the goods in his actual possession. In contracts by a mine owner for the supply of coals, or by manufacturers for the supply of marketable manufactured articles, or by timber merchants for the supply of timber for large undertakings, the subject of sale has generally to be worked, or manufactured, or obtained, as the contract provides : and yet in all such cases, the seller, in the event of the buyer's non-acceptance at the time mentioned in the contract, has a right to recover damages from him, ascertained according to the ordinary rule. If in each of such cases the Court was bound to enquire what it cost the mine owner to get the coals, or the manufacturer to make the articles,—or the merchant to buy the timber, the enquiry would not only be endless, but it would be introducing a novel, and we consider, an incorrect, principle of ascertaining the extent of plaintiffs' loss.

[275] In the case of *Cort v. The Ambergate Railway Company* (20 L. J., Q. B., 460 ; s. c., 17 Q. B., 127), which appears to have been somewhat relied upon in the Court below, it will be found that the goods, which were the subject of sale, were not marketable articles, nor was it suggested in the course of the argument that they were so. The contract there was for the supply of several thousand tons of railway chairs, which, from their very nature, would not be bought and sold in any general market, and, consequently, the ordinary rule affecting marketable articles would not apply to such a contract.

In this view, we are of opinion that the ordinary rule does apply, and we therefore award the plaintiffs the sum of Rs. 3,900, claimed in the plaint, which is a somewhat smaller sum than the evidence would warrant.

The appeal is decreed with costs on scale No. 2.

Appeal allowed.

Attorneys for the appellants : Messrs. Chauntrell, Knowles and Roberts

Attorney for the respondent : Mr. Goodall.

[1 Cal. 275]

APPELLATE CIVIL. *

The 2nd March, 1876.

PRESENT :

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE McDONELL.

Hurymohun Shaha.....Defendant

versus

Shonaton Shaha.....Plaintiff.†

Hindu Law — Inheritance — Stridhan.

With respect to property given to a woman after her marriage by her husband's father's sister's son, the brother, mother, and father are preferable heirs to the husband.

SUIT by a Hindu, to recover certain immoveable property as heir to his deceased wife. The plaintiff alleged that the pro-[276]perty in dispute had been given to his wife after her marriage by the defendant, who was the plaintiff's father's sister's son. Amongst other grounds of defence, the defendant, in his written statement, contended, that the plaintiff could not inherit or claim his wife's stridhan, inasmuch as her mother, father and brother were all living.

The Munsif did not go into this question, but dismissed the suit upon other grounds. On appeal the Subordinate Judge reversed the Munsif's decision as regards the grounds on which it rested. As regards the plaintiff's right to maintain the suit as the right heir under the Hindu law to the property claimed, he said :—"The plaintiff's right of inheritance is questioned, and thus I have to decide, first, whether plaintiff has such right of property as to have a right of action against the defendant. According to Hindu law, the property under the denomination of anwadheya, gift subsequently given by her kindred, means anything given to her by her father or mother or by her brother, and the heir to such property is the brother in preference to her husband, *vide* Shamachurn's Vyavastha, sec. 463, first edition (Vyavastha 470 in the 2nd edit.). But to property not given by her father or kindred, the husband first succeeds; sec. 466 (Vyavastha 473 in the 2nd edit.). In the present case, the gift was not by the father, or kindred of the donee, and the husband therefore is the heir. Upon these grounds, I find the plaintiff has a right of action."

From the above decision, the defendant now appealed.

Baboo Mohinee Mohun Roy (Baboo Lall Mohun Dass with him) contended, that, on the death of the plaintiff's wife, her brother, and not the plaintiff, was entitled to succeed to her stridhan, and that this suit was consequently not maintainable. He cited the Dayabhaga, Chap. iv, §§ 10 and 16, and the Vyavastha Darpana, 2nd edition, Vyavastha 470, cl. 3, and the first column of the table of succession to a childless married woman's stridhan given at p. 733.

Baboo Hurry Mohun Chuckerbutty for the respondent.—§ 10, Chap. iv, sec. 3 of the Dayabhaga is one of several para-[277]graphs, *viz.*, §§ 4 to 28, in which the order of succession* to the separate property of a childless woman is discussed, and the result of the discussion is summed up by Jimuta Vahana in § 29, where, in support of his conclusion, he quotes

* Special Appeal, No. 1501 of 1875, against a decree of the Subordinate Judge of Zilla Dacca, dated the 30th of April 1875, reversing a decree of the Sudder Munsif of that district, dated the 22nd of August 1874.

the text of Catyayana. "That which has been given to her by her kindred goes, on failure of kindred, to her husband," thereby clearly indicating the scope of the previous discussion. [JACKSON, J.—It is expressly stated in § 10 that "wealth, received by a woman, after her marriage, from the family of her husband, goes to her brothers, not to her husband."] In his summary of the Chapter Śhrikrishna says of property not received at the wedding, and not given by the father, that, in the absence of the persons specified by him, "the order is the same with that of property received at Brahma nuptials," i.e., the husband comes first. In the present case, it is not contended that any of the persons there specified are in existence, and the plaintiff is accordingly the preferable heir. The other authorities are clearer than the Dayabhaga, see the Dayatattwa, Chap. x, ss. 10 and 26, and the Dayakrama Sangraha, Chap. ii, sec. 4, §§ 10 and 11. Section 5 shows that the only exception to the general rule now recognised is with regard to gifts subsequent by the father, see also Macn. Pr. H. L., pp. 38—40. But assuming that the brother is the preferable heir to property received after the marriage from the family of the husband, it is submitted that the defendant, the donor in this case, is not a member of the plaintiff's family; see Dayabhaga, Chap. iv, sec. 1, § 3.

Baboo Mohinee Mohun Roy in reply contended, that the defendant was a *sapinda* of the plaintiff, and must therefore be deemed a member of his family, and he referred to the judgment of MITTER, J., in *Juloonath Sircar v. Bussant Coomar Roy Chowdry* (11 B. L. R., 286, at p. 299), as showing that the plaintiff was not the preferable heir to the property in dispute.

The judgment of the Court was delivered by

Jackson, J.—The question which we have been called upon [278] to consider in this special appeal is whether the plaintiff has any right to maintain the present suit as the right heir, under the Hindu law, to the property which is claimed in this suit. That property was given to the deceased wife of the plaintiff after their marriage and during the continuance of the marriage state by the husband's father's sister's son. It is admitted that this property was the stridhan of the deceased wife, and that the plaintiff claims it as being preferable heir to such property on her decease. This was a matter objected to by the defendant in his written statement. The Munsif dismissed the suit upon other grounds, but did not go into this question. On appeal before the Subordinate Judge, he reversed the decision of the Munsif as regards the grounds on which it rested, and, having then to decide this question, he disposed of it in this wise.

(The learned Judge read the portion of the Subordinate Judge's judgment set out above, and continued) :—

There is some obscurity in the language of this judgment, but, setting that aside, I must observe that it is not satisfactory to find a Subordinate Judge, himself a Hindu and sitting in a Court of appeal, disposing of a question of this kind merely on the authority of a text book, however valuable, such as Baboo Shamachurn Sircar's *Vyavastha Darpana*. That is a book of which I am far from underrating the excellence, but after all it is merely a collection of various authorities upon the main points of Hindu law, and any Judge, who has to decide a question of this description, ought undoubtedly to refer to those authorities themselves, although, in the decision of it, he is of course not precluded from considering and using such a valuable commentary as that of Babu Shamachurn Sircar. I think we are bound to decide the case entirely upon the authority of the Dayabhaga, and if we can satisfy ourselves as to the

meaning of the author of the Dayabhaga on this question, it will be unnecessary to go to any inferior authority. But we have the express authority of Jimuta Vahana himself. In Chap. iv, sec. iii, the question of succession to the separate property of a childless woman is fully discussed, and we find that the author, after propounding the text of Yajnyavalkya in the second verse of that section, goes on, and in the fourth verse [279] says:--

"It is not right to interpret the text as signifying that any property of whatever amount which belongs to a woman married by any of those ceremonies termed Brahma, &c., whether received by her before or after her nuptials, devolves wholly on her husband by her demise:" he goes on to give reasons for that, and then we find it stated in the 10th verse of the same chapter and the same section: "But wealth received by a woman after her marriage, from the family of her father, of her mother, or of her husband, goes to her brothers (not to her husband), as Yajnyavalkya declares, that which has been given to her by her kindred, as well as her fee or gratuity, and anything bestowed after marriage, her kinsmen take, if she die without issue:" and after the brother there is no doubt, that, where the husband does not first take, the mother and the father come in between. The husband, therefore, in such a case would not be the heir, if the text applies, until after brother, mother, and father. The question is whether the text applies to this case. It seems to me that it very clearly does. The property in dispute is undoubtedly wealth received by a woman after her marriage, and it was received, not from the family of her father, or of her mother, but from the family of her husband. That the expression "family of her husband," includes the degree of kindred in which the donor of this property stood to the deceased woman I have no doubt. The question was raised before us to-day whether such a relation could be properly called *sapinda*. It is not necessary that we should decide that point, but we think that the "family of the husband" is a term wide enough to include this kind of relation, and it appears to us that, if the Subordinate Judge, in deciding this appeal, had looked carefully to the very author to whom he does refer, he would have found ample authority so far as the book itself goes for not coming to the conclusion that he arrives at. He appears to have referred to text 473, which is at page 722 of the second edition of the book; but if he had referred to the preceding texts, 470 and 471, he would have found what we now decide set out very fully, and moreover in the table of succession set out at page 733, we find that the order of succession to property given by the parents before [280] marriage or bestowed after marriage, is, first the brother, second the mother, third the father, and fourth the husband. Pages 712 and 720 are here referred to us, showing what was meant by the words "bestowed after marriage," and the explanation is given under the third branch of Vyavastha 470, which says:-- "Wealth received by a woman after her marriage, from the family of her father or mother or of her husband, goes to her brothers." A great deal has been sought to be made of the language of the Dayakrama Sangraha and Dayatattwa upon this point, but it seems to us that the contention so raised is based entirely upon the very concise language used in some places by the authors of those two books who, when they mean to designate a particular class of persons, use the person who heads the class to designate the whole. We are reminded by Baboo Mohinee Mohun Roy, who argued this case for the appellant, of the careful explanation given of this very matter by my late colleague, DWARNATH MITTER, J., in the very able judgment which he delivered in the case of *Judoonath Sircar v. Bussunt Coomar Roy Chowdry* (11 B. L. R., 286), a judgment to which I was a party, and in which I at the time entirely concurred. For these reasons we think that in this case the plaintiff is not the next heir, and therefore the Subordinate Judge has come to an erroneous decision

on the point of Hindu law involved, and that his judgment must be set aside, and the plaintiff's suit dismissed with costs.

I am bound to say that, as far as we have been able to judge, it seems to us that it is a suit which in every way deserves to be dismissed on the merits. I should observe that the contention that the donor of this property is not a member of the husband's family involves the contention that he was a stranger* and this is contrary to the admitted fact that the property was stridhan.

Appeal allowed.

NOTES.

[HINDU LAW—STRIDHAN—SUCCESSION TO—

Held that lease-hold interest granted to a Hindu daughter after marriage becomes her *Anuadheya* Stridhana under the Dayabhaga Law and as such her mother is preferential heir to her husband in respect of that property:—(1908) 33 Cal., 315—10 C. W. N., 510—3 C. L. J., 18.]

[281] APPELLATE CRIMINAL.

The 7th April, 1876.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE MORRIS.

The Queen

versus

Gobin Tewari and another.

Criminal Procedure Code (Act X, 1872), s. 272—Arrest pending Appeal.

In an appeal under s. 272 of Act X of 1872,* the High Court has power to order the accused to be arrested pending the appeal.

In this case, the accused Gobin Tewari and Jodoo Lall had been tried on a charge of murder by the Sessions Judge of Bhaugulpore, and released : and against this acquittal, the Government appealed. On the admission of the appeal, the *Legal Remembrancer* applied for the re-arrest of the accused.

[MACPHERSON, J.—Why should not the prisoners be re-arrested under s. 92 of the Criminal Procedure Code ?] (See *Queen v. Gholam Ismail*, I.L.R., 1 All., 1).

The Legal Remembrancer (Mr. H. Bell) submitted that the Court had power to order the arrest of the accused persons. It was true that s. 272 did not expressly give the Court this power, but it was a power which was impliedly vested in the Court. Where a Court had jurisdiction over an offence, it had of necessity power to bring the persons accused of the offence before it—*Bane v. Methuen* (2 Bing., 63.)

No appeal in case of acquittal, except on behalf of Government. * [Sec. 272.—The Local Government may direct an appeal by the Public Prosecutor or other officer, specially or generally appointed in this behalf, from an original or appellate judgment of acquittal ; but in no other case shall there be an appeal from a judgment of acquittal passed in any Criminal Court.

Such appeal shall lie to the High Court, and the rules of limitation shall not apply to appeals presented under this section.]

The admission of the appeal revived the charge against the accused ; and it was absurd to treat persons accused of murder as mere respondents in an appeal. Before the appeal was heard, the accused ought to be in the custody of the law. If the accused were treated as respondents, and merely served with notice of the appeal, it would be open to them after the appeal had been heard, and a capital sentence had perhaps been passed upon them, to plead that they had never been served with notice of the appeal. In such a case what would the Court do. There was no [282] provision in the law for rehearing an appeal. Under s. 297, when the Court ordered that an accused person who had been improperly discharged be tried, it was not disputed that the Court could order the re-arrest of the accused person though there was no express provision on the point in the section : and in the same way he submitted that the Court had equal authority to direct the re-arrest of the accused on the admission of an appeal under s. 272.

Macpherson, J.—Let the Magistrate be directed to re-arrest Gobin Tewari and Jodoo Lall, and keep them in custody till the hearing of the appeal.

Application granted.

NOTES.

[Followed in (1879) 2 All., 340 ; (1879) 2 All., 386.]

The 28th March, 1876.

PRESENT :

MR. JUSTICE MACPHERSON, MR. JUSTICE MARKBY, AND MR. JUSTICE MORRIS.

In the Matter of the Petition of Mohesh Mistree and another.*

Criminal Procedure Code (Act X of 1872), ss. 294, 295, 296 and 297—Order of Discharge under s. 215—Revival of Proceedings.

An order of a District Magistrate, directing the revival of certain criminal proceedings against the petitioners who had been discharged under s. 275 of the Criminal Procedure Code by a Subordinate Magistrate after evidence had been gone into, quashed as illegal and *ultra vires*.

As the case was one of improper discharge and came before the Magistrate under s. 295 of the Criminal Procedure Code, the proper and only course for him was to report it for orders to the High Court, which, if of opinion that that the accused were improperly discharged, might, under s. 297, have directed a retrial.

The case of *Sidya bin Satya* differed from.

APPLICATION to set aside an order of the Magistrate of Alipore for the revival of certain criminal proceedings against the petitioners, discharged by the Cantonment Magistrate of Barrackpore under s. 215 of the Code of Criminal Procedure.

The facts of the case material to this report are as follows :—In July 1875, one Gopal Malla charged the petitioners with [283] causing hurt to him

* Criminal Motion, No. 53 of 1876, against the order of the District Magistrate of the 24-Pergunnas, dated the 10th February 1876.

in the Court of the Cantonment Magistrate of Barrackpore, then presided over by Colonel Elderton, who heard the evidence for the prosecution and called upon the petitioners for their defence. Before the disposal of the case, however, he was relieved in his office by Captain Hopkinson, who refused to decide the case on the evidence taken before his predecessor, and heard the case *de novo*. Captain Hopkinson, who was a Magistrate of the first class, did not believe the evidence tendered on behalf of the prosecution, and discharged the petitioners.

The complainant thereupon applied to the Magistrate of the district, praying for a revival of the case, on the ground that all his witnesses were not examined by Captain Hopkinson. The District Magistrate, upon such *ex parte* statement, on the 10th of February 1876, ordered the revival of the case, holding that "as the case was one triable under Chapter XVII of the Criminal Procedure Code, the order for the discharge of the accused persons should not have been passed without hearing all the witnesses for the prosecution." The Magistrate also added that he had no doubt, that the High Court would quash the order of discharge if the case came before them; but he did not think it necessary to make any reference, inasmuch as a discharge under s. 215 was not equivalent to an acquittal, and did not bar a fresh enquiry into the same fact. He accordingly directed the Joint-Magistrate to proceed afresh with the case against the petitioners under Chapter XVII of the Criminal Procedure Code.

The petitioners applied to the High Court, on the 1st of March 1876, to have the above order quashed as illegal and made without jurisdiction, and, upon such application, a rule was issued by MACPHERSON and MORRIS, JJ., on the prosecutor, to show cause why the order of the 10th of February should not be set aside, and the records were sent for under s. 294 of the Criminal Procedure Code. There being some doubt on the point raised before the High Court, owing to the case of *Sidya bin Satya*, decided by the Bombay High Court, and referred to in the notes to s. 215 in the 5th edition of Prinsep's Criminal Procedure Code, the rule came on for hearing on the 28th of [284] March before three Judges, *viz.*, MACPHERSON, MARKBY, and MORRIS, JJ.

Babu *Brojonaath Mitter* for the petitioners.

No one appeared for the Crown.

The judgment of the Court was delivered by

Macpherson, J.—It seems to us to be clear that this case came before the Magistrate of the 24-Pergannas under s. 295 of the Criminal Procedure Code,* and that it was in the first instance dealt with by the Magistrate under that section. That being so, his proper and only course was to proceed under s. 296 †

Powers of Court of Session and Magistrate to call for record of Subordinate Courts.

* [Sec. 295:—Any Court of Session or Magistrate of the District may, at all times, call for and examine the record of any Court subordinate to such Court or Magistrate, for the purpose of satisfying itself or himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such Subordinate Court.]

For the purposes of this section, every Magistrate in a Sessions Division shall be deemed to be subordinate to the Sessions Judge of the Division.]

† [Sec. 296:—If the Court of Session or Magistrate of the District is of opinion that the judgment or order is contrary to law, or that the punishment is too severe or is inadequate, such Court or Magistrate may report the proceedings for the orders of the High Court :

Report to High Court. Provided that in sessions cases if a Court of Session or Magistrate of the District considers that a complaint has been improperly dismissed or that an accused person has been improperly discharged by a Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial.]

to report the case for orders to the High Court, which (under s. 297) might have ordered the accused persons to be tried, if of opinion that they had been improperly discharged.

A case (*re Sidya bin Satya*) quoted by Mr. Prinsep in his latest edition of the Criminal Procedure Code, as having been decided by the Bombay High Court, has been referred to as showing that the Magistrate was right in the course he adopted. But that case is not reported in the regular reports of the Bombay High Court: nor have we been able to find any report of it. The full facts with which the Bombay Court had to deal are not before us, and we are unable to say how far the Court may really have gone. The note we have of this decision is therefore of little value; and, taking it as it stands, we are not prepared to agree with it as regards cases coming before the Magistrate under s. 295.

Dealing with the matter under ss. 294 and 297, we think there is material error in the Magistrate's proceeding, and that his order, directing the Joint Magistrate to entertain the fresh complaint now made and all the subsequent proceedings, ought to be quashed.

Whatever may have led to the various delays which have occurred in the prosecution of this case since the 21st of July 1875, there is no doubt that very great and unfortunate delays have taken place. It is, as a rule, most unfair and undesirable [233] in every way to order an accused person to be tried over and over again for the same offence, unless under very peculiar circumstances. In the present instance there is nothing peculiar in the circumstances to warrant a third trial: and it seems to us wrong and improper (within the meaning of s. 294) that an order should be made directing the prosecution to be now recommenced.

The order of the 10th of February and all the subsequent proceedings are quashed.

Order quashed.

NOTES.

[The main case was merely followed in:—(1877) 1 C. J. R. 83; (1878) 2 Bom. 534; (1879) 4 Cal. 647; (1884) 10 Cal. 268.

In (1879) 2 All. 570 this case was distinguished on the facts and it was there held that a re-commitment of the already discharged accused on a different charge under the orders of the District Magistrate, though at the suggestion of the Sessions Judge, was not illegal as there was no "direction to commit."

In (1888) 2 Cal. 405 the main case was followed with the observation that under the new Code the District Magistrate has the power to order further inquiry.

In (1900) 28 Cal. 682 F. B. it was held by the majority that a Presidency Magistrate is competent to re-hear a warrant case in which he has discharged the accused person.]

* [Sec. 294:—The High Court may call for and examine the record of any case tried by any Subordinate Court for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of such Court.]

Power to call for records of Subordinate Courts.

ORIGINAL CIVIL.

The 16th May, 1876.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Harris *versus* Harris.

Harris *versus* Koylas Chunder Bandopadiah.

*Husband and Wife—Married Woman's Property Act (III of 1874),
ss. 7 and 8—Succession Act (X of 1865), s. 4—Action for
Trove—Wife against Husband.*

The plaintiff was, at the time of her marriage in 1870, possessed in her own right of certain articles of household furniture, given to her by her mother. Since January 1875 she had lived separate from her husband, but the furniture remained in his house. In February 1875, her husband mortgaged the property to B, without the plaintiff's knowledge or consent. In June 1875, one KCB, a creditor, obtained a decree against the husband and B, in execution of which he seized the furniture as the property of the husband, and it remained in Court subject to the seizure. In July 1875, the plaintiff instituted a suit in her own name in trover to recover the articles of furniture or their value from her husband, on the ground that they were her separate property, and in August 1875 she preferred a claim in her own name to the property under s. 88 of Act IX of 1850.* It was found on the facts that the furniture was the property of the plaintiff. The husband and wife were persons subject to the provisions of the Succession Act, s. 4 and the Married Woman's Property Act, 1874.

Held that, under s. 7 of the latter Act,† the suit was maintainable against the husband.

Held also, that the judgment for the plaintiff in the suit, to recover the furniture or its value from the husband, could not, without satisfaction, have the [286] effect of vesting the property in the husband from the time of the conversion, and therefore the claim under Act IX of 1850 was also maintainable.

Brinsmead v. Harrison (L. R., 6 C. P. 584), followed.

*[Sec. 88 :—If any claim shall be made to, or in respect of, any goods or chattels taken in execution under the process of any Court holden under this Act, in respect of the proceeds or value thereof, by any person not being the party against whom such process has issued, the Clerk of the Court, upon application of the Officer charged with the execution of such process, as well before as after any action brought against such officer, may issue a summons calling before the said Court, as well the party issuing such process as the party making such claim, and thereupon any action, which shall have been brought in the Supreme Court in respect of such claim shall be stayed, and any Judge of the Supreme Court on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing such action to pay the cost of all proceedings had upon such action after the issue of such summons out of the Court of Small Causes, and the Judges of the Court of Small Causes shall adjudicate upon such claim and make such order between the parties in respect thereof, and of the costs of the proceedings as to them shall seem fit, and such order shall be enforced in like manner as any order made in any suit brought in such Court.]

†[Sec. 7 :—The domicile of origin of every person of legitimate birth is in the country in which, at the time of his birth, his father was domiciled : or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death.

ILLUSTRATION.

At the time of the birth of A, his father was domiciled in England. A's domicile of origin is in England, whatever may be the country in which he was born.

Sec. 8 :—The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.]

CASE referred for the opinion of the High Court, under s. 55, Act IX of 1850,* by G. C. Sconce, the Officiating First Judge of the Calcutta Small Cause Court.

The material portion of the reference was as follows :—

“ The first suit was instituted, in her own name, on the 12th July 1875, by Ella Harris, a married woman, against her husband. It is a suit in trover to recover certain household furniture, alleged by the wife to be her separate property, or its value.

“ Ella Harris is an East Indian woman. She was married to her husband P. H. Harris in Calcutta, on the 24th of January 1870, at the Church of the Sacred Heart, Dhurrumtollah. They are both Roman Catholics. They lived and cohabited together at 22 Kenderdine's Lane, where the husband still resides. The wife's mother, Mrs. Noel, lived with them, and still resides there with Mr. Harris. P. H. Harris is the son of one J. M. Harris, who died in Calcutta in 1865. The son believes that his father was born in England, but he had long made Calcutta his home, and had acquired a domicile here. P. H. Harris was born in Calcutta, where he has always lived, and he had no other domicile. He has no relatives in England. He is 25 years old, and employed in the Military Secretariat. On the 20th January 1875, Mrs. Harris left her husband, and eloped with a man called Margray, who was afterwards prosecuted by the husband, to conviction for adultery. The wife has not since returned to her husband, but lives with some friends at 7 Bmambaugh Lane in Calcutta. The marriage has never been dissolved.

“ The plaintiff was, at the time of marriage, possessed of the articles of furniture in her own right, which were given to her by her mother. A wing almirah was bought by Mrs. Noel, the mother of Mrs. Harris, about a year after her daughter's marriage, and given by her to her daughter. The present value of all the property is stated to be Rs. 200. The property until very lately remained in the husband's house and under his charge. Subsequently to the separation, the plaintiff demanded [237] the above property from her husband, who, on the 11th June 1875, sent her the following letter : ‘ It is not for me to deprive you of your property, you are, therefore, at liberty to take it away whenever you want, and in whatever way you please.’ Mr. Harris afterwards refused to give up the property, telling his wife, she might, if she could, recover it through the Court. After his wife left him, Mr. Harris mortgaged the property in February 1875, without her knowledge or consent, to one Mr. Bouchez,* but the property remained in his (Harris') own house. Bouchez subsequently, on the 17th June, obtained a decree against him, which is still unsatisfied. On the 12th July, Mrs. Harris instituted in her own name the suit in trover against her husband to recover the property or its value. The husband did not appear to defend the suit brought against him, but I considered his evidence necessary in both suits which are now before the Court, and I desired his attendance that he might be examined personally.”

After setting out s. 4 of Act X of 1865, and ss. 7 and 8 of the Married Woman's Property Act, 1874, the Judge, who referred the case, continued :—“ I entertain considerable doubt whether the Legislature intended so absolutely to

* [Sec. 55 :—The Judges of the Court of Small Causes may, in their discretion, reserve any question of law or equity on which they entertain doubts or which they shall be requested by either party to the suit to reserve, for the opinion of the Judges of the Supreme Court, and shall give judgment contingent upon the opinion of the said Supreme Court on a case which they shall thereupon be entitled to state to the said Court. If only two Judges sit together and shall differ in opinion, the question on which they differ shall be so referred.]

abolish the doctrine of unity of person between husband and wife as to enable them to sue each other during the marriage, about the right to possession by one or the other of some portion of the furniture in what should be the common dwelling-house, or about some petty debt: and I do not apprehend that such suits ever would be brought, except upon some domestic difference, more or less serious, arising.

"I now come to the second suit. It is an interpleader suit, instituted, on the 18th August 1875, by Ella Harris in her own name against Koylas Chunder Bandopadia, who obtained judgment against P. H. Harris and Mr. Bouchez on the 25th June 1875 last. Koylas Chunder Bandopadia, on the 11th August, in execution of his decree, by a warrant of this Court, seized all the articles but one which Mrs. Harris claims in the suit against her husband, supposing them to be the property of P. H. Harris his judgment-debtor. The property is at present in Court under the seizure. It was [288] seized in the house 22 Kenderdine's Lane, where Ella Harris had left it. Babu Odoy Chunder Bose, the pleader, who appeared on behalf of Koylas Chunder Bandopadia, contended that, if the plaintiff recovered a judgment against her husband in the trover suit, such judgment would vest the property in the goods in the husband from the time of the conversion, and that therefore the articles, when seized by Koylas Chunder Bandopadia in execution of his decree, must be deemed to be the property of P. H. Harris, the judgment-debtor."

After referring to the dictum of JERVIS, C.J., in *Buckland v. Johnson* (15 C. B., 145, see pp. 162 & 163) and the case of *Brinsmead v. Harrison* (L. R., 6 C. P., 384; see p. 588, per WILLES, J., and the same case on appeal, L. R., 7 C. P., 547, per BLACKBURN and LUSH, JJ.), and finding on the evidence that the articles claimed in the suits were the property of Mrs. Harris and not of her husband, the learned Judge gave judgment for the plaintiff in both suits contingent on the opinion of the High Court, as to whether, under the circumstances stated, the suits or either of them were maintainable.

No Counsel appeared for either party in the High Court.

The following was the **opinion** of the Court:

Garth, C.J.—We are of opinion that both these suits have been correctly decided.

Mrs. Harris was entitled, as against her husband to the property in question, and could sue him for it under s. 7, Act III of 1874.*

If the suit was to recover the articles themselves or their value, it was in form an action of *detinue*, not of *trover*; but, whatever the form may have been, we are of the same opinion as the Court of Common Pleas in *Brinsmead v. Harrison* (L. R., 6 C. P., 584), that a judgment in such a suit, without satisfaction, does not change the property in the goods. The true explanation of the doctrine attributed to JERVIS, C.J., in *Buckland v. Johnson* (15 C. B., 145) [289] is this, that a man who has recovered the value of his goods in one action in the shape of damages, shall not be allowed to recover the goods themselves in another action; but this reason only applies when the damages have been actually recovered.

* [Sec. 7:—A married woman may maintain a suit in her own name for the recovery of property of any description which, by force of the said Indian Succession Act, 1865, or of this Act, is her separate property; and she shall have, in her own name, the same remedies, both civil and criminal, against all persons, for the protection and security of such property, as if she were unmarried, and she shall be liable to such suits, processes, and orders in respect of such property as she would be liable to if she were unmarried.]

PRIVY COUNCIL.

The 8th, 9th and 10th February, 1876.

“ PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH AND
SIR R. P. COLLIER.

Jumoona Dassya.....Plaintiff.

versus

Bamasoondari Dassya.....Defendant.

[*On Appeal from the High Court of Judicature at Fort William in Bengal.*]

*Adoption, Suit to set aside—Infant Marriage—Presumption as to age—
Power of Minor to give permission to adopt—Regs. X of 1793, s. 33,
and XXVI of 1793, s. 2—Minor under Court of Wards—Onus
probandi—Estoppel.*

The foundation for infant marriages among Hindus is the religious obligation which is supposed to lie on parents to provide for a daughter, so soon as she is *matura viro*, a husband capable of procreating children ; the custom being that when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. The presumption, therefore, is, that the husband, when called upon to receive his wife for permanent cohabitation, has attained the full age of adolescence and also the age which the law fixes as that of discretion.

According to the Hindu law prevalent in Bengal, a lad of the age of fifteen is regarded as having attained the age of discretion, and as competent to adopt, or to give authority to adopt, a son.

Semble.—The operation of s. 33, Reg. X of 1793, which, read together with s. 2, Reg. XXVI of 1793, prohibits a landholder under the age of eighteen from making an adoption without the consent of the Court of Wards, is confined to persons who are under the guardianship of the Court of Wards.

Quere, whether a decree in favour of the adoption passed in a suit by a reversioner to set aside an adoption is binding on any reversioner except the plaintiff ; and whether a decision in such a suit adverse to the adoption would bind the adopted son as between himself and any other than the plaintiff.

APPEAL from a decision of the High Court, Calcutta (KEMP and PONTIFEX, JJ.), dated the 14th February 1873, reversing [290] a decision of the Subordinate Judge of Rajshahye, dated the 26th February 1872.

The plaintiff Jumoona Dassya sued to set aside the adoption of a son by the defendant Bamasoondari Dassya, who was the widow of the plaintiff's deceased son Gobind Chunder Mozoomdar. The case was governed by the Hindu law prevalent in Bengal, under which a widow has no power to adopt without the sanction of her husband. Bamasoondari alleged that the adoption was made by her in conformity with a written authority to that effect executed by her husband shortly before his death. The plaintiff contended that this writing was a forgery contrived to defeat the reversionary interest of herself and her daughters in the property which had belonged to her son. In the first Court the written authority to adopt was held to be a forgery, and the plaintiff had a decree in her favour. On appeal the High Court held the authority to adopt to be proved, and on an objection that was taken as to Gobind Chunder's power to execute the

permission to adopt, inasmuch as he was then a minor, they found that though not of full age, he had arrived at years of discretion, and were of opinion that, on the authority of *Rajendra Narain Surina Lahoree v. Saroda Soonduree Dabee* (15 W. R., 548), the deed of permission to adopt was not invalid by reason of his minority. They therefore dismissed the plaintiff's suit with costs. From this decision the plaintiff appealed to Her Majesty in Council.

The facts of the case are fully disclosed in their Lordships' judgment.

Mr. *Doyle* for the appellant :— The written authority to adopt set up by the plaintiff is a forgery, and even if it were genuine it is invalid. [SIR J. COLVILLE.—What interest have you which entitles you to bring this suit ?] The plaintiff has a reversionary interest. But for this adoption she would be heir to her son on Bamasoondari's death. She sues on her own behalf and on behalf of her daughter. [SIR J. COLVILLE.—You are suing for a declaration of rights which are remote and contingent, does not the case of *Kathama Natchiar v. Dorasinga* [291] *Tevan* apply ? (15 B. L. R., 83 : S. C., L. R., 2 Ind. Ap., 169).] Our suit was brought under an apprehension that if delayed it might become barred under the Limitation Act, No. IX of 1871, which by article 129 of schedule II, allows only twelve years from "the date of the adoption or, at the option of the plaintiff, the date of the death of the adoptive father," within which to bring a suit to set aside an adoption.

Assuming that the alleged authority to adopt was in fact executed by Govind Chunder Mozoomdar, he was at the time a minor and incapable of granting such a power without the consent of his guardian. According to the plaintiff's witnesses, Govind, at the time of his death, was not more than twelve or thirteen years of age, but taking his age to have been between sixteen and seventeen as deposed to by the defendant's witnesses, the case falls under s. 33, Reg. X of 1793,^{*} and s. 2, Reg. XXVI of 1793,[†] the effect of which is to declare that no adoption by a landholder under the age of eighteen shall be deemed valid without the previous consent of the Court of Wards. [SIR J. COLVILLE.—Reg. XXVI of 1793 does not alter the general law as to the minority of Hindus, but says that in particular cases the age of eighteen shall be the age of majority.] Had Govind Chunder been under the Court of Wards he must have had the consent of the Court of Wards ; on the same principle we contend that not being under the Court of Wards he could not validly adopt without the consent of his guardian. [SIR M. SMITH referred to the observations made by their Lordships in their judgment in *Ameerounissa Khatoon v. Abadoonnissa Khatoon* (15 B. L. R., 81 ; S. C., L. R., 2 Ind. Ap., 108). SIR J. COLVILLE.—The Regulations of 1793 referred to seem only to apply in respect of estates of which possession has been taken by the Court of Wards. The disqualified persons under the Regulations are owners of the estates of which the Court of Wards has taken charge. Here the minor was not under the Court of Wards. We cannot extend positive law by analogy or parity of reasoning. Moreover, Reg. X only says that an adoption by the minor shall not be valid. Does that prevent his giving a valid

No adoption by disqualified landholders valid without previous consent of the Court of Wards.

* [Sec. 33 :—No adoption by disqualified landholders is to be deemed valid, without the previous consent of the Court of Wards, on application made to them through the Collector.] •

Period of minority extended to the end of the eighteenth year.

† [Sec. 2 :—The rule contained in section XXVIII, Regulation X, 1793, which limits the minority of Hindoo and Mahomedan proprietors of estates paying revenue to Government, to the expiration of the fifteenth year, is hereby rescinded, and the minority of such proprietors is declared to extend to the end of the eighteenth year.]

authority to adopt ?] I would say *a fortiori* it does. [SIR J. COLVILLE.—There may be reasons why a minor [292] should not be himself allowed to adopt, which would not extend to his giving a power to another]. It is submitted that no person can give a power to another to do that which he cannot do himself. The late Sudder Court held that the Regulation applied, as well to a power to adopt, as to an adoption—*Anundmoyee Chowdrain v. Sheeb Chunder Roy* (S. D. A., 1855, p. 218). [SIR M. SMITH.—The case does not seem to have been argued before the High Court on the question whether Govind Chunder was a minor by statutory enactment. The Judges do not notice that point. They consider the question of minority under the Hindu law. If it is a question of statutory law, it does not matter whether Govind was twelve or seventeen, if he was not eighteen.] The Judges of the High Court say that Govind was not of full age. An adoption by a minor has no civil effect. See *Vyavastha Darpana*, sec. 521, p. 770, and secs. 206, 207 at pp. 396, 397.

Mr. J. D. Bell for the respondent.—There can be no argument from analogy in respect of statutory law, and Reg. X of 1793 only applies where the minor is under the Court of Wards. In Bengal a Hindu who has attained fifteen years of age has an uncontrolled power to adopt—*Rajendro Narain Lahooree v. Saroda Soonduree Dabee* (15 W. R., 548). But if a guardian's consent were necessary, the evidence is that it was given. The question of minority does not however really arise in the case. If Govind Chunder was only twelve years of age, the defendant's case were false from the beginning.

Mr. Doyne replied.

Their Lordships' Judgment was delivered by

Sir J. Colville.—This is an appeal against the decree of the High Court of Calcutta, which, reversing a decree of the Subordinate Judge of Zilla Rajshahye, dismissed the plaintiff's suit.

The suit was brought by a Hindu widow, Jumoona Dassya, against her daughter-in-law, Bamasoondari Dassya, who was sued in her own right, and also as the guardian of Giris [293] Chunder Mozsoondar, whom she had adopted under an authority alleged to have been executed by her deceased husband. The object of the suit, which may be taken to be a suit between Jumoona Dassya and the infant adopted, was to set aside that adoption, and to have it declared invalid. Jumoona was the widow of Guru Pershad, who died in the year 1851. He left, besides his widow, two sons, Govind Chunder and Gopal Chunder, and three daughters. On his death-bed he executed a *wasitnamah*, the effect of which was to constitute his widow the guardian of the two sons, and manager of his property during their minorities, with a direction that, on their attaining majority, the elder should take a nine-anna share, and the younger only a seven-anna share of his estate. Govind Chunder, the eldest son, died in the year 1853. He had, according to the custom of Hindus, been married in his father's lifetime, whilst yet a child of tender years, to another child some years younger than himself. It is alleged on the part of the defendants that on his death-bed, the day before his death, he executed a document authorizing his widow to adopt a son; and the truth of this allegation is the principal question in the cause.

If the adoption stands good, the adopted son is not only entitled as actual possessor to the share of Govind Chunder, his adoptive father, but upon the death of Jumoona, will, if then living, become entitled to take the share of the other brother, who died unmarried, and whilst still a child, in preference to the sisters of his father. On the other hand, if the adoption is invalid, Jumoona,

if she survives Bamasoondari, will become entitled on the death of the latter to the share of her eldest son. This contingent interest is the only *locus standi* which she has in the present suit: although the desire to strengthen the future and contingent claims of her daughters may have been an additional motive for bringing it.

Various questions were raised in the suit which are now of no moment. The only substantial issues are, first, whether Govind Chunder did execute the alleged authority to adopt; and, secondly, if he did so, whether he was by reason of his age capable of executing such a document.

[294] Their Lordships think it will be desirable, in the first place, to come to a clear conclusion upon a question which has been very much disputed in the cause, namely, the age of Govind Chunder at the time of his death, because it is one which bears upon both the issues to be now determined. It bears of course directly upon the latter of them, and it bears indirectly upon the former, inasmuch as the older Govind Chunder was, the more probable is it that he would desire to execute such a document as that in question.

The contention in the present suit is, that although Bamasoondari was, at the time of her husband's death, 11 or 12 years old, he was only between 13 and 14; that there was not a difference of more than two years between them. That there can be any doubt now as to the age of Bamasoondari, is, their Lordships think, impossible. (After stating an admission of Jumoona that there was a difference of about four years between the age of Bamasoondari and that of her husband, his Lordship continued): The question of Bamasoondari's age was solemnly tried and determined between her and her mother-in-law in the suit of 1860. The horoscope of Bamasoondari was then produced, and the finding of the Judge made it perfectly clear that she must have been, at her husband's death, of the age of 11 or 12 years. The result of that suit, no doubt, has been the *consensus* of the witnesses on both sides in the present suit as to the age of Bamasoondari. But the effect of the admission of Jumoona remains, and there is no reason why we should come to any conclusion other than that the difference of age between Bamasoondari and her husband was that which was originally stated. Their Lordships, moreover think there is great force in the observations of KEMP, J., a Judge admittedly of large experience as to native usages and customs upon this point. He thinks that Hindu marriages are usually arranged so that there is a difference considerably more than one or two years between the age of the husband and wife; and their Lordships think this is probable and reasonable. The foundation upon which marriages between infants, which so many philosophical Hindus consider one of the most objectionable of their customs, are supported, [295] is the religious obligation which is supposed to lie upon parents of providing for their daughter, so soon as she is *matura viro*, a husband capable of procreating children: the custom being that when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. Therefore, it is to be expected, both for physical and moral reasons, that marriages should be arranged so that the husband, when called upon to receive his wife for permanent cohabitation, should have attained the full age of adolescence, and also the age which the law fixes as that of discretion.

Their Lordships, therefore, upon the evidence, have no difficulty in coming to the conclusion that Govind Chunder was, at the time of his death, of the age of 15 or 16, and, therefore, of an age which, according to the law prevalent in Bengal, is to be regarded as the age of discretion.

(His Lordship then examined the evidence bearing on the execution of the authority to adopt, the conclusion being that the decision of the High Court was not to be disturbed. He then continued):—

The only remaining point is that taken by Mr. Doyme, to the effect that although Govind Chunder may have been of the age of discretion according to the Hindu law as prevailing in Bengal, he was still a minor under the 2nd section of Reg. XXVI of 1793, and that under the 33rd section of the prior Reg. X of 1793 he could not make the adoption without the consent of his guardian. The last-mentioned enactment prohibits a disqualified proprietor from making an adoption, except with the sanction of the Court of Wards; and it has been determined by the Sudder Court in the case cited, *Anundmoyee Chowdrain v. Sheeb Chunder Roy* (S. D. A., 1855, p. 218), a case which afterwards came here, though not on the same point (*see* 9 Moore's I. A., 287), that the prohibition applies equally to an authority to adopt and to an actual adoption. But the words of the 33rd section of Reg. X of 1793 would seem to confine its operations to persons who are under the guardianship of the Court of Wards. And we have the judgment of MITTER, J., to [296] the effect that where a minor is not under the Court of Wards, but has attained years of discretion according to the Hindu law, he is capable of executing such an instrument as this—*Rajendro Narain Lahoori v. Saroda Soonduree Dabee* (15 W. R., 548). If then the case actually turned upon this point, their Lordships' opinion would have been that Govind Chunder was not incapacitated from executing this instrument by reason of his not having attained the age of 18 years. If, however, the consent of Jumoona was, as their Lordships think they must take it to have been, given to the execution of the instrument, the particular objection thus taken by Mr. Doyme would not arise.

Their Lordships have dealt with this case as if the question were one fairly open for trial between the parties. They give no opinion as to what the effect of a decree in such a suit may be, whether one in favour of the adoption is binding against any reversioner except the plaintiff, or whether, on the other hand, a decision adverse to the adoption would bind the adopted son as between himself and anybody except the plaintiff. All their Lordships can do on the present occasion is to say that Jumoona has not made out her right to have this adoption declared invalid, and they must humbly advise Her Majesty to affirm the judgment under appeal, and to dismiss this appeal with costs.

Appeal dismissed.

Agent for the Appellant: Mr. T. L. Wilson.

Agents for the Respondent: Messrs. Nickinson, Prall and Nickinson.

NOTES.

[I. ADOPTION—BY MINOR—VALIDITY OF—

- (a) In (1879) 5 Cal., 363, the adoption was made by a minor after attaining age of discretion. Held it was valid.
- (b) In (1890) 18 Cal., 69, adoption was actually performed by a minor widow, though authority to adopt was given by her deceased husband when of age. Held adoption valid.
- (c) In (1890) 15 Bom., 565, as no express authority is required in the Mahratta country for a widow to adopt, it was held that the adoption was valid even though her husband died at the age of 16 years as his authority to adopt can be inferred and if inferred, it will be valid.

II. REVERSIONERS—HOW FAR SUITS BY, BINDING ON SUBSEQUENT REVERSIONERS—

- (a) In (1899) 22 All., 33, it was held that as one reversioner does not claim through another reversioner, but only through the last full-owner, the right to contest an alienation or adoption by a widow, though barred as regards one reversioner, is not barred as against subsequent reversioners.

See also (1900) 22 All., 382.

- (b) But in (1905) 29 Mad., 390, F.B., it was held by a Full Bench that suits questioning adoption stand on a quite different footing from those impeaching validity of alienation and that a suit brought by a reversioner disputing adoption must be held binding on the succeeding reversioners.

III. GENERAL—

In (1888) 11 All., 194, the main case as regards the necessity to marry one's daughter was by way of analogy referred to while discussing the question whether a Hindu son inheriting the self-acquired property of his father, is legally bound to maintain his predeceased brother's widow.

In (1887) 11 Bom., 727, this case was referred to for the *obiter dictum* that "Positive law cannot be extended by analogy or parity of reasoning." There the question was as to what extent a representative of a judgment-debtor was liable to the creditor.]

[297] APPELLATE CIVIL.

The 14th and 21st December, 1875 and 25th April, 1876.

PRESENT:

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE McDONELL.

Lokenath Ghose.....One of the Defendants

versus

Jugobundhoo Roy.....Plaintiff.*

Lessor and Lessee—Lease granted while Lessor is out of possession—

• Rights of Lessee—Suit for possession.

A transfer of property, of which the transferor is not at the time of the transfer in possession, is not *ipso facto* void.

Where a patnidar, while out of possession of the patni estate, granted a dur-patni thereof, held that the dur-patnidar's suit against third persons, who were in possession of the estate, to recover possession would lie, it appearing that the plaintiff had paid an adequate consideration for the dur-patni, and that the dur-patni potta was not evidence of a contract to be performed in future on the happening of a certain contingency, or that if it were so that the plaintiff had done all he was bound to do to entitle him to specific performance of the agreement by the patnidar.

THE plaintiff sued for a declaration of his dur-patni and char-patni rights in certain estates and for possession. He alleged that he had obtained in 1278 (1871) a dur-patni of an 8-anna share in the properties mentioned in the plaint from Grish Narain Roy and Mohendro Narain Roy, the heirs of Bykunt Nath

* Regular Appeal No. 311 of 1874, against a decree of the Subordinate Judge of Zilla Moorshedabad, dated the 30th of June 1874.

Roy, the patnidar of the said share; that he afterwards granted a sepatni of one of the estates to one Krishto Bullubh Roy and again took from the latter a char-patni; and that, on attempting to take possession of the estates, he was opposed by the defendants.

The defendants contended, amongst other things, that the ikrar of 1278 from Grish Narain Roy and Mohendro Narain Roy in the plaintiff's favour showed that the plaintiff's title had not become complete and that neither Bykunt Nath Roy nor his heirs Grish Narain and Mohendro Narain were ever the owners of the patni or in possession thereof, and that the plaintiff had never obtained possession of the estates granted in dur-patni.

[298] The original ikrar of 1278 was not forthcoming, but a copy was put in evidence which, so far as material, was as follows:—

"1st. I shall pay rent for the dur-patni mehal from the date on which I shall get possession thereof, and within one month from the date of my obtaining possession, I shall pay the balance of the consideration money for which I have given a bond. If I fail herein, I shall pay with interest at the rate of one per cent. per month. If from any cause the crops of the entire mehal or of any portion of it are injured in the future, I shall get back from you with interest at the rate one per cent. per month consideration money in proportion to the injury which my interest will suffer, and you will also grant an abatement of rent in that proportion.

"2nd. From this time I shall pay out of the amount due to the zemindar whatever you have to pay into the Collectorate under assignment regarding the zemindar's sudder rent as per towji of the mehals mentioned in the patni-potta and the profit which after deducting the same, you have to pay to the zemindar. If I do not get possession of the dur-patni mehals at present, you will pay me the rent which will be paid to the Collectorate and the zemindar during the said period of dispossession, with interest at one per cent. per month from the amount which you will receive from other parties on account of wasilat for the period that I may be out of possession in my dur-patni time. If that be deficient you will pay me yourselves. After deducting from the said dur-patni rent the Collectorate rent of Rs. 5,223-5-5 and the zemindar's profit of Rs. 2,731-10-7 mentioned above, which I shall pay from the date on which I shall get possession of the entire mehal, I shall go on paying you the remaining profit of Rs. 1,100. If I fail to pay the Collectorate and zemindar's rent, and the mehal is consequently sold by auction, I shall be responsible for the loss or damages which will result therefrom.

"3rd. If for obtaining possession of this property I or you have to institute any suit in the Court or in the Collectorate, I shall pay the amount of costs and you will pay me that amount. If the suit is decreed you will receive the costs which will be stated in the decree and the wasilat for the period of [299] dispossession, and if it is dismissed you will pay the costs which will be incurred by the opposite party and there will be no concern with me."

The plaintiff paid the consideration for the dur-patni partly in costs and partly by a bond, the due date of which had not arrived when this suit was brought.

It was admitted on the part of the plaintiff that Grish Narain Roy and Mohendro Narain Roy were not in possession when they granted the dur-patni.

The first issue tried by the Subordinate Judge, and the only issue material for the purpose of this report, was whether under the terms of the ikrar executed by Grish Narain and Mohendro Narain in favour of the plaintiff the plaintiff's suit for possession would lie. This issue he decided in the plaintiff's favour, holding that the rulings cited by the defendant, viz., *Raja Sahib Prahlad Sen v. Budhu Sing* (2 B. L. R., P. C., 111, at p. 117; s.c., 12 Moore's I. A., 275, at p. 307) and *Ranee Bhobosoondree Dasseah v. Issur Chunder Dutt* (11 B. L. R., 36) did not apply, the facts of the present case being quite dissimilar, and that he considered the cases of *Pran Kristo Dey v. Bisumbhur Sen* (11 W. R., 81) and *Tara Soonderry Debya v. Shama Soonderry Debya* (4 W. R., 58) to be authority for the position that a transfer by one who has a right of possession, but who is not in possession, is not void on that account, and that in the present case there was no suggestion even that the plaintiff had not done all he was bound to do, and, as he had been distinctly empowered by his lessor to sue alone, that the transfer to him was complete, and that the present suit would lie. Having also decided the other issues in the plaintiff's favour he gave him a decree for possession of the half share of the several mehals. From this decision the principal defendant appealed.

Baboo Gopal Lal Mitter and Lucky Churn Bose for the Appellant.

Baboo Mohiny Mohun Roy, Gooroodoss Banerjee, and Kishory Mohun Roy for the Respondent.

[300] The arguments raised and the cases cited appear in the judgment of the Court which was delivered by

Jackson, J. (who, after stating the facts and the holding of the Subordinate Judge on the first issue tried as above, and briefly stating the findings on the other issues, continued):—In appeal the first point argued was that the Subordinate Judge ought to have dismissed the plaintiff's case on the strength of the Privy Council Rulings cited by the (defendant) appellant. Great stress was laid upon the fact that Grish Narain and Mohendro Narain were admittedly not in possession at the time they granted the lease, which formed the basis of the plaintiff's claim, and it was pointed out that the ikrar, dated 17th Assar 1278, clearly showed that the full payment of the consideration was contingent on the result of this litigation, and that thus the suit was eminently a speculative one. The rulings cited by the (defendant) appellant before the Subordinate Judge as well as *Tara Soondaree Chowdhrair v. The Collector of Mymensingh* (13 B. L. R., 495), *Ram Khelawun Singh v. Mussamut Oudh Koor* (21 W. R., 101), *Boodhun Singh v. Mussamut Luteefun* (22 W. R., 535), and *Bishonath Dey Roy v. Chunder Mohun Dutt Biswas* (23 W. R., 165), were referred to in support of the appellant's contention. Now the ruling in *Tara Soondaree Chowdhrair v. The Collector of Mymensingh* (13 B. L. R., 495) only shows that where the vendor was a defendant in the suit, and the agreement was only to sell as much as was recovered, the suit could not be maintained as contrary to public policy. In the ruling in *Ram Khelawun Singh v. Mussamut Oudh Koor* (21 W. R., 101), the principle laid down was that wherever a party executed a deed of sale of property not in his possession, this should be held to be only a contract to sell. In *Boodhun Singh v. Mussamut Luteefun* (22 W. R., 535), it was ruled that an assignee of property is not entitled to recover against his assignor, on the footing of a champertous contract, and that an assignee of property, whose assignor was not in possession when the assignment was made, [301] can only recover even from the hands of third persons, upon showing that he should have a right to enforce specific performance of his contract against his assignor, if the property were to come back to the hands of the assignor. The ruling in *Bishonath Dey Roy v. Chunder Mohun Dutt Biswas*

(23 W. R., 165), lays down the proposition that alleged purchasers whose vendors were not in possession, and who pay nothing for what is said to have been sold to them, are not competent to maintain a suit for possession of the property in dispute. The ruling in *Rajah Sahib Prahlad Sen v. Budhu Singh* (2 B. L. R., P. C., 111; s.c., 12 Moore's I. A., 275) has been fully discussed by the Subordinate Judge.

None of these rulings in our opinion apply to the present case. The present case was not brought for the specific performance of a contract, and there is nothing to show that the plaintiff has not performed his part of the contract. The contract may be a speculative one, but there is nothing to show that the plaintiff purchased at a sum below the value of the thing sold. The stipulation in the *ikrar*, regarding the refusal of part of the consideration money in case of loss of the thing sold, tends to show that the price paid was adequate. There is nothing in the present case to show that the *dur-patni potta* was evidence of a contract to be performed in future on the happening of a certain contingency, or that if it were so that the plaintiff has not done all he was bound to do, if a suit for the specific performance of the contract were brought. The *ikrar* in the present case shows that the transfer was in substance complete. The warranty clause at the end of the first paragraph shows not only that the consideration money was paid, but that under certain contingencies it would be refunded.

In none of the cases relied on by the appellant has it been held that a transfer of property of which the transferor is not at the time of such transfer in possession would be *ipso facto* void.

The rulings in *Bikan Singh v. Mussamat Parbutty Koor* (22 W. R., 99), *Chedambara Chetty v. Renja Krishna Muthu Viru Puchanja* [302] *Naiker* (13 B. L. R., 509), and *Gungahurry Nundee v. Raghubram Nundee* (14 B. L. R., 307) point to a contrary conclusion. In the first of these cases it was ruled that where a conveyance of property was made by a person who had been in possession and enjoyment for years before, and he was wrongfully ousted, the conveyance gave a right to sue for immediate possession. In the second the Lords of the Judicial Committee of the Privy Council pointed out that the statute of champerty has no effect in the mofussil of India; they held that the true principle was that stated by Sir BARNES PEACOCK, *viz.*, that the Courts in India administering justice in accordance to the broad principles of equity and good conscience, will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bona fide* entered into, or whether it is an unfair or illegitimate transaction got up merely for the purpose of spoil or of litigation, and carried on for corrupt or other improper motives.

In the third the ruling was still stronger; there it was distinctly held that delivery was not necessary to complete the title of the vendee; further, that this was the general rule in India, and that under the Hindu law a well-defined usage acquires the force of law. Considering, therefore, that the latter rulings support the view taken by the Subordinate Judge, we hold that in the present case the plaintiff had a right to bring the suit.

(His Lordship, after deciding the remaining issues in the plaintiff's favour, dismissed the appeal with costs.)

Appeal dismissed.

NOTES.

[It was held in the Bombay cases of (1882) 6 Bom. 380 F. B. and (1877) 2 Bom. 299 that delivery of possession of the property sold is under Hindu Law essential to complete the title of the vendee and this decision was observed upon as not in conformity with the Privy Council rulings.]

[303] PRIVY COUNCIL.

The 1st and 2nd December, 1875, and 5th February, 1876.

PRESENT: •

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND
SIR R. COLLIER.The Mayor of Lyons.....Petitioner
versus

The Advocate-General of Bengal and others.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Charitable Gift--Failure of Object—Cypress performance.

The doctrine of *cypress* as applied to charities rests on the view that charity in the abstract is the *substance* of the gift, and the particular disposition merely the *mode*, so that in the eye of the Court, the gift, notwithstanding the particular disposition may not be capable of execution, subsists as a legacy which never fails and cannot lapse.

It cannot be laid down as a general principle that the *cypress* doctrine is displaced where the residuary bequest is to a charity, or that among charities there is anything analogous to the benefit of survivorship, since cases may easily be supposed where the charitable object of the residuary clause is so limited in its scope, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it.

On the failure of a specific charitable bequest, jurisdiction arises to act on the *cypress* doctrine, whether the residue be given in charity or not unless upon the construction of the will a direction can be implied that the bequest if it fails should go to the residue.

In applying the *cypress* doctrine, regard may be had to the other objects of the testator's bounty, but primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. The character of a charity as being for the relief of misery in a particular locality may guide the Court in framing a *cypress* scheme to benefit that locality.

Unless the *cypress* scheme framed by the lower Court be plainly wrong, a Court of Appeal should not interfere with it.

APPEAL from an order of the High Court at Calcutta (KEMP and PONTIFEX, JJ.), dated the 10th September 1873, and made in certain causes instituted for the purpose of administering the trust of the will of General Claude Martin.

General Claude Martin was a Major-General in the service of the Honourable East India Company, and a native of Lyons in [304] France. He died at Lucknow, in the territories of the King of Oude, in the East Indies, on the 30th September 1800, leaving a will bearing date the 1st January of that year, and being then possessed of personal property to a large amount and also of houses and lands in Calcutta and other parts of India.

The said will contained, among others, the following dispositions:—A gift of Rs. 5,000 per annum for the release of prisoners for debt in Calcutta, and a gift of Rs. 1,000 per annum for the relief of such prisoners: a similar gift of Rs. 4,000 per annum for the liberation of poor prisoners in Lyons: a like gift of Rs. 4,000 per annum to liberate prisoners for debt in Lucknow: three bequests to found charities at Calcutta, at Lyons, and at Lucknow, respectively, and a gift of the residue equally between the said three charities. With reference to

the gift in favour of the Lucknow prisoners, the will directed that if it should fail the fund should remain to the estate. • No similar direction was given in respect of the gifts in behalf of the Calcutta or Lyons prisoners. The articles of the will in which these dispositions are contained are set forth in their Lordships' judgment. The 28th article contains the bequest for the release and relief of prisoners in Calcutta, in reference to which the question involved in this appeal has arisen.

On the 3rd August 1865 a petition was presented to the High Court by the Advocate-General of Bengal, in which it was stated that the bequest to prisoners in Calcutta had become obsolete, and had not been acted upon for a considerable time by reason of the change in the law relating to imprisonment for debt, and that a fund of Rs. 3,50,000 had accumulated, and a scheme was proposed for the application of such accumulated funds. The scheme was subsequently adopted by the Court, and an order passed confirming it on 2nd March 1866. The order now on appeal was made in a petition from the Mayor of Lyons presented to the High Court on 30th June 1873, which prayed, among other things, for a declaration that the bequest in clause 28 of the will had failed, and that the sums standing to the credit of the accounts for the release and relief of prisoners under the order of 2nd March 1866 fell into and formed part of the residue of the testator's estate.

[306] The petition of the Mayor of Lyons came on to be heard before the High Court, and by the order made on the said petition on the 10th of September 1873, it was among other things ordered that the prayer of the petition of the Mayor of Lyons, so far as it related to the bequest in article 28 of the will of the said testator, be refused, and it was declared that the charitable gift in the 28th article of the said will was an absolute charitable gift capable of being applied *cyprés*, and that the Mayor of Lyons, as one of the residuary legatees under the said will, was not entitled to any part of the trust funds appropriated to such gift.

The grounds on which the Judges of the High Court proceeded in passing this order are thus stated in their judgment : —

“The contention of the Mayor of Lyons before us by his Counsel, Mr. Goodeve, was that under the bequest in article 28 of the will, the charitable intent of the testator was particular and not general, and that the particular object having failed by the virtual abolition of imprisonment for debt, the subject of the bequest fell into the residue. As authorities for this contention, Mr. Goodeve cited the cases of which *Cherry v. Mott* (1 My. & Cr., 123) is the leading authority, and the principle of which cases has lately been approved of by the present Lord Chancellor in the case of *Chamberlayne v. Brockett* (L. R., 8 Ch. Ap., 206). But we are of opinion that in the bequest in article 28, the charitable intent of the testator was general and absolute, and that the specification of imprisonment attached to it and which, from an altered state of circumstances, brought about by changes in the law which the testator did not foresee, and by the practical abolition of imprisonment for debt, no longer applies, was merely intended as a convenient badge of description to discover the most necessitous of a large class, *viz.*, the honest poor of Calcutta, but we think such intention cannot fail while that class of objects continues to exist.

We should have been of this opinion even if the case had been untouched by authority, but in fact it is amply covered by authority. There is the well-known case of *The Attorney-General v. The Ironmongers' Company* (2 My. & K., 576; 1 Cr. & Ph., 208; 10 Cl. & F., 908), which was reported in

several stages. In that case the charitable gift was for the redemption of Christian captives in Barbary, a gift which wholly failed because, by the events which [306] had happened since the death of the testator, there were no such captives for whose benefit it could be bestowed, and notwithstanding that, it was held that the fund was dedicated generally to charity, and that it could be applied *cyprès*.

Again in the case *Ex parte Governors of Christ's Hospital* (L. R., 8 Ch. Ap., 199), the Attorney-General in England had applied to the Court for the settlement of a scheme, with respect to several charitable funds which were vested in the Corporation of London, and thirty-six other sets of trustees being city companies, churchwardens, and overseers of parishes and others, who nearly all appeared and opposed the application. The object of these charities was the relief of poor prisoners for debt. The charities had been founded at different times in the course of the 17th and 18th centuries with an income amounting in the aggregate to £2,670 a year. At the time the Attorney-General applied to the Court, the funds were either accumulated by the trustees or applied by them to purposes which they considered *cyprès* to the original gifts. In that case Vice-Chancellor BACON held, and his opinion was confirmed by the Court of Appeal, that the gifts were absolute charitable gifts and that they could be applied *cyprès*.

We therefore think that the charitable gift in the 28th clause of the will was an absolute charitable gift capable of being applied *cyprès*, and consequently that the Mayor of Lyons, as one of the residuary legatees under the will, has no claim whatever to any part of the trust funds appropriated to such gift. But the Mayor of Lyons has further objected that notice of the proceedings of 1865 ought to have been given to him as one of the residuary legatees, to which I am by no means disposed to assent: and it has been argued on his behalf that if notice ought to have been given to him, he is entitled now to reopen the matter and to show that the application of the prisoners' funds authorized by the order of 1866 was not properly *cyprès*. I think it clear that he cannot do so under the present petition, which prays that those funds should be dealt with and divided as residue; nor do I hold out to him any hopes of success if he should apply under a differently framed petition, because it seems to me and also to my learned colleague that if the scheme which was confirmed in March 1866 could by any possibility be reopened at all, the terms on which it would be reopened would be that the application of the whole of these funds should be confined to the city of Calcutta. The gift was for the benefit and for the release from prison of poor debtors in [307] Calcutta, amongst whom poor officers and other military men were to be preferred: that class of persons still continues to exist, although imprisonment for debt has been virtually done away with; and we are both of opinion that if any alteration could be made in the scheme, no benefit would result to the Mayor of Lyons.

After reading the remarks of BACON, V. C., in the case of the *Governors of Christ's Hospital* after it left the Appeal Court and came before him for confirmation of the scheme proposed by the Attorney-General, the learned Judge continued:—"It seems to me that if the scheme of 1866 could possibly be reopened, these observations would be very pertinent to any other applications of the funds; and, if these observations are pertinent, it is clear that the Mayor of Lyons would have no claim to any portion of the funds which were by the testator dedicated to the honest poor of Calcutta. We, therefore, think that, with respect to these funds, the petition of the Mayor of Lyons wholly fails." (L. R., 16 Eq., 129, see pp. 146, 147, 148 and 149.)

Against the order passed by the High Court in so far as it relates to the bequest in Article 28 of the testator's will, the Mayor of Lyons brought the present appeal to Her Majesty in Council.

Mr. Cowie, Q.C., and Mr. Hemming, Q.C., for the Appellant:—Where the residuary bequest is to a charity, the doctrine of *cypres* disposition of charitable legacies is inapplicable. The object of the doctrine is to save for charity what otherwise would be taken from charity: see Jarman on Wills, Vol. I, pp. 223, 224, and see the cases of *Moggridge v. Thackwell* (7 Ves., 36, and 13 Ves., 416), and *Cary v. Abbott* (7 Ves., 490). Where the residuary bequest is to a charity, there is no occasion to have recourse to *cypres*. It cannot be applied to take from a charity contemplated by the testator, and to give to another charity which he did not contemplate. There is no instance of such a case.

The *cypres* doctrine does not apply in the present case by reason of the special provisions of the will. The broad object of the testator was to found three charitable institutions or colleges at Lucknow, Calcutta, and Lyons, and to make these [308] the principal objects of his bounty. The testator did not contemplate the possibility of his bequest in favour of poor debtors in Calcutta failing from default of objects; but had he done so, it may be presumed that he would have provided, as he did in the similar bequest to poor prisoners at Lucknow, that in case of failure the gift should remain to the estate, and go to increase the funds of the three great charities which he had made residuary legatees.

The orders passed by the Courts in dealing with the will in the previous proceedings arising out of it have determined the appellant's right to share in the fund set free by the failure of the bequest to the Calcutta prisoners. This was the effect of the general declaration as to the disposition of the surplus funds among the three colleges, made by the decree of the Supreme Court of the 28th February 1832, which was not disturbed on appeal, and was afterwards carried out under the decree of the same Court, passed on the 31st August 1840, and the subsequent decree of the 28th February 1849. In the previous appeal by the *Mayor of Lyons v. The East India Company* (1 Moore's I.A., 175, sec. 290), the Judicial Committee had to consider whether the gift to found the college at Lucknow could be carried into effect, and, if not, what was to be done with the fund left for that purpose. In delivering their Lordships' judgment, Lord Brougham said that on the authority of the cases of *Attorney-General v. Bishop of Llandaff* (not reported), and *Attorney-General v. The Ironmongers' Company* (2 My. & K., 576), "it was clear that the other two charities must take if the gift failed as regards the third."

Assuming that a *cypres* application of this fund is admissible, the actual scheme is an improper one. The bequest was for the relief and release of poor honest debtors. The scheme is in the first place for the relief of criminals on their release from jail. This is not a purpose akin to the intentions of the testator. The scheme then distributes the surplus fund between Calcutta and Lucknow. If Lucknow is to share the gift, there is no reason why Lyons should be excluded.

[309] Mr. Cotton, Q.C., and Mr. E. Macnaghten for the Respondents:—The principle of distribution in the will is to confer two kinds of benefit on each of the three towns, Lucknow, Calcutta and Lyons. Each is to have a school and relief for poor prisoners for debt, and the schools are to be the residuary legatees. The gift to the Calcutta prisoners having failed, the appellant asks that it may be treated as residue, and a share of it given to the school at Lyons.

He contends that, where the residuary bequest is to a charity, the doctrine of *cyprès* does not apply, since the only object of *cyprès* is to save for charity what otherwise would be lost to charity. This is an inadequate conception of the principle on which the doctrine of *cyprès* rests. *Cyprès* does not direct a performance in accordance with the general intentions of the testator, but as nearly as possible in conformity with the nature of the particular gift which has been defeated, and it is to be applied whether the residuary is a charity or an ordinary legatee. On the failure of a charitable gift it does not fall into residue unless the will so directs. In the present will there is a provision that on the failure of the gift for relief of the Lucknow prisoners it shall fall into the residue, but there is no similar direction in respect of the similar gifts to Calcutta and Lyons, and no indication of any intention that such should be the case. The principle on which the doctrine of *cyprès* rests is that expressed by Lord ELDON in the cases of *Moggridge v. Thackwell* (7 Ves., 36), and *Mills v. Farmer* (19 Ves., 482; s.c., 1 Mer., 55), namely, that where a testator has shown that charity is the substance of his gift, and a particular disposition merely the mode, the failure of the particular mode is not to hinder the substantial gift to charity being carried out: see also *Ex parte Governors of Christ's Hospital* (L. R., 8 Ch. Ap., 199). In the present case the testator's plain intention was to give to charity. The case consequently was not governed by the rule laid down in *Cherry v. Mott* (1 My. & Cr., 123) and *Chamberlayne v. Brockett* (L. R., 8 Ch. Ap., 206), to the effect that where the testator has a particular object in view and not a general charitable [310] intent, the gift, if its objects fail, will not be applied *cyprès*, but will fail altogether.

The appellant's contention that his right to a share in the gift to the Calcutta prisoners had been determined by previous decrees is not supported by the terms of these decrees, which did not, in fact, deal with the matters now in question. The remarks which have been cited from Lord Brougham's judgment in the previous appeal were not necessary for the decision of the case as it then stood. They express the erroneous view of the doctrine as to *cyprès* which Lord BROUGHAM then entertained, and which he had similarly expressed in the earlier stage of the case of the *Ironmongers' Company v. The Attorney-General* (2 My. & K., 576). That view was corrected at a later stage of that case (10 Cl. & Fin., 908). The cases of *Fisk v. Attorney-General* (L. R., 4 Eq., 521) and *Re Ashton's Charity* (27 Beav., 115) are opposed to the view that *cyprès* will not apply where the residuary bequest is to a charity.

In his petition the appellant claimed as a residuary legatee for a lapsed legacy. Assuming that position he has no *locus standi* to ask for a reform of the *cyprès* scheme approved of by the High Court. It has been laid down in the *Ironmongers' case* that a Court of Appeal ought not readily to interfere with the discretion exercised by the Court below in framing a *cyprès* scheme. In the present case there are reasonable grounds for limiting the benefit of the scheme to India and excluding Lyons.

Mr. Hemming in reply.

Their Lordships took time to consider their judgment which was delivered by

Sir M. E. Smith.—The questions in this appeal arise upon one of the bequests in the will of Major-General Claude Martin, whereby he gave the annual sums of 5,000 rupees and 1,000 rupees to be applied respectively to the discharge and relief of poor debtors detained in prison in Calcutta. [311] The

residue of his large property the testator bequeathed, in the special manner more particularly stated hereafter, to increase the funds of certain charitable establishments which, by previous clauses in his will, he had founded in Calcutta, Lucknow, and the City of Lyons, in France. The bequests to poor prisoners in Calcutta* having failed by reason of the abolition of imprisonment for debt, the point to be considered is, whether these gifts are to be dealt with by the Court upon the principle of a *cypres* application of them, or whether, as the appellants contend, they fall into the residue, so as to increase the endowments of the three establishments above referred to.

The testator was a Frenchman, born in Lyons. He entered the military service of the East India Company, and attained the rank of Major-General. With the sanction of the British Government he afterwards took service under the Ruler of Oude, and resided at Lucknow, where he died in September 1800. The will, dated the 1st January 1800, was composed and written by the testator himself in English, a language of which, it appears, he had only an imperfect knowledge. It contains numerous bequests, comprised in thirty-four articles or clauses, and has been the subject of many suits and much litigation. Several questions arising upon it, and notably the question whether the English law relating to aliens had been introduced into British India, were determined by this Committee on appeal in 1836. The judgment was delivered by Lord Brougham, and some passages of it will hereafter be referred to. The general history of the suits will be found in Mr. Moore's full report of the case. (*The Mayor of Lyons v. The East India Company*, 1 Moore's I. A., 175).

By the will in question the testator bequeathed his property, which he valued at upwards of thirty lakhs of rupees, partly to individual legatees, and more largely to various charitable objects. The most prominent of the charities were the institutions he founded in Lucknow, Calcutta, and Lyons for educational and other purposes, his desire being to perpetuate his memory in those cities. The purposes are not precisely alike in the three cities, owing to the different conditions of the countries to which they belong. The bequest to Calcutta is found in [312] the 24th Article of the will; that to the City of Lyons is contained in the 25th Article, and is as follows:—

"I give and bequeath the sum of 200,000 sicca rupes to be deposited in the most secure interest fund in the town of Lyons in France, and the Magistrates of that town to have it managed under their protection and control: that above-mentioned sum^{ms} is to be placed, as I said, in a stock or fund bearing interest, that interest is to serve to establish an institution for the public benefit of that town; and the Academy of Lyons are to devise the best institution that can be permanently supported with the interest accruing of the above named sum; and, if no better, to follow the one devised in the Article 21 as at Lucknow; the institution to bear the name of Martinière, and to have an inscription made at the house of the institution, mentioning the same title as the one of Calcutta, and this institution to be established at the Place of St. Pierre, St. Sufirin being where I have been christened—there at that place to buy or build a house for that purpose; and to marry two girls every year, to each 200 livres tournois, besides paying about 100 livres for the marriage and feast of each of those who married: or if the institution,* such as the Lucknow one, educating a certain number of boys and girls, then they are to have a sermon and a dinner for the school-boys and those that are married, and they are to drink a toast in memory of the institutor; and a medal is to be given of the value of 50 livres, with a premium in cash or in kind, to be about 200 livres, to the boy or girl that has been the most virtuous, and behaved better during the course of the year; and also to have a premium of the value of 100 livres for the second that behave better, and also a third premium of about 60 livres for the third that behave better. I am in hope that the Magistrate of the town will protect the institution;

and in case the sum above allowed of 200,000 sicca rupees is not sufficient for a proper interest to support the institution, and buying or building the house, then I give and bequeath an additional sum of 50,000 sicca rupees, making 250,000 sicca rupees. One of my male relations residing at Lyons may be made administrator or executor, joined with any one appointed by the Magistrate to be manager of the said institution; and these managers are to have an economical commission for their trouble, taken from the interest of the sum above mentioned. I also give and bequeath the sum of 4,000 sicca rupees to be paid to the Magistrates of the town of Lyons for to liberate from the prison so many prisoners as it may extend, such that are detained for small debt; and this liberation is to be made the day of [313] month I died, as that the remembrance of the donor may be known, and my name, Major-General Martin, is the institutor; and as given and bequeathed the sum of 4,000 sicca rupees for to liberate some poor prisoners as far as that sum can afford it. This I mention to have it made known, as that if neglected, that some charitable men may acquaint the Magistrate of the town of Lyons, as that they might oblige my executor, administrator, or assigns, to pay the same above said, and be more regular in their payments."

It is to be observed that this 25th Article contains the gift of an annual sum of 4,000 rupees to be paid to the Magistrates of Lyons to liberate poor prisoners detained for debt.

The analogous gift in favour of poor prisoners in Calcutta, which forms the subject of the present appeal, is not in like manner included in Article 24, containing the principal bequest to that city, but is found in a separate article (the 28th), which is as follows:—

"I give and bequeath the sum of 5,000 sicca rupees to be paid annually to the Magistrate, or Supreme Court of Calcutta, or to Government. This sum is to serve to pay the debt of some poor honest debtor detained in jail for small sum, and to pay as many small debts and liberate as many debtors as the sum can extend. This liberation is to be made the day and month, I died, as a commemoration of the donor; and as being a soldier, I would wish to prefer liberating any poor officers or other military men detained for small debt preferable to any other. And I also give and bequeath the sum of 1,000 sicca rupees to be paid yearly, and to make a distribution of it to the poor prisoners remaining in jail on the same day as the one mentioned above, both sums making 6,000 rupees every year."

The material part of the 33rd Article, which contains what may be treated as a residuary disposition, is in the following terms:—

"After all accounts being settled, and sum insured for the interest for the payment of the several monthly pensions, and the several payment of gift and others, as also the several establishments, if a surplus above 100,000*l.* sterling, or about 10 lacs of sicca rupees, remain of my estate, that above surplus of 10 lacs of sicca rupees is to be divided in such a manner as to increase the several establishments of Calcutta, at Lyons, and Lucknow, as that they may be permanent and exist for ever. Besides the sum allowed for finishing all the building, and other of [314] Constantia House, which I suppose my amount to 200,000 sicca rupees, I also give and bequeath the sum of 100,000 sicca rupees for the support of the college and other schools, to be regulated as the Calcutta establishment, as per Article 24, as also as the establishment at Lyons, Article 25, the gift for the poor of Lucknow, to be conducted as mentioned in Article 23. I also give and bequeath the sum of 4,000 sicca rupees to be paid annually for to liberate as many prisoners for debt at Lucknow as it may extend, and if none, then that sum is to remain to the estate; any sum remaining is to be placed at interest for to accumulate, and improve the several establishments and concerns of Indigo."

This article, it may here be remarked, comprises a gift of 4,000 rupees, to be paid annually to liberate poor prisoners for debt at Lucknow, but with a direction, that "if none, that sum is to remain to the estate."

Without going into the details of the suits, it will be convenient to refer generally to the proceedings relating to the fund now in dispute.

It appears that by an order of the Supreme Court of Judicature at Fort William of the 11th November 1802 made in the cause of *Uvedale v. Palmer*, a scheme which had been settled by the Master for the administration of the charities for the release and relief of poor prisoners at Calcutta, was confirmed by the Court, and funds to satisfy these charities were, by orders of the Court, transferred to the credit of two accounts entitled respectively, "Distribution of General Claude Martin's Fund for the Release of Prisoners," and "Distribution of General Claude Martin's Fund for the Relief of Prisoners."

The above orders are not found in the Record, but their existence was admitted by the Counsel, and the substance of them is stated in the petition of the Officiating Advocate-General of the 3rd August 1865, and in a previous decree of the 31st August 1840. It also appears that the income of these funds, in excess of what was required for poor prisoners, had accumulated, and at the date of the petition of the Advocate-General above referred to, the fund amounted in the aggregate to about 351,000 rupees. This petition, after stating that for many years past, owing to the passing of laws for the relief of insolvent debtors and other causes, the existing scheme "had [316] become obsolete," submits that there were useful charitable objects of a kind not very different from those contemplated by the testator, and also charitable objects of other descriptions which the testator approved and made the subjects of other bequests, towards which the income of the funds might now be beneficially applied; and prays to be at liberty to submit a scheme for the application of the funds "in lieu and supersession of the former schemes."

On the 3rd August 1865 an order was made on this petition as prayed. This was done without citing the Mayor of Lyons; and in making it the Court evidently assumed it had power to deal with these funds on what is called the *cyprés* principle.

A scheme was accordingly settled and confirmed by an order of the Court on the 2nd March 1866. This scheme provides, in substance, that a sum of 150,000 rupees, representing an annual income of 6,000 rupees, should be reserved in an account, to be headed, "The Account of General Martin's Fund for the Release and Relief of Prisoners;" the income of which was to be applied by the visiting justices to assist convicts who had conducted themselves properly in prison upon their discharge; and that the corpus of the fund, after reserving the above sum of 150,000 rupees, should be applied as follows, *viz.*: that one lakh of rupees should be transferred to the credit of the Governors of the Calcutta Branch of La Martinière, and the residue (amounting to nearly a lakh of rupees) after paying the costs of these proceedings, should be transferred to the credit of the Lucknow Branch of La Martinière for the general purposes of these institutions respectively." Some special directions also were given regarding the disposition of the fund transferred to Lucknow.

It will be convenient to mention here what has been done with respect to the charities for the liberation of poor prisoners in Lyons and Lucknow. With respect to Lyons, it was declared by the decree of the 23rd February 1832 (and this declaration was not disturbed on the appeal, in 1836), "that a sum sufficient to satisfy the bequest of 4,000 rupees to be paid annually for the liberation of prisoners at Lyons, together with the accumulation of interest since testator's death had been [316] fully paid to the Mayor and Commonalty of Lyons." It appears therefore that this fund, instead of being carried to an account in the causes, as was done with the Calcutta fund, was, before the year 1832, paid

over "fully" to the Municipality of Lyons, and that the administration of it has since taken place without any control by the Court.

With respect to Lucknow, the decree of the 23rd February, 1832, declared that it being impossible owing to the form of Government at Lucknow and other causes to give effect to the gift in favour of poor prisoners at that place, the bequest was void. This declaration relating to the gift to poor prisoners of Lucknow was not disturbed on appeal, and the residue was increased by the amount which would have been required to satisfy it. No objection appears to have been made to the Lucknow gift going into the residue; but it is to be remembered that in the clause of the will relating to this legacy it is expressly directed that in case of failure "the sum is to remain to the estate."

The order of the 2nd March 1866, confirming the scheme for the application of the funds in dispute, appears to have been unquestioned until 1873, when the petition of the Mayor of Lyons, which gives occasion to the present appeal, was filed. The petition (dated 21st June 1873), after stating the facts, and asking relief with respect to other sums which was granted in the Court below, prays that it might be declared that the bequests in the 28th Article of the testator's will had failed, and that the sum standing to the credit of the accounts for the release and relief of prisoners at the date of the order of the 2nd March 1866, fell into and formed part of the residue of the testator's estate. It also prays for relief consequent on this declaration, to the effect that this amount with the accumulations should be ascertained and carried to the general credit of the causes, and divided between the petitioner and the other residuary legatees.

The Judges of the High Court, in a judgment fully stating their reasons, whilst granting relief to the petitioner on other matters, refused this prayer, and inserted in their formal decree a declaration containing the ground of their refusal in these [317] terms:—"That the charitable gift in the 28th Clause of the will was an absolute charitable gift, capable of being applied *cyprès*; and that the petitioner, the Mayor of Lyons, as one of the residuary legatees under the will, is not entitled to any of the funds appropriated to that gift.

It is to be noticed that the only question raised by the petition is, whether the appellant, representing the city of Lyons, is entitled as one of the residuary legatees to a share of these trust funds, as having fallen into the residue. Whether the Martinière establishment of Lyons should have been included in the distribution provided by the scheme ordered by the Court is a different question, which is not raised by the petition.

Three points were made at the bar by the appellant's Counsel.

1. That the doctrine of *cyprès* disposition of charitable legacies is inapplicable where the residuary bequest is to charity.

2. That if this be not true as a general proposition, the doctrine is inapplicable to the particular case, by reason of the special provisions of General Martin's will.

3. That the previous decrees have determined the question in the appellant's favour.

I. The appellant's Counsel did not dispute the general doctrine, and there is no doubt that although strongly disapproved of by Lord ELDON, it was in his time so firmly established, that this great Judge felt himself bound, contrary to his own opinion, to give effect to it. But their broad contention was that there was no room or necessity for the interposition of the Court where the residuary bequest is to charity, and they sought in the reason of the rule the

grounds for supporting this distinction. The rule, they said, was founded on the presumption that although the gift might be to a particular charity, the intention was to give to charity generally, and the Court, therefore, when the particular disposition could not be carried into effect, undertook to make a *cyprès* application of the fund in order that charity should not be disappointed. The reason of the presumption, it was said, being to prevent funds given to charity from falling to residuary legatees or next-of-kin, and so disappointing the general intention of charity, altogether failed, [318] and left no foundation for the interposition of the Court where the bequest of the residue itself was to charity. Why, it was asked, should the Court interfere to intercept a fund falling into a residue devoted to charity, substituting its own discretion for the testator's?

The question thus raised does not seem to have been distinctly before the Courts in any of the previous decisions: but their Lordships, after fully considering the argument, are unable to perceive satisfactory grounds for such a limitation of the *cyprès* doctrine: certainly not as a limitation applicable generally to all cases in which the residuary bequest is to charity, whatever its kind and nature may be. The principle on which the doctrine rests appears to be, that the Court treats charity in the abstract as the substance of the gift, and the particular disposition as the mode, so that in the eye of the Court, the gift, notwithstanding the particular disposition may not be capable of execution, subsists as a legacy which never fails, and cannot lapse.

This seems to be what Lord ELDON understood to be the effect of the decisions, from the following passage of his judgment in *Mills v. Farmer* (as reported in 19 Ves., 486).

"With regard to charity, therefore, without going through all the cases, which I examined with great diligence in *Moggridge v. Thackwell*, a case that, bound by precedent, I decided as much against my inclination as any act of my judicial life, I consider it now established, that although the mode in which a legacy is to take effect is in many cases with regard to an individual legatee considered as of the substance of the legacy, where a legacy is given so as to denote that charity is the legatee, the Court does not hold that the mode is of the substance of the legacy, but will effectuate the gift to charity, as the substance; providing a mode for *that legatee* to take which is not provided for any other legatee." This passage is reported in somewhat different language, but substantially to the same effect, in 1 Mer., 99.

Nor can the suggested distinction, as a general qualification of the doctrine, be, in reason, maintained. Cases may be easily [319] supposed where the charitable object of the residuary clause is so limited in its scope, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it. If a large sum were given to endow a college, and the residue bequeathed for the support of three poor almshouses, or to provide coals at Christmas for ten poor persons, it would be manifestly absurd, supposing the *cyprès* doctrine be established at all, to withhold the application of it in instances of this kind. It cannot, therefore, in their Lordships' opinion, be laid down as a general principle that the *cyprès* doctrine is invariably displaced where the residuary bequest is to charity.

II. But it was next contended that, however this may be, the Court below was wrong in applying the *cyprès* doctrine to the will in question. Undoubtedly the charitable establishments mentioned in the residuary bequest are of a comprehensive character, as well as prominent objects of the testator's

bounty; and the argument of the appellant's Counsel on this part of the case was strongly urged and has been carefully considered by their Lordships. The argument on this point really raises two distinct questions: (1) whether the *cyprès* doctrine is excluded; and (2) whether upon the construction of the will there was a bequest over of the legacy, in case of failure of objects, to the Martinière charities.

On the first (in the discussion of which it must, of course, be assumed there was no bequest over, otherwise *cadit questio*) the argument was founded on the presumed intention of the testator to make the Martinière establishments the principal objects of his bounty, and to give them the benefit of all lapsed funds. There is certainly much to favour this presumption; but if it be granted for the sake of the argument that, looking at the whole will, it is probable the testator, supposing he had thought about it at all, would have wished the bequest in question to have gone to increase the funds of these establishments, can this conjecture of intention—and upon the hypothesis that the will does not contain expressly or by implication a bequest over, it can be no more—exclude the operation of the doctrine? It seems to their Lordships that an answer in the [320] negative is found in the explanation of the doctrine already given, and that on this point the contention of the Counsel for the respondent is supported both by principle and precedent. It was in effect that the Court, when deciding whether the *cyprès* doctrine applies, looks only to the particular gift, and if it finds charity to be the legatee, sustains the legacy as such, without regarding at this stage of the inquiry (whatever may be proper when a scheme comes to be framed) the rest of the will.

This view of the doctrine appears to have been present to the minds of the learned Lords who took part in the decision of *The Ironmongers' Company v. The Attorney-General* (10 Cl. & Fin., 908), although the discussion in the House of Lords turned wholly on the propriety of the scheme for the distribution of the trust funds; it never having been doubted apparently that the doctrine itself was applicable. In the will in that case the testator had divided the residue of his property between three charities, and the question arose upon a scheme for the appropriation of one of them, *viz.*, the gift for redeeming British slaves in Barbary, which had failed for want of objects. It was held that, in applying the *cyprès* doctrine, the Court was to look primarily to the object of the charity which has failed, and was not bound to apply the funds which were set free in that case to the two other charities mentioned in the residuary clause of the will. The Counsel, in arguing, is reported to have said:—"The proper application of the doctrine of *cyprès* is, that you are to look to the objects of the testator, and to what comes near to those objects." To which Lord COTTENHAM replied: "No *cyprès* means as near as possible to the object which has failed." Although this opinion was expressed with reference to a scheme for the distribution of the fund, it is clearly to be inferred that this would have been the consideration by which Lord COTTENHAM would have been guided in a case where he had to decide whether the doctrine applied at all. And upon fully considering the operation as well as the principle of the rule, it is difficult to see that it could be otherwise. Their Lordships, therefore, are brought to the conclusion that the jurisdiction of the Court to act on the *cyprès* doctrine upon the [321] failure of a specific charitable bequest arises whether the residue be given to charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue.

The question remains whether such an implication arises upon this will. It certainly cannot be inferred from the terms in which the respective gifts to

poor prisoners in Calcutta and Lyons are bequeathed, that the testator had contemplated the failure of either of these charities, or had formed any intention in that case regarding them; on the contrary, the inference arises, upon comparing these clauses with the corresponding gift for the benefit of prisoners at Lucknow in which there is a direction that in the event of failure it shall remain to the estate, that he had not. If, then, an implication can be made, it must be from the residuary clause itself, construed with the other parts of the will relating to the Martiniere establishments. The frame of this clause is peculiar: "after the several payment of gift and others, as also the several establishment—if a surplus above ten lakhs remain, that above surplus is to be divided in such a manner as to increase the three establishments." Assuming this to be a residuary disposition into which, in case of failure, legacies other than to charity would fall, yet, in considering the present question, the peculiar frame and language of it cannot be disregarded, and from these it may be inferred that what was present to the testator's mind, and what alone he intended to dispose of, was a residue after the funds for these charities had been provided and set apart. It seems, therefore, to their Lordships, that there is not such a necessary inference of intention to be found in the terms and provisions of the will as is required to raise the implication of a bequest over by the testator of these legacies, upon the failure of the particular charities.

III. The third point argued at the bar was that the decrees already passed are judgments in his favour on the questions above discussed. What the Counsel mainly relied on was a general declaration as to the surplus funds contained in the decree of the 23rd February 1832, which was left undisturbed on appeal, and a disposition by a later decree of the 31st August 1840, of [322] part of such surplus funds among the three Martiniere establishments.

It is to be observed that the judgment of the High Court does not notice this point, nor does it appear to have been insisted on below. But however this may have been, their Lordships cannot find anything in the decrees referred to which decides the question. The declaration in the decree of 1832 was to the effect that after setting aside sufficient funds for the various charitable and other purposes of the will, the surplus, if amounting to ten lakhs, should be at once divided between the three establishments, and if it fell short of ten lakhs, should accumulate until it amounted to that sum, and be then divided. This is no more than an exposition of the will with regard to the surplus, after provision had been made for the particular gifts. The Court did not then contemplate the failure of the gift in question, and could not have intended to make any declaration regarding it. The disposition referred to in the later decree of 1840 was only a distribution of part of the surplus on the footing of the declaration in the decree of 1832.

Reliance was placed by the appellant's Counsel on some observations in the judgment of this tribunal, delivered by Lord BROUGHAM, in the former appeal. A question had arisen whether the gift to found the establishment at Lucknow could, in the circumstances of the country, be carried into effect. The decree below, founded on reports of the Master, declared the inability of the Court to give effect to that bequest, but the Court considering that the Governor-General had the means of doing so, had ordered the funds to be paid to the Government for that purpose. This tribunal held that this part of the decree was not warranted by the Master's reports, and directed a further reference upon the facts. In stating the questions which arose, Lord BROUGHAM made the observations relied on (1 Moore's I. A., 290):—"Can the decree as to the application of the fund stand?—Shall the fund be applied to the establishment

and support of a college at Lucknow?—Shall it sink into the residue and be divided between the two charities appointed to be established at Calcutta and at Lyons?—for the cases of *Attorney-General v. [323] Bishop of Llandaff* (not reported) and *Attorney-General v. The Ironmongers' Company* (2 My. & K., 576) make it clear that in this case, which is indeed stronger than either of those, the other two charities must take if the gift fails as regards the third." It is obvious that the question of the ultimate disposition of the fund was not ripe for decision, the point then under consideration being the directions proper to be given for carrying into effect, if possible, the Lucknow Charity; and, indeed, the decree advised by this Committee, giving directions for that object, was expressly made "without prejudice to any question as to the final application of the same fund under the directions hereinafter contained or otherwise." The observations in the judgment, therefore, can only be regarded as an opinion, and not as a judgment. So regarded, however, they would have been entitled to great weight, if their authority had remained unimpeached. But the subsequent decision in the case of the *Attorney-General v. The Ironmongers' Company* (10 Cl. & Fin., 908) in the House of Lords, in which Lord BROUGHAM concurred, corrected the views his Lordship had expressed in an earlier stage of that case, and in the observations referred to. That decision was in effect that among charities there was nothing analogous to benefit of survivorship.

It was lastly submitted by the appellant's Counsel, that if a *cypres* application was admissible, the actual scheme which excluded the Lyons Charity from participation in the fund is an improper one. The High Court held, and, as their Lordships think, rightly, that it was not competent for the appellants, under their present petition, which is confined to the claim of a share of the residue, as residuary legatees, to open the scheme. But with a view to prevent further litigation and expense, the Judges expressed an opinion that if it was proper to reform the scheme at all, it might be right to confine it to charitable objects in the city of Calcutta, excluding both Lucknow and Lyons. Their Lordships have been invited to correct this view, and to declare that the Lyons Charity ought not to be excluded.

Agreeing with what was said in the House of Lords in the case [324] of *The Ironmongers' Company* (10 Cl. & Fin., 908), as to the care and circumspection to be exercised by a Court of Appeal in substituting its discretion for that of the Court below, their Lordships would be reluctant in any case to interfere with a scheme unless it were plainly wrong, and still more to unsettle, by a premature declaration, one which is not regularly before them. Besides, bearing in mind the opinions expressed in the House of Lords, so often referred to, they are not satisfied, as at present advised, that the view of the High Court does not accord with them. The sum of these opinions appears to be, that whilst regard may be had to the other objects of the testator's bounty in constructing a scheme, primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. If this be the rule, may not the gift to poor prisoners in Calcutta be considered to have a local character; and in that case, may not a scheme properly framed for the benefit of other poor persons in Calcutta be supported, as being *cypres* to the original purpose. And if these questions are capable of being answered in the affirmative, it follows that it would not be a valid objection to the present scheme that it gives no part of the funds to Lyons. The contention upon this point, then, appears to come to this, that the inclination of the testator to benefit the Martiniere institutions so strongly appears that it ought to guide the Court in framing a scheme, in preference to the principle of selecting an object near to that which has failed.

Opinions may well differ on such a point. Reasons are not wanting in favour of the appellant's contention; but, on the other hand, much may be said in favour of the view that these gifts to poor prisoners bear the character of a charity for the relief of misery in the particular locality. The necessary funds for them were directed by the will to be set apart, and in the case of the Lyons Charity were, long ago, paid over to the municipal authorities of that city. It may well be doubted whether if such a contingency as the failure of the gift to Lyons should occur, it would be thought proper that any part of the funds paid over to the authorities there should be restored to India.

Their Lordships are not now called upon to decide whether [325] the application of the gift which has failed to the relief of criminal prisoners, and the transfer of part of it to Lucknow, are proper, or the best possible disposition of the fund. All they need say about the actual scheme is, that they do not feel justified upon the present appeal in declaring, as they are invited to do, that it is necessarily bad, because no part of the fund has been appropriated to the Lyons Charity.

In the result, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

Appeal dismissed.

Agents for the Appellant: Messrs. *Young, Jackson and Co.*

Agents for the Respondents: Messrs. *Lawford and Waterhouse.*

[1 Cal. 325]

APPELLATE CIVIL.

The 31st March, 1876.

PRESENT :

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE McDONELL.

Khajah Ashanoollah.....One of the Defendants

versus

Ramdhone Bhuttacharjee.....Plaintiff.

Limitation—Beng. Act VIII of 1869, s. 27—Suit for possession with mesne profits—Defendants—Title.

A suit for possession of certain lands "by establishing the plaintiff's howla right," and for mesne profits, brought against a sharcholder of the talook in which the lands are situated, a former talookdar, and certain ryots who paid rent to the first defendant, is not a suit to recover the occupancy of the land from which the plaintiff has been illegally ejected by the person entitled to receive the rent, within the meaning of s. 27 of Beng. Act VIII of 1869, and is not governed by the limitation provided by that section.

SUIT for possession of certain lands "by establishing the plaintiff's howla right," and for mesne profits. The defendants were the auction-purchasers of a share of the talook wherein [326] the lands were situated, the late talookdars,

* Special Appeal No. 1163 of 1875, against a decree of the Second Subordinate Judge of Zillah Backergunge, dated the 5th April 1875, affirming a decree of the Additional Munsif of that district, dated the 19th September 1873.

and certain ryots who, the plaintiff alleged, had joined in ousting him from possession by paying rent to the first defendant.

Both the lower Courts having decided the suit in the plaintiff's favour, the first defendant appealed to the High Court, on the ground, amongst others, that the suit ought to have been dismissed under s. 27 of Beng. Act VIII of 1869, inasmuch as it had been instituted more than a year after the date of dispossession.

Baboo Chunder Mudhub Ghose (with him Baboo Lall Mohun Dass), for the appellant, contended, that the suit was practically a suit against the landlord; that the second defendant had in fact acted as a servant of the first defendant, and that the joinder of the ryots made no difference, since the suit was to recover possession, and was not a suit for rent; and that, therefore, the provisions of s. 27 of Beng. Act VIII of 1869 were applicable.

Baboo Hurry Mohun Chuckerbutty, for the respondent, contended that the section cited did not apply to the present suit, because the first defendant was only one of several shareholders and not a person solely entitled to receive the rent; secondly, because the plaintiff also claimed mesne profits, and lastly because the tenants were joined as defendants—*Mugnee Roy v. Lalla Khoonee Lall* (6 W. R., Act X Rul., 19). The corresponding section of Act X of 1859 (s. 23, cl. 6) has been held to be inapplicable to suits in which the plaintiff sets out his title, and seeks to have his right declared and possession given him in pursuance of that title—*Gooroodoss Roy v. Ramnaram Mitter* (B. L. R., Sup. Vol., 628) and *Baboo Laljee Sahoo v. Baboo Bhugwan Doss* (3 W. R., 337).

Baboo Chunder Madhub Ghose in reply.

The judgment of the Court was delivered by

Jackson, J.—It appears to us that this is not a suit to which the provisions of s. 27 of Beng. Act VIII of 1869 could be applied for the purpose of barring the suit as not brought within one year. Whatever other difficulties that section may present [327] in regard to suits differing from the present one, we think there are many circumstances which prevent the application of it here. In the first place, it is not simply a suit to recover the occupancy of land from which the plaintiff has been dispossessed by the person entitled to recover the rent. There is a certain complication in the facts alleged, because the plaintiff claims a howla right of which the principal defendant altogether denies the existence. He sues Khajah Ashanoolah, who is not the sole zemindar, but one of the persons entitled to the rent. He sues also Ram Coomar Sen, the previous talookdar of this estate, and he also sues the several persons who are now paying rent to Khajah Ashanoolah. The case is not therefore merely whether the plaintiff has been unduly ejected from a subsisting tenure, but whether the Courts will find and establish by their adjudication a howla right which the plaintiff asserts and the defendant denies. The plaintiff also seeks to recover wasilat. Taking all these circumstances together, it appears to us that this is not a suit of the simple nature referred to in s. 27, and that clearly limitation would not apply. But beyond that it may be observed that this question is now raised for the first time in special appeal. The only kind of limitation set up by the present special appellant in his answer to the suit was that of twelve years. He denied that the plaintiff had been in possession of the land in any shape within twelve years previous to the suit. That allegation has been disallowed by both the Courts. I may observe that the defendant's written statement in this suit has been verified by his mookhtear. No doubt, there are certain kinds of cases in which an extensive landholder may be allowed to make the verification by his local agent, but there are many allegations in this case which the defendant

ought to have personally admitted by signing the verification himself, and I do not think that the Court should, in the exercise of its discretion, allow written statements such as the present one to be verified by the mookhtear. For all these reasons, we think that the plea now set up must fail, and as there is no other point relied upon, this appeal must be dismissed with costs.

Appeal dismissed.

[328] ORIGINAL CIVIL.

The 22nd May, 1876.

PRESENT:

MR. JUSTICE PONTIFEX.

Nocoor Chunder Bose

versus

Kally Coommar Ghose.

Limitation—Act IX of 1871, Sch. II, No. 72—Promissory Note payable on Demand.

The defendant gave the plaintiff a promissory note on the 5th August 1869, payable on demand with interest at 5 per cent. per annum. No sum either in respect of principal or interest was paid on the note, and payment was demanded for the first time in November 1875. Act XIV of 1859 contains no provision as to the date of the accrual of the cause of action in a suit on a promissory note payable on demand, but Act IX of 1871, which repeals Act XIV of 1859, and which applies to suits brought after the 1st April 1873, provides that the cause of action in such a suit shall be taken to arise on the date of the demand. In a suit brought on the note after the demand, held that the cause of action arose at the date of the note, and as a suit on it would have been barred under Act XIV of 1859 if brought before the 1st April 1873, the subsequent repeal of that Act would not revive the plaintiff's right to sue.

SUIT on a promissory note, payable on demand, dated the 5th August 1869, for Rs. 5,603 with interest at the rate of 5 per cent. per annum.

The plaintiff stated that the plaintiff for the first time demanded payment of the note on the 14th November 1875, and submitted that his cause of action arose at that date, and therefore the suit was not barred by limitation. It was admitted by the plaintiff that no payment, either in respect of principal or interest, had been made on the note. The defendant filed a written statement, in which he submitted that the suit was barred by limitation, but he did not appear at the hearing of the suit.

Mr. *Bonnerjee*, for the plaintiff, contended that the suit was not barred: it was brought after the 1st April 1873, and therefore Act IX of 1871 would apply. By No. 72 of Schedule II of that Act, the cause of action on a promissory note payable on [329] demand, would arise on the demand being made, and that having occurred within three years, the suit is not barred.

Even under Act XIV of 1859, which was repealed by Act IX of 1871, the suit would not have been barred: it is submitted a demand would have been necessary, and that limitation would not begin to run until such demand had been made. Act XIV of 1859 contains no provision as to the date of the arising of the cause of action on a promissory note payable on demand. There are conflicting cases on the point. In *Parbati Charan Mookerjee v. Ramnarayan Matilal* (5 B. L. R., 396), it was held that where it was agreed that a sum of money should be repaid on demand, and that a monthly sum should be paid on it in the meantime, the cause of action arose from the date of the agreement to

repay and not from the date of the demand; but in a subsequent and similar case—*Brammamayi Das v. Abhai Charan Chowdry* (7 B. L. R., 489)—it was held that the cause of action arose from the date of the demand. [PONTIFEX, J.—Is there not a decision that if the suit were barred under Act XIV of 1859, the subsequent repeal of the Act would not revive it? Yes, the case of *Thakoor Kapilmauth Sahai Deo v. Government* (13 B. L. R., 445) is on that point in favour of the defendant, see p. 460.]

Pontifex, J. (after shortly stating the facts as above, continued):— I was referred to two cases said to be conflicting with one another. One *Parbati Charan Mookerjee v. Ramnarayan Matilal* (5 B. L. R., 396) decided by MACPHERSON, J., and the other *Brammamayi Das v. Abhai Charan Chowdry* (7 B. L. R., 489) decided by NORMAN and PHEAR, JJ. In each of these cases interest had been paid up to within a short time of the date of suit. And in the second case, PHEAR, J., expressly held that limitation did not apply, however interest had been paid. "As long," he said, "as the plaintiff forebore to make demand of the principal, and the defendant at the stipulated periods paid the monthly sums by way of interest, so long it was, as it seems to me, impossible in reason to say that the plaintiff had any cause of suit." In my opinion, both of the cases cited are adverse to the plaintiff's claim, and, if additional authority was necessary, I might refer [330] to the case of *Hempammal v. Hanuman* (2 Mad. H. C. Rep., 472). In the present case neither principal nor interest has been paid since the 5th of August 1869, and if the plaintiff had instituted his suit on the 6th of August 1872, it must have been dismissed as barred by limitation.

It is impossible for me to hold that he is not barred now because he has deferred the institution of his suit until after the 1st day of April 1873, the date mentioned in s. 1 of the Limitation Act of 1871 (see *Venkatachella Mudali v. Sashagherry Rau*, 7 Mad. H. C., 283; *Molakatella Nayanna v. Pedda Narappa*, 7 Mad. H. C., 288; *Venkataramanier v. Manche Reddy*, 7 Mad. H. C., 298; and *Chinnasami Iyengar v. Gopalacharry*, 7 Mad. H. C., 392; but see *Madhavbhai Shirobhai v. Fattessang Nathubhai*, 10 Bom. H. C., 487).

I must, therefore, dismiss the plaintiff's suit, but, as the defendant does not appear, without costs.

Suit dismissed.

Attorney for the Plaintiff: Baboo Kallynauth Mitter.

Attorney for the Defendant: Baboo Troylucknath Roy.

NOTES.

[LIMITATION—EFFECT OF REPEAL :—

These cases, 1 Cal., 328, (1877) 3 Cal., 331 and 1 Cal., 283, were overruled in (1880) 6 Cal., 340, where it was held that the law of limitation at the date of the institution of the suit should be applied, even though under the repealed law the claim was unenforceable. See also (1880) 5 Cal., 897.

This case was followed in Bombay in (1879) 4 Bom., 290.]

PRIVY COUNCIL.

The 1st, 2nd, 3rd and 4th February, 1876.

• PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH AND
SIR R. P. COLLIER.

Moung Shoay Att.....Defendant

versus

Ko Byaw.....Plaintiff.

[*On Appeal from the Special Court of British Burma.*]

Duress—Imprisonment—Avoidance of Contract.

An agent employed by the plaintiff to purchase timber for him in the Siamese territory was imprisoned by an officer of the Siamese Government, on a charge brought against him by the defendant of stealing timber. In order to obtain his release he contracted to purchase from the defendant, for the plaintiff, the timber which he was charged with stealing, at a price much beyond its value. *Held*, that the plaintiff might repudiate the contract as obtained under duress.

[331] In England the mere fact of imprisonment is not deemed sufficient to avoid an agreement made by one who is in lawful custody under the regular process of a Court of competent jurisdiction, where no undue advantage is taken of the situation of the party making the agreement. But in a country in which there is no settled system of law or procedure, and where the Judge is invested with arbitrary powers, imprisonment may in itself amount to duress such as will avoid a contract entered into by the prisoner with the view of obtaining release.

APPEAL from a decree of the Special Court of British Burma, dated 3rd of June 1874, reversing a decree of the Judge of Moulmein, dated 21st April 1874.

The suit was instituted to recover Rs. 28,603 damages from the defendant, for wrongfully causing the agent of the plaintiff, one Ngu Douk, whilst under restraint, to enter on behalf of the plaintiff into a contract, by which the plaintiff sustained considerable loss. By the contract in question, Douk* was to buy from the defendant 152 logs of timber at a very high price, and to give up to him some elephants and harness belonging to the plaintiff, a sum of Rs. 3,000 deposited by the plaintiff with a binyakin (an officer of the Siamese Government), who was alleged to be acting in the matter in collusion with the defendant, as payment of timber-duty, and a sum of Rs. 4,700, which the plaintiff had advanced to certain foresters for timber which he was unable to utilize through being deprived of his elephants. The plaintiff claimed these two sums, with interest at 5 per cent. per annum, for fifteen months; he also claimed Rs. 6,128 for the elephants and harness, and Rs. 9,000 as hire for the elephants for fifteen months, at Rs. 150 each per month. In the Court of the Judge of Moulmein, the suit was dismissed with costs; but this decree was reversed on appeal by the Special Court of British Burma, on the ground that the contract was void as having been made under duress; and a decree was given for Rs. 3,080 for the elephants and harness, for the sum of Rs. 3,000 deposited with the binyakin with the interest claimed, and for the use of four elephants for the time stated at Rs. 140 per month. The claim of Rs. 4,700

was disallowed, as being, even if proved to have been advanced, too remote to be recovered in this suit. From that decree, the defendant appealed to Her Majesty in Council.

[332] Mr. *Leith*, Q. C., and Mr. *Doyme* for the Appellant.

Mr. *Cave*, Q. C., and Mr. *Coryton* for the Respondent.

The judgment of their Lordships was delivered by

Sir M. E. Smith.—This is an appeal from a decree of the Special Court of British Burma, reversing a decree of the Judge of Moulmein, which had dismissed the plaintiff's suit, and giving instead of that decree a judgment for the plaintiff for the sum of Rs. 8,480, with interest

The plaintiff and defendant are merchants in the timber trade, residing at Moulmein, in British Burma, and it is their practice to go up into the Siamese territory, and under permission from the Government to cut timber there, and bring it down in a manner which has been described by Mr. Coryton, to Moulmein. The plaintiff, at the time when the transactions which gave occasion to these proceedings took place, did not go into the Siamese territory himself, but employed an agent called Douk to purchase timber for him, and entrusted him with a considerable sum of money, and with elephants used in drawing the timber which has been cut. It seems that Douk, on the 20th September 1870, entered into an agreement with a man called Pho to purchase some timber, 200 logs, if Pho could obtain a permit. It will be necessary, hereafter, to consider that agreement more in detail; it is sufficient now to state the fact that such an agreement was made, and the general purport of it. A few months afterwards, on the 3rd of January in the following year 1871, the defendant, who was personally on the spot, also entered into an agreement with the same man Pho, to cut timber for him, under a permit which the defendant had obtained from the Siamese authorities. The defendant entered into agreements with two other foresters of a similar kind. Timber was cut by Pho and by the two other foresters, and on the 6th May, Douk, the plaintiff's agent, went to the two creeks which seem to be called Whaypoogan and Whaykoonpai, where the timber was stacked, and put his mark upon 152 logs. It appears upon the evidence, that at that time there were no marks [333] upon the timber, except those of the foresters who had cut it. It seems that Pho had cut 81 of these logs, and the two other men had cut 71 logs. The defendant hearing of this proceeding, complained to a Siamese officer, styled binyakin, who was said to be a Judge of the district, of what Douk had done, and the Judge sent a peon with the defendant to arrest Douk, and to bring him before him. It seems that after searching for Douk for two or three days, he was found, and taken into custody, considerable violence being used. How far some violence was necessary to secure him, or what degree of force might reasonably have been employed for that purpose, does not appear, but certainly it would seem that a great deal of violence was used; that he was beaten, tied with a rope, and in this state carried into the presence of the binyakin. When there the binyakin put Douk into irons, with an iron collar round his neck, and it is said that threats of personal violence were used towards him, unchecked by the binyakin. There is probably some exaggeration in the evidence upon that point. But enough remains to show that he was not only placed in imprisonment, but had these irons put upon him, and an iron collar. Under these circumstances, he was charged with having put his mark upon the logs, and he was charged with having so done fraudulently and criminally. That being the state of affairs, and Douk being evidently under great apprehension at

the time as to what further might happen, it was proposed that he, having put his mark upon the timber, should purchase it; then there was a parley as to the price, and ultimately it was stated that the price he must give for this timber should be 45 rupees a log, a price certainly much larger than the value of the timber as it then lay. It is said to be the law of Siam that, a man who has improperly put his mark upon timber which does not belong to him is liable to pay the value of 10 logs for every log so marked. That law or custom is by no means clearly proved, but whether it be so or not, it is clear that the agreement for the purchase of the logs by Douk was at a price considerably beyond their value.

It has been argued on the part of the appellant that although Douk must be considered as a prisoner at the time before this Judge, yet his imprisonment was lawful, and therefore that the [334] contract cannot be avoided on the ground that he was under illegal constraint at the time he made it. The Judge of Moulmein is right in his view of the law of England, that in this country if a man is under lawful imprisonment for a civil debt, an agreement which he makes while subject to that constraint is not, by reason of his being so subject to it, capable of being avoided, provided that it is not unconscionable. But imprisonment in a country where there is no settled system of law or procedure, and where the Judge is invested with arbitrary powers, is duress of a wholly different kind. In the one case the prisoner knows that the length and severity of his imprisonment are defined and limited by the law, and cannot be exceeded; whereas in the other the prisoner neither knows what will be the length of his imprisonment, nor what amount of pain and misery he may be put to; all is indefinite; and therefore the apprehension acting on the mind of a man in such a situation would be infinitely greater than if he were imprisoned in a country like England, where the law is settled, and cannot be exceeded by the Judge.

With regard to the actual circumstances of this imprisonment, there was a great deal of violence used at the time of the arrest, and whether some violence was justified or not by Douk's resistance, it is unquestionable that he received a severe beating, which would affect the state of his mind. Then he was put into irons. The charge is made against him—not that he had unintentionally put his mark upon the property of another—but that he had done so criminally, with a view to steal it. He knew what had happened and might happen again in this Siamese territory, —that a wrongful act of that kind might be very severely punished, and to an extent which in this country might be supposed to be disproportionate to the offence.

No doubt, speaking generally, all matters relating to a contract are to be decided by the law of the country where the contract is made, but there are principles of universal application by which all contracts, wherever made, must be judged. The first principle of contract is, that there should be voluntary consent to it. In this country duress has always been held to avoid a contract, except in certain cases where the imprisonment [333] is lawful. But this exception would not be held to apply to a case where a man is in custody upon a criminal charge like the present, and has made an agreement to give a benefit to another to release him from that charge; in fact such a contract in this country would be held to be void on other grounds. Upon the face of it, this contract shows that the man was charged with a criminal offence. "Treephaw"—that is Douk—"requests not to raise contention against me with regard to having stolen, impressed, and struck with hammer mark the 152 logs of teak timber which has been cut, worked, and kept at the place allotted by Moungh Shoay Att in the forest, for which Moungh Shoay Att obtained the Imperial order and

written permit." It was to get rid of that charge of having stolen these logs, when he was in custody under the circumstances which have been referred to, that this agreement was made. Their Lordships therefore think that the plaintiff may repudiate it, as having been made by his agent when under duress.

It is to be observed that the treaty between the British Government and the Siamese Government contains this clause: "With reference to the punishment of offences or the settlement of disputes, it is agreed that all criminal cases in which both parties are British subjects, or in which the defendant is a British subject, shall be tried and determined by the British Consul." It seems, therefore, that the binyakin had no jurisdiction to try the offence, and the proceedings bear the character of an attempt, by bringing Douk before this Judge, to extort an agreement from him.

Their Lordships for these reasons think that this agreement does not in any way bind the plaintiff; and inasmuch as Rs. 3,000 of his money was paid, and his elephants were delivered under it, that he is entitled to bring this suit.

A question was raised whether the agreement had not been confirmed and ratified by the subsequent acts of the plaintiff, or Douk as his agent. No doubt, if there had been a clear ratification, it being in the power of the plaintiff to ratify or reject it, if there were circumstances from which a ratification might properly be presumed, he would be bound by it, but their Lordships do not find any evidence of such a ratification. The [336] delivery of the elephants was in effect made before the constraint or the apprehension of constraint had disappeared; for simultaneously with entering into this agreement, it appears that Douk gave an order to the man who had the custody of the elephants, to give them up to the defendant, and although the actual delivery did not take place immediately, it was made in consequence of that order, and Douk says he was in such a state of apprehension that he could do nothing afterwards, and as soon as he recovered from his beating, went down to Moulmein. The other point is that the timber was accepted by the plaintiff. But their Lordships think that it was not accepted under such circumstances as constitute a ratification, because, all the way through, Douk was protesting against this agreement, and so was the plaintiff, claiming the timber as his own property.

Another ground suggested by the Special Court on which this agreement could not be sustained as against the plaintiff, seems to their Lordships to be well founded. Douk being in custody upon a criminal charge had clearly no authority to part with his employer's property, or to make an agreement to part with it, to relieve himself from such a charge. If there had been any question of a civil nature, it might have been within the scope of his authority, as a general agent, to compromise such a claim, but when charged with personal misconduct and a crime, which it cannot be assumed that his principal had authorized, no authority from the employer can be implied that his money and his elephants should be handed over to the man making the charge, in order to relieve his agent from it. It is sufficient, however, to decide that the agreement is avoided on the ground of the duress for, as the lower Appellate Court observes, this last ground for impeaching the agreement was not made in the pleadings.

Their Lordships having come to this conclusion upon the agreement, it follows that the decree in favour of the plaintiff must stand.

Then the question arises whether a deduction should not be made from the amount of the decree for the value of the timber, which their Lordships are satisfied the plaintiff got into his [337] possession. Undoubtedly if the timber

belonged to the plaintiff, and the claim made by the defendant upon it was an invalid one, no deduction ought to be made from the damages, although possession of it may have been obtained in consequence of this agreement. This raises the question to whom the timber belonged at the time when this agreement was made up on the 10th May. (His Lordship, after going through the evidence on this point and finding it in favour of the defendant, continued :) Their Lordships are therefore of opinion that the total amount decreed and payable to the plaintiff under the decree appealed from should be reduced by the sum of Rs. 3,040, being the value of the 152 logs of timber at Rs. 20 per log. The amount so reduced will be payable to the plaintiff with interest thereon at 5 per cent. from the date of the said decree to the date of realization.

Their Lordships will humbly advise Her Majesty that the decree be varied by making the reduction in these terms, and that in other respects it be affirmed. The decree being thus varied, their Lordships think there should be no costs of this appeal.

Decree varied.

Agent for the Appellant: Mr. W. D. H. Oehme.

Agents for the Respondent: Messrs. Watkins and Lattey.

ORIGINAL CIVIL.

The 13th and 14th March and 16th May, 1876.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE
PONTIFEX.

Bhuggobutty Dossee.....Plaintiff

versus

Shamachurn Bose and others.....Defendants.

*Mortgage—Lien of Mortgagee on sale of Right, Title and Interest of
Mortgagor—Writ of fi. fa.—Purchaser at Sheriff's sale at
instance of Mortgagee.*

N, M and G borrowed from B a sum of Rs. 12,000, to secure repayment of which they executed in her favour a joint and several bond in May 1863 for payment of the said sum with interest on the 6th of May 1864, and also a warrant to confess judgment on the bond. On the 27th of April 1864, N, M [333] and G executed a mortgage, in the English form, of certain property to B purporting to do so in pursuance of an agreement alleged to have been entered into between them and B at the time the money was advanced by B in 1863; but the evidence was not sufficient to show that such agreement had been entered into. Under a writ of *fi. fa.* issued previously to the mortgage of 1864, viz., on the 23rd of March 1864, in a suit against M and N, the Sheriff sold to A, on the 7th July 1864, the right, title and interest of M and N in the mortgaged property. Assuming that an agreement to mortgage had been entered into in 1863, A had no notice of such agreement. After this, a writ of *fi. fa.* was issued by the Sheriff, at the instance of B, in execution of a decree which B had caused to be entered upon the bond of May 1863; and under that writ the Sheriff, on the 22nd February 1866, sold the right, title and interest of N, M and G in the mortgaged property, and A became the purchaser. The purchase-money at this sale was paid to B, and A entered into possession of the property.

In a suit by *B* against *A* and others on the mortgage of the 27th of April 1864, for foreclosure or sale of the property, the Court below (PHEAR, J.) held :—

that the *fi. fa.* issued on the 23rd of March 1864, previously to the mortgage, must be taken to have operated against the share of *M* and *N* from the date when it was issued ;

that even if there was an agreement to mortgage, as alleged, then, although as against *N*, *M* and *G* themselves, a Court of Equity would treat such agreement as equivalent to an actual mortgage, yet it would not do so as against a purchaser under the *fi. fa.* without notice ; and

that the sale of the 7th July 1864, therefore, passed the shares of *M* and *N* to *A* free of any rights or equities of *B*.

Further, that the sale by the Sheriff, of the 22nd February 1866, having been effected at the instance of *B*, for the purpose of realizing the mortgage-debt, was operative, as between *B* and *A*, to pass to *A* the entire shares of *N*, *M* and *G* in the property free of *B*'s mortgage lien.

Held on appeal, that no agreement to mortgage being established, the sale by the Sheriff to *A* in 1864 overrode the mortgage to *B*, and passed to *A* the shares of *M* and *N*.

Held further, that the sale by the Sheriff in 1866 being of the right, title and interest of *N*, *M* and *G*, and made at the instance of *B*, without notice of her mortgage, and *B* having received the purchase-money, which would appear to have been estimated on the value of the unencumbered shares, and no objection having been made to the sale by the mortgagors, who had allowed *A* to hold unchallenged possession ever since, the entire equitable estate in the share of *G* must be taken to have passed to *A*.

A mortgagee is not entitled, by means of a money-decree obtained on a collateral security, such as a bond or covenant, to obtain a sale of the equity of redemption separately. To allow him to do so would deprive the [339] mortgagor of a privilege which is an equitable incident of the contract of mortgage,—namely, a fair allowance of time to enable him to redeem the property. *

APPEAL from a decision of PHEAR, J., dated 26th July 1875.

This was a suit on a mortgage, dated 27th April 1864, for foreclosure or sale of 28-48ths of a house and land in Calcutta ; but the case is worth reporting only in so far as it relates to 14 out of these 28 shares.

In the plaint and written statement of the plaintiff, it was alleged that Nobinchunder, Muttylall and Gopalchunder, the owners of these 14 shares, borrowed from the plaintiff Rs. 12,000 on 9th May 1863, and to secure re-payment thereof executed in her favour a joint and several bond for payment of the said sum with interest on the 6th May 1864, and also a warrant to confess judgment thereon, and agreed to execute the mortgage now sued on by way of further security for the loan ; that on 27th April 1864 the mortgage now in suit was, in pursuance of the aforesaid agreement, executed by Nobinchunder, Muttylall and Gopalchunder in favour of the plaintiff ; that the money advanced on the bond and mortgage formed a portion of the estate of the plaintiff's deceased husband Baneymadhub Mitter, of which the Court Receiver had been appointed Receiver, and on default being made in payment of the sums secured by the bond and mortgage, the Receiver in the name of

* See on this point the following cases cited in the argument before the Appellate Court—*Ramlochan Sircar v. Kamini Deb*, 5 B.L.R., 460n. ; s.c. on appeal, 10 B.L.R., 60n. ; *Brajnath Kundu Choudhry v. Gobindmuni Dasi*, 4 B.L.R., O.C., 88 ; *Kamini Deb v. Ramlochan Sircar*, 5 B.L.R., 450 ; and *Neerunjun Mookerjee v. Opendro Narain Deb*, 10 B.L.R., 57.

the plaintiff obtained a writ of *fi. fa.*, in pursuance of which the Sheriff seized the right, title and interest of Nobinchunder, Muttylall and Gopalchunder in the mortgaged premises, and sold the same on the 22nd February 1866 for Rs. 3,700 to the defendant Anundlall Doss, who obtained possession thereof under his purchase; that besides this purchase-money the plaintiff had received nothing on account of her debt. The plaintiff also alleged that the defendant, [340] at the time of his purchase, was aware of the existence of the mortgage. The plaintiff prayed for an account, for foreclosure or sale, for possession, and for such further relief as the plaintiff might be entitled to.

From the written statement of the defendant Anundlall Doss, it appeared that, under a writ of *fi. fa.*, issued on the 23rd March 1864 in the suit of one Thomas Owen against Muttylall and Nobinchunder, the Sheriff, on the 7th July 1864, seized and put up for sale the right, title and interest of Nobinchunder and Muttylall in the said house and land, and it was purchased by Goureychurn Chatterjee, but at his request transferred by the Sheriff to the defendant Anundlall, and on the 10th August 1864 the Sheriff executed in favour of the defendant Anundlall a bill of sale of the right, title and interest of Muttylall Bose and Nobinchunder Bose; that the defendant Anundlall had no notice at the time of his purchase of the plaintiff's mortgage; that on 22nd February 1866 the Sheriff, in pursuance of the writ of *fi. fa.*, mentioned in the plaint, put up for sale the right, title and interest of Nobinchunder Bose, Muttylall Bose, and Gopalchunder Bose of in and to the said house and premises, and one Nobongo Moonjery Dasse became the purchaser, and transferred the said purchase to the defendant Anundlall, who obtained from the Sheriff and the purchaser and her son a bill of sale thereof on 18th June 1866. The defendant Anundlall submitted that the mortgage mentioned in the plaint, even if executed by the parties by whom it purported to be executed, was fraudulent, and was executed to avoid payment of the decree which then remained unsatisfied against Nobinchunder and Muttylall, in respect of which the *fi. fa.*, in the suit of Thomas Owen was issued, and was therefore void as against the defendant, and that the shares of the said Nobinchunder and Muttylall in the said house and premises did not pass under the mortgage; that the writ of *fi. fa.*, in execution of which the sale of 22nd February 1866 took place, having been issued at the instance of the plaintiff, the said property was sold discharged of the mortgage debt, even if the said mortgage were held to be otherwise valid and binding. The defendant further submitted that if, the Court should be of [341] opinion that the sale of 22nd February 1866 did not discharge the mortgage debt, then that the said mortgage could operate only against the share of Gopalchunder Bose in the said house and premises.

PHEAR, J., after stating the facts, observed, that if the mortgage on which the plaintiff relied was established, the first question would be whether the sale of July 1864, effected under Mr. Owen's *fi. fa.*, which was issued in March 1864 before the date of that mortgage, would not prevail against it. That the defendant urged that that mortgage was made without valuable consideration, and that the case of the plaintiff was that it was made in pursuance of the original agreement, on which the plaintiff lent her money on the 9th April 1863, and that therefore it was founded on substantial consideration.

The learned Judge having then examined the evidence on this point said, that he was on the whole disposed to think that the defendant's contention to the effect that the mortgage of 27th April 1861 did not stand on the consideration of the loan of May 1863 was a just contention.

Assuming, however, that the mortgage was an effective conveyance or instrument, he asked what was the effect of Mr. Owen's *fi. fa.*, which preceded it? He then continued as follows :—

This question, as well as one which will occur presently, seems to necessitate a slight examination of the English cases so far as they bear on the operation of a writ of *fi. fa.*

I have more than once in this Court had occasion to express the opinion that an order for the sale of a judgment-debtor's goods, made to enforce execution of a decree, whatever its shape, and whether preceded by actual attachment or not, has the effect of binding the debtor's property as against any alienations which the debtor himself may make after its date. The proceedings in execution taken for the purpose of effecting a sale are in a sense proceedings in the suit against property, and all persons, who purchase from the judgment-debtor pending those proceedings, come into the position of purchasers *pendente lite*, and in a case lately before me and now pending before an [342] Appeal Bench—*Dorab Ally Khan v. Khajah Moheerooddeen* (I. L. R., 1 Cal., 104)—I felt myself obliged to act on that view with regard to the operation of the writ of *fi. fa.* issued by this Court in a suit which had been commenced in the Supreme Court. The English cases which I have been able to find touching on this point seem to support that view entirely. Doubtless a writ of execution in the English Courts of whatever form is issued as of course founded on the record and judgment signed, but it is in its nature a judicial order operative as such till set aside even though taken out irregularly. This was settled in *Blanchenay v. Burt* (4 Q. B., 707), and it was expressly stated by POLLOCK, C. B., in *Wright v. Mills* (5 Jur. N. S., 771) that the issuing of a *fi. fa.*, was a judicial act.

As against the owner of goods, the writ of *fi. fa.*, is an order that the goods be sold, and it is operative from the date of *teste*, which, under the old practice, might have been a date long antecedent to the actual issue, though as against *bond fide* purchasers for value the Statute of Frauds stayed its operation till it was delivered to the Sheriff. This matter was first explained in *Brugner v. Langmead* (7 T. R., 20).

The operation of a *fi. fa.*, in itself was to give the judgment-creditor a right to have the property sold : it did not alter the property in the goods, but it originated the right to sell in the judgment-creditor, which took priority from the date of the writ. The leading case on this point is *Giles v. Grover* (1 Cl. & F., 72) ; see per TINDAL, C. J., at p. 201. The principle was also explained by LITTLEDALE, J., in *Lucas v. Nochells* (10 Bing., 157, see p. 182), and by Lord ELLENBOROUGH in *Payne v. Drewe* (4 East., 523). There remains I think no doubt what the effect of a *fi. fa.*, is in England as regards the property against which it operates. There I need hardly say the writ only issues against goods and chattels, and it is one of the questions in the present case, what did the writ issued by Mr. Owen in 1864 operate [343] upon? The plaintiff says it operated solely on the defendant's equity of redemption in the premises. This position is I think unfortunate, because there is ample authority to show that in England the writ of *fi. fa.*, cannot be made use of against the equity of redemption in such property as the writ itself can operate on. For instance, although the Sheriff can seize the leasehold of the debtor, he cannot seize the debtor's equity of redemption in the leasehold, because the legal estate is in the hands of the mortgagee. A *fi. fa.*, in England issuing from the Common Law Courts was only directed to legal assets, and in the eye of the Common Law Courts the mortgagor had no legal estate in property mortgaged. The cases

of *Burdon v. Kennedy* (3 Atk., 738) and *Scott v. Scholey* (8 East, 467, see p. 483) serve to establish this proposition.

But in this Court, which is a Court of equity as well as of law, the relations between mortgagor and mortgagee of immoveable property, though no doubt governed by the mortgage contract, do not amount to two estates or two sorts of property. This Court only recognises in the mortgagee the right to recover the money due on the mortgage, and the right to obtain and hold the mortgaged property till foreclosure as security for repayment. On the other hand the mortgagor has the whole beneficial interest in the lands subject to the mortgagee's right to have effect given to his security.

And from the date of the Charter of the Supreme Court, the writ of *fi. fa.* has issued indifferently against all classes of property belonging to the debtor without any distinction as to whether it is land, *i.e.*, immoveable or moveable. This is pointed out in the Master's Report in *Freeman v. Fairlie*, printed, I think, in 1 Moore's Indian Appeals at the end of the case of *Mayor of Lyons v. East India Company* (p. 305). And every form of writ of *fi. fa.*, from whatever side of the Court issued, to which I have been able to get access, is couched in the same perfectly general terms. Form 10 given in the rules of the Supreme Court, which were made after the passing of Act VI of 1855, is in these words :

[344] " PROCESS OF EXECUTION AGAINST PROPERTY.

Writ of fieri facias on a Judgment for Plaintiff on the Plea Side.

Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland,
Queen, defender of the faith, and so forth.
Fort William in Bengal. To the Sheriff of the Town of Calcutta, and Factory of Fort William in Bengal.

Greeting, we command you that you cause to be levied and made of the houses, lands, debts, and other effects, moveable and immoveable, of C. D., now or late of in the provinces, districts or countries of Bengal, Bihar and Orissa, and the province or district of Benares, or in any of the factories, districts, and places which now are annexed to and made subject to the Presidency of Fort William in Bengal aforesaid, by seizure, and if it be necessary by sale thereof, company's rupees (the amount of all the monies recovered by the judgment) which A. B. lately in our Supreme Court of Judicature at Fort William in Bengal, on the Plea Side thereof, recovered against him, whereof the said C. D. is convicted, and have that money before the Justices our said Court at Fort William aforesaid, immediately after the execution hereof, to be rendered to the said A. B., and that you do all such things as by Act No. VI of 1855 you are authorised and required to do in this behalf, and in what manner you shall have executed this our writ make appear to our said Court at Fort William aforesaid immediately after the execution hereof, and have you there then this writ. • Witness Sir Chief Justice at Fort William aforesaid, the day of in the year of our Lord one thousand eight hundred and fifty."

I am of opinion that the *fi. fa.* issued on Mr. Owen's application must be taken to have issued against all the property of the judgment-debtors whatever the character of that property. Those debtors were Muttylall and Nobinchunder, and they at the time when the *fi. fa.* was issued had not actually mortgaged the house to the plaintiff, but at most had agreed to mortgage. The *fi. fa.* then in my view operated against their shares in the house from the date when it was issued.

If it be assumed for the moment that they had agreed to mortgage those shares to the plaintiff, then although as against themselves a Court of Equity would treat the agreement to mortgage as equivalent to an actual mortgage, yet this would [345] not be so as against a purchaser under the *fi. fa.* without notice, and little or nothing as the evidence of an agreement on the part of Muttylall and Nobinchunder to mortgage is, the evidence of the defendant having knowledge of such an agreement at the date of the *fi. fa.* or even at the

date of his purchase is still less. It seems to me therefore that even under this hypothesis of an agreement to mortgage, the sale under Mr. Owen's *fi. fa.* passed the property to the purchaser free of any rights or equities of the plaintiff. But I have already said I think it has not been established by evidence that the plaintiff had right of recourse equitable or other to the property in the hands of Muttylall and Nobinchunder at that time, and if so the matter is clear of all question of notice to the defendant.

But the discussion relative to the effect of the *fi. fa.* just gone through at some length leads me to the opinion that whatever had previously happened, and even if the plaintiff's contention as to the mortgage is made out, the sale by the Sheriff on the 22nd February 1866 as between the plaintiff and defendant passed to the defendant the entire share of Nobin, Muttylall and Gopalchunder Bose free of the plaintiff's mortgage lien. That sale was effected at the instance of the plaintiff and by getting the *fi. fa.* issued in execution of the money-decree which had been entered up by her on the bond of May 1863. She got in substance the same right of recourse against the property affected by the *fi. fa.* as she had by the terms of her mortgage on the property affected by that instrument, in other words simply the right to have the property sold and to apply the proceeds of sale to payment of the debt which was owing to her, and which was the same debt, namely, the bond debt in both cases; the alternative right to foreclose does not materially affect the comparison. Had the *fi. fa.* issued at the instance of a third party, any sale effected under it would have passed the property to the purchaser, subject to the plaintiff's prior right to realize her mortgage debt either out of that property or by the coercive process of taking possession of and holding it. As however it was issued at the instance of the plaintiff herself for the purpose of realizing that very debt, it seems plain that the sale and conveyance of the property [346] could not be subject to a still remaining right in her to sell the property over again to realize that debt.

It was put in argument (not expressly but by implication) that after the mortgage the property in the house consisted of two parts, namely, the mortgagee's estate and the mortgagor's estate (or equity of redemption), and that what was sold under the *fi. fa.* was the latter only. I need not now discuss the meanings of these terms as understood in the English system of real property law, administered as that law is in two sets of Courts (common law and equity) of differing jurisdictions. This Court is a Court both of law and equity with complete jurisdiction to deal with the matter according to the true relations between the parties, and I have already pointed out what those relations are in the case of mortgage. I think then that the plaintiff, after having sold the share of Nobin, Muttylall and Gopalchunder under the *fi. fa.* issued by her in 1866, cannot now maintain that those shares still remain mortgaged to her.

Indeed I think it appears on a little consideration that it would be absurd to hold that she sold the property in February 1866 subject to her previous mortgage lien; for by the act of selling she reduced the extent of her lien necessarily by the amount of the purchase-money, and therefore there must be a very substantial difference between the lien subject to which the property was put up for sale and bought, and the lien which remained to the plaintiff after the sale. The only other alternative seems to be that the property was put up for sale and sold subject to a lien which could only be ascertained by solving an algebraic equation, and that as a matter of practice is absurd.

The result is that, in the view of the case at which I have arrived, the plaintiff cannot set up any mortgage against the defendant Anundall Doss in respect of the shares of Nobin, Muttylall and Gopalchunder Bose in this house.

This suit must be dismissed with costs No. 2 as against Anundall Doss.

From this decision the plaintiff appealed.

[347] Mr. Kennedy and Mr. Bonnerjee for the Appellant.

Mr. Jackson for the Respondents.

Mr. Kennedy.—No change was produced in the law by giving the Courts here power to administer both law and equity: the fact that equity will not grant relief causes no change in any strictly legal rights to which the plaintiff may be entitled. Whether there was notice or not is immaterial if the mortgage is a valid one, but the inference to be drawn from the evidence is that there was notice. The sale of the right, title and interest of the mortgagor cannot have any effect on the mortgagee's title; at any rate the sale of the equity of redemption of a portion of the property could not discharge the rest. [PONTIFEX, J., referred to *Syed Esmat Momtazooddeen v. Rajcooman Dass* (14 B.L.R., 408) and *Syed Nazir Hossein v. Pearoo Thorildarnee* (14 B. L. R., 425 note).] Those cases are decided with respect to mofussil bonds, which are different: here the mortgage was in the English form. There is an Act (VI of 1855) which specially empowers the sale of the equity of redemption. It has been deemed inequitable to permit the mortgagee to sell for the same debt the property on which the debt was created and to retain his lien, so he could not execute his decree against the mortgaged property. Here only the right, title and interest of the mortgagors were sold, and not the right, title and interest of any other person. The remedy of a mortgagee until 1855 was not sale but foreclosure. The mortgagee cannot sell the equity of redemption; see *Kamini Debi v. Ramlochan Sircar* (5 B. L. R., 450) and *Ramlochan Sircar v. Kamini Debi* (5 B. L. R., 460 n.; and on appeal, 10 B. L. R., 60 n). [PONTIFEX, J., referred to the principle of tacking.] The doctrine of tacking does not apply in India. [PONTIFEX, J.—Would it not apply in Calcutta to a mortgage in the English form?] The law of this Court in 1864 was the Civil Procedure Code, under which an attachment is necessary before sale, here there was no attachment. It is well settled that a person taking under a sale by a judgment-creditor can take nothing except what he had a right to sell. *Watts v. [348] Porter* (3 E. and B., 743) is completely got rid of; see *Whitworth v. Gordon* (Cr. & Ph., 325), *Holroyd v. Marshall* (10 H.L.C., 191), *Eyre v. Macdowell* (9 H.L.C., 619), and *Anandalall Dass v. Radhamohan Shaw* (2 B. L. R., F.B., 49, see pp. 62, 64, 70 and 72; S. C., on appeal, 14 Moore's I. A., 543). The fact therefore of a man having a judgment against him does not enable him, by having his property sold, to sweep away all equitable rights against himself by reason of contracts made by him. As to the effect of a judgment under the statutes of Westminster, see *Neate v. Duke of Marlborough* (3 My. & Cr., 407), an *elegit* had to be issued. [GARTH, C. J., referred to Coote on Mortgages, p. 31, 3rd ed., where he says, that "though an equity of redemption was not extendible at law under 29 Car. ii, c. 3, yet the judgment formed a lien on the land, and the creditor might file his bill to redeem."] The hovering lien created by an *elegit* does not exist in this country. Although the Supreme Court administered both law and equity, the same Judges sat in different capacities: the change in the constitution of the Courts in 1862 did not make any difference so as to affect the rights of suitors. A mortgagee by the purchase of the mortgage property becomes a trustee for the mortgagor—*Kamini Debi v. Ramlochan Sircar*

(5 B. L. R., 450); but this would be an unnecessary precaution if it was considered the equity of redemption had been sold, as the mortgagor would not have been injured. In that case the proceeding is considered as an attachment and sale of something subject to the mortgage; see *per* MACPHERSON, J., in that case, p. 458; see also *Brajanath Kundu Chowdry v. Gobindmani Dasi* (4 B. L. R., O. C., 83), and Act VIII of 1859, ss. 205, 215, 240. There is no way here of registering a judgment and so making it a lien. Until attachment the property was not bound at all; see s. 246. [GARTH, C. J.—That provides for the case of an execution-creditor and a third person, which is not the present case.] The intention of the Procedure Code is to place the turning point of the lien at the attachment; and s. 246 shows that previously to attachment there was no lien. [PONTIFEX, J.—Sec. 246 is a mere section of pro-[349] cedure. GARTH, C. J.—Of procedure in the nature of an interpleader, so that it might be summarily determined in case of dispute whose the land is? Mr. Jackson.—A suit begun in the Supreme Court may be continued under the procedure of that Court; see 24 and 25 Vict., c. 104, s. 9, and *Dorab Ally Khan v. Khajah Moheooddeen* (1 L. R., 1 Cal., 104).] *Nerunjun Mookerjee v. Opendro Narain Deb* (10 B. L. R., 57) shows that a mortgagee cannot sell the equity of redemption except by special leave of the Court [Mr. Jackson.—There is a rule of Court now to that effect; see Rule 92 of the Rules of February 1875.] That rule contains a proviso when the mortgagee is willing to join in the conveyance to a purchaser; this must mean that a sale by the mortgagor would not pass the whole interest, or why ask the mortgagee to join in the conveyance.

Even if the *fi. fa.* is valid, though it is submitted attachment was necessary, yet it ought only to have the effect of an attachment, *i.e.*, apply from the time of taking possession under it. [Mr. Jackson refers to Act XXIV of 1865.] That does not affect the question; it only shows, if anything, that the procedure up to that time had been irregular. [GARTH, C. J.—The Registrar tells me that a *fi. fa.* was only issued in old suits, not in new ones. May we not presume then that this was an old one, a *fi. fa.* having been issued.] The learned Counsel contended, that on the evidence there was sufficient to show that there was an agreement for the mortgage, and that the mortgage having been executed in pursuance of that agreement, was executed on substantial consideration.

Mr. Jackson for the Respondents. —Act XXIV of 1865 does justify the issue of a *fi. fa.* in this case. Section 2 refers to cases where execution has been taken out; s. 3 to cases in which execution has not been taken out: the former are to be executed according to the High Court procedure; the latter, though executed according to the procedure of the Supreme Court, are to be valid. If the procedure had been regular up to 1865, what object would the Act have had; there would have been no defect to cure.

[350] The Full Bench decision in *Syud Emam Montazuddern's* case cannot be distinguished by being a case of a mofussil mortgage,—that is not the ground of the decision: see pp. 423, 425. It applies directly to this case.

The case of *The Bank of Bengal v. Nundolall Doss* (12 B. L. R., 509, see p. 515), shows that an equity of redemption can be sold. The principle of the case of *Kamini Debi v. Ramlochan Sircar* (5 B. L. R., 450) is not applicable to this case: the state of facts is wholly different. On the question of whether there was an agreement to mortgage, the learned Counsel was not called upon.

Mr. Kennedy in reply.—There is a great difference between charges by mortgage and by bond as to subsequently bringing a suit. The Full Bench case only applies to the facts of the particular case. [PONTIFEX, J.—The whole

question was fully discussed and considered in that case : it was decided on principle. Does an action on a covenant in a mortgage in which the mortgagee recovers money by arrest of person or sale of chattels, do away with the mortgage lien or act as a bar to a suit for foreclosure ? [PONTIFEX, J.—Is there a conveyance on a decree for sale in a mortgage suit ?] Yes, always here ; how otherwise is the purchaser to obtain the subject of his purchase. [PONTIFEX, J.—You would then never be able to sell the mortgagee's lien at all. There is no such thing under Act VIII of 1859 as selling the mortgagee's lien : you sell the right, title and interest of the mortgagor under a money-decree, and under a sale in a mortgage suit you sell precisely the same. GARTH, C. J. — Why cannot a mortgagee sell subject to his own lien in the same way as other estates are sold subject to liens ?]

The case of *The Bank of Bengal v. Nuntdall Doss* (12 B. L. R., 509, see p. 515) is inconsistent with the Full Bench decision. Since the Statute of Will. IV, a *fi. fa.* would issue in England against the mortgaged property, but it could not be contended that it barred a suit for foreclosure.

Cur. adv. vult.

Garth, C. J., after stating the facts, delivered the **Judgment [331]** of the Court. The portion of the judgment relating to 14-48ths share was as follows :—

With respect to the remaining 14-48ths, the defendant Anundall claims to be a purchaser in priority to, or in exclusion of, the mortgage on the following grounds : First with respect to Nobinchunder's 6-48ths and Muttylall's 1-48ths, the defendant Anundall proves that the right, title and interest of Nobinchunder and Muttylall in the property were sold by the Sheriff on the 7th July 1864 under a writ of execution issued on 23rd March in a suit brought by one Thomas Owen against Muttylall and Nobinchunder, such sale being made to one Gourychurn, by whose direction the purchase was transferred to Anundall, to whom a conveyance was executed by the Sheriff on the 10th of August 1864.

The plaintiff, on the other hand, insists that the alleged agreement for a mortgage of this property to her was made on the 6th of May 1863, and that the Sheriff's sale could not operate to the prejudice of such alleged agreement. We are however unable to discover sufficient evidence of this alleged agreement for a mortgage. The entries appearing in the books of Messrs. Rogers and Remtry on which the plaintiff relies (even assuming that they were properly receivable in evidence) are far too indefinite to prove that there was a binding agreement for a mortgage of this particular property on the 8th of May 1863 when the money was advanced on the bond, or prior to the actual date of the mortgage. The entries do not show what property was to be included in the mortgage, nor what were to be its terms, or that the lender of the money stipulated for the security of a mortgage. We are therefore of opinion that the Sheriff's conveyance to Anundall in 1864 overrides the mortgage upon which the plaintiff sues.

And Anundall also relies on a further sale by the Sheriff in 1866 made under the following circumstances :—On the second of February 1866, the Sheriff, under another writ of execution, issued upon the judgment entered upon the plaintiff's warrant of attorney of the 6th of May 1863, sold the right, title and interest of Nobinchunder, Muttylall and Gopalchunder in the property to one Nobongo Monjery Dabee, by whose direction [352] the purchase was

transferred to Anundlall, to whom a conveyance was executed by the Sheriff on the 18th of June 1866.

The plaintiff insists that this sale, though made at her own instance and without notice of her mortgage, passed only the right, title and interest of Nobinchunder, Muttylall and Gopalchunder in the equity of redemption subject to the mortgage, and did not affect the mortgage itself, so as *pro tanto* to discharge or annul it; and that in fact such sale must be treated precisely in the same manner as a sale upon a judgment of a person who is not a mortgagee. This argument of the plaintiff only affects Gopalchunder's share, as we have already stated that in our opinion the shares of Nobinchunder and Muttylall passed under the Sheriff's sale in 1864. But we are unable to assent to the argument as affecting Gopalchunder's share. We think that a mortgagee selling in execution the right, title and interest of his mortgagor obviously stands in a different position from a stranger selling in execution the mortgagor's right, title and interest. Take for example the case of an estate worth Rs. 2,000, but subject to a mortgage for Rs. 1,000. If the mortgagor sold by contract, or if his judgment-creditor sold in execution the equity of redemption for Rs. 1,000, the mortgagor would in each case benefit by the sale and receive in effect the full value of the estate, Rs. 2,000. But if the mortgagee could sell separately in execution the equity of redemption for Rs. 1,000, the result would be that his own debt would be discharged, and the purchaser would hold an estate worth Rs. 2,000 for the price of Rs. 1,000, and the mortgagor would lose an estate worth Rs. 2,000 having received only the mortgage money of Rs. 1,000.

And though we asked for authority to support the plaintiff's argument, we were not referred to any case, where under a mortgage in the English form the equity of redemption has been separately sold under a money-decree recovered by the mortgagee. The only case we can find in the English reports in which the question was approached, is *Lyster v. Dolland* (1 Ves., 431), which is very imperfectly reported, and was ultimately decided [353] by Lord THURLOW on the ground that an equity of redemption could not be extended under the Statute of Frauds. One of Lord REDESDALE'S arguments in that case appears to have been that such a sale would in effect defeat the mortgagee's own agreement for a redemption. Under the present law in England, an equity of redemption can be reached by a judgment-creditor only by means of an equitable execution, as it is called, or through the decree of a Court of Equity, which would necessarily, by the proceedings in the suit, be informed of the existence of the mortgage, and the fact that the judgment-creditor was also mortgagee.

We are of opinion that a mortgagee is not entitled by means of a money-decree obtained on a collateral security, such as a bond or covenant, to obtain a sale of the equity of redemption separately, because by so doing he would deprive the mortgagor of the privilege which, upon the principle of considering the estate as a pledge, a Court of Equity always accords to a mortgagor, namely, a fair allowance of time to enable him to discharge the debt and recover the estate. This privilege is an equitable incident of the contract of mortgage, and it would be inequitable to permit the mortgagee to evade it to do that circuitously which he could not do directly.

In the present case the sale of the Sheriff in 1866 was of the right, title and interest of the mortgagors, the sale being at the instance of the mortgagee without disclosing her mortgage and without notice of the amount due to her as a charge upon the property. The purchase-money would appear, as in the case

of *Lyster v. Dolland* (1 Ves., 431), to have been estimated on the value of the unencumbered shares, and it has been received by the plaintiff. This sale has not been objected to by the mortgagors who are parties to this suit, and possession was at once taken under it and has been held unchallenged ever since. Under these circumstances we are of opinion that the sale and conveyance by the Sheriff must be considered to have passed the entire equitable estate in Gopalchunder's share, and we therefore concur with PHEAR, J., in dismissing the plaintiff's suit, so far as respects the 14-48ths of Nobinchunder, Muttylall and Gopalchunder.

[334] Under the circumstances we think the appellant must pay Anundall's costs of this appeal, and must add her own costs of this suit and appeal to her security, and PHEAR, J.'s decree will be modified accordingly.

Decree varied.

Attorney for the Appellant : Mr. Remfry.

Attorney for the Respondents : Baboo G. C. Chunder.

NOTES.

[After the date of this decision, the following statutory provisions were made. —

Transfer of Property Act, 1882, Sec. 99 : —Where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section sixty-seven, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section forty-three.

The Code of Civil Procedure, 1908, repealed the above provision and by Order 34, Rule 14, enacts as follows :—

(1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, Rule 2.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.

For cases, see under the foregoing sections in the Transfer of Property Act edited by Mr. Gour or Messrs. Shepherd & Brown.]

[355] ORIGINAL CRIMINAL.

The 13th April, 1876.

PRESENT :

MR. JUSTICE PONTIFEX.

The Queen on the Prosecution of Morad Ali

versus

Hadjee Jeebun Bux.

Act X of 1875 (High Courts' Criminal Procedure Act), s. 147—Case transferred to High Court—Refund of Fine on Quashing Conviction—Notes of Evidence taken by Magistrate.

The High Court has no power, under s. 147*, Act X of 1875, to order a fine to be refunded on quashing a conviction. (In *In re Louis*, 15 B. L. R., Ap., 14, the Court ordered the fine to be refunded.)

The Court in this instance decided whether the case should be transferred under s. 147 on the notes of the evidence taken by the Magistrate at the trial.

In this case a rule had been granted by PHEAR, J., on the 30th March, calling on Mr. Dickens, Police Magistrate for the Northern Division of Calcutta, and Morad Ali, the complainant in the case, to show cause why the case should not be transferred to the High Court under s. 147, Act X of 1875. The facts were, that the complainant and defendant lived in adjoining houses between which there was a party wall. A hole was found to have been made in the wall, apparently from the defendant's side, and Morad Ali instituted a charge against Hadjee Jeebun of having committed criminal mischief. On that charge Hadjee Jeebun was convicted by the Magistrate Mr. Dickens and fined Rs. 50, which was ordered to be paid to the complainant. The ground of the application for transfer to the High [355] Court was that there was no evidence adduced at the trial of any intention on the part of the defendant to commit mischief.

Mr. Branson and Mr. Evans now appeared to show cause against the order.

• Mr. Jackson and Mr. Bonnerjee contra.

On the part of Morad Ali, an affidavit of Mr. Pittar, and on behalf of Hadjee Jeebun Bux, a joint and several affidavit of Mr. Leslie and Hadjee Jeebun Bux, were filed. To the latter affidavit was annexed an attested copy of the notes of the evidence taken by the Magistrate at the hearing of the charge.

Mr. Branson went into the merits of the case, and contended that the defendant had been rightly convicted. [Mr. Jackson.—The notes of the evidence taken before the Magistrate must be taken to be the materials on

* [Sec. 147:—Whenever it appears to the High Court of Judicature at Fort William, Madras, or Bombay that the direction hereinafter mentioned

Power of Presidency High Court to transfer to itself cases from Police Magistrates.

will promote the ends of justice, it may direct the transfer to itself of any particular case from any criminal court situate within the local limits of its ordinary original criminal jurisdiction, and the High Court shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only.]

which the Court is now to decide. See *In re Louis* (15 B. L. R., Ap., 14.) Affidavits cannot be used to supplement that evidence.] There the case had been brought up under s. 147; this is an order calling on us to show cause why it should not be sent up: The notes do not comprise all the evidence taken before the Magistrate. He is not bound to take notes at all. [PONTIFEX, J.—Is it a case of mischief at all? The wall appears to be a party wall. But even if it had been the complainant's, the defendant's conduct seems to have been trespass, not criminal mischief.]

Mr. *Evans* on the same side.—Mr. *Leslie's* affidavit mentions evidence which does not appear in the notes of evidence taken by the Magistrate. Where it appears that all the evidence is not before the Court, the Court ought to call for the whole of the evidence, or it might rehear the case.

Mr. *Jackson* submitted that all the materials necessary for decision were before the Court, and that on those materials the conviction ought to be quashed.

The Court was of opinion that on the evidence which had come up from the Police Court there was no case for convicting [356] the defendant of mischief: inasmuch as there was no evidence to show that the hole was made in the wall maliciously or for the purpose of annoying the prosecutor. The conviction was therefore ordered to be quashed.

Mr. *Jackson* applied for an order for refund of the fine: but the Court was of opinion it had no power under the section to order repayment of the fine.

An application by Mr. *Jackson* for costs was refused, the Court being of opinion that the defendant was not wholly free from blame in the matter, and that the prosecution did not appear to have been a malicious prosecution.

Conviction quashed.

Attorney for the Complainant: Mr. *Pittar*.

Attorney for the Defendant: Mr. *Leslie*.

[1 Cal. 356]

ORIGINAL CRIMINAL.

The 9th, 16th and 20th March, 1876.

PRESENT:

MR. JUSTICE PHEAR AND MR. JUSTICE MARKBY.

The Queen

versus

Upendronath Doss and another.

Act X of 1875 (High Courts' Criminal Procedure Act), s. 147—

Case transferred to High Court—Notice to Prosecutor—Penal

Code, ss. 292 and 294—Specific Charge—Procedure on

Transfer to High Court.

In an application for the transfer of a case under s. 147, Act X of 1875, in which the prisoner has been convicted and is undergoing imprisonment, it is in the discretion of the Court to order, for sufficient *prima facie* cause shown, that the case be removed, without notice to the Crown.

Semle.—A charge under ss. 292 and 294 of the Penal Code should be made specific in regard to the representations and words alleged to have been exhibited and uttered, and to be obscene; and the Magistrate, in convicting, should in his decision state distinctly what were

the particular representations and words which he found on the evidence had been exhibited and uttered, and which he adjudged to be obscene within the meaning of those sections. Where no such specific decision has been given, the High Court when the case has been transferred under s. 147, Act X of 1875, may either try the case *de novo*, or dismiss it on the ground that the Magistrate has come to no finding on which the conviction can be sustained.

THE prisoners had been charged with offences under ss. 292 * and 294 of the Penal Code, and had been on conviction sentenced [357] by the Magistrate for the Northern Division of Calcutta to one month's simple imprisonment. On their application to the High Court, PHEAR, J., made an *ex parte* order under s. 147 of Act X of 1875, removing the case to the High Court, and allowed the release of the prisoners on bail under s. 148. The case now came on for hearing.

Mr. Branson, Mr. M. Ghose, and Mr. Palit appeared for the Prisoners.

The Standing Counsel (Mr. Kennedy) for the Crown.

Mr. Branson contended that the conviction could not be sustained, first, on account of the vagueness of the charge, inasmuch as it did not specify the nature of the crime charged; secondly, that the prisoners had committed no offence under ss. 292 and 294; and thirdly, that the evidence did not justify the conviction. He also contended that the Magistrate had no power to dispose of the case summarily.

The *Standing Counsel* raised an objection to the order made removing the case to the High Court, inasmuch as no notice thereof had been given to the Crown. The Court offered to adjourn the case if the Crown required time to enable them to proceed with it, but the *Standing Counsel* said he thought an adjournment was unnecessary. He then contended that the Magistrate had power to try, and dispose of, the case summarily, and that on the evidence the conviction ought to be upheld. After hearing Mr. Branson in reply, the Court took time to consider its **Judgment**, which, on a subsequent day, was delivered by

Phear, J. --This case now comes before us by reason of its having been removed to this Court from the Court of the Magistrate of Calcutta, Northern Division, by an order made under s. 147 of the High Courts' Criminal Procedure Act.

The learned *Standing Counsel*, on behalf of the Crown, objected that the order had been irregularly made, because the Crown was not served with notice of the application for it, [358] and was not given an opportunity of being heard upon that application. We are of opinion, however, that when, as in the present case, a conviction has been arrived at by the Magistrate, and the petitioner is actually suffering imprisonment thereunder, it is within the discretion of this Court to order for sufficient *prima facie* cause shown, on the application of the prisoner, that the case be removed without notice to the Crown. We intimated our readiness to give time to the *Standing Counsel*, if he required it,

* [Sec. 292 :—Whoever sells or distributes, imports, or prints, for sale or hire, or wilfully exhibits to public view any obscene book, pamphlet, paper, sale, &c. of obscene books. drawing, painting, representation, or figure, or attempts or offers so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.]

Sec. 294 :—Whoever sings, recites, or utters in or near any public place any obscene song, ballad, or words to the annoyance of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.]

for the purpose of this hearing, but he said he was quite prepared to go on with the case without delay.

The charge preferred against the petitioners and some other person, upon which they were tried by the Magistrate, appears in the Court book, which the Magistrate has sent up to us, in the following words :—“ Defendants are charged with having, on 1st March, at Beadon Street in Calcutta, exhibited to public view certain obscene representations. Defendants are further charged with having at the time and place aforesaid uttered or recited certain obscene words to the annoyance of others, ss. 292 and 294 of the Penal Code ;” and the original order or conviction made and signed by the Magistrate after hearing the evidence given on both sides appears to have been as follows :—“ Defendants (2) and (3) Upendronath Doss and Omritolall Bose” (the two petitioners to this Court) “are found guilty under ss. 292 and 294 of the Penal Code, and sentenced to suffer imprisonment for one month.”

The scope of each of the two sections, 292 and 294, of the Penal Code is wide : and it is much to be regretted that the charge against the prisoners was not made specific in regard to the representations and words alleged to have been exhibited, uttered, and to be obscene, before at least the accused persons were called upon to answer it. And it was certainly very important, both in the interest of the accused persons, and of the public, that the Magistrate, in his decision of the matter, should have stated distinctly what were the particular representations and words which he found in the evidence the convicted persons had exhibited and uttered, and which he adjudged to be obscene within the meaning of these sections.

[339] Had the case remained as the Magistrate's book represents it, we should have been reduced to the alternative of either practically trying the case *de novo* or of dismissing it, upon the ground that the Magistrate had come to no finding upon which his conviction could be sustained. Fortunately, however, since the conviction has been impeached by the making of the application for the removal of the case to this Court, the Magistrate has formally drawn up his specific findings of fact, and his order thereon, and we may now safely assume that this document discloses all that in the opinion of the Magistrate is established by the evidence against the petitioners within the scope of ss. 292 and 294 of the Penal Code. (After going through the specific findings of the Magistrate his Lordship found that the evidence was not sufficient to justify the findings of fact arrived at by the Magistrate, and that the words and passages were not obscene within the meaning of ss. 292 and 294, and continued :) It thus appears to us that the grounds upon which the Magistrate has placed his conviction in this case fail : and we can discover in the evidence no other ground upon which it could legally be supported. It follows that the conviction must be quashed, the sentence set aside, and the petitioners released from the obligation of their recognizances.

Conviction quashed.

Attorney for the Crown : The Government Solicitor, Mr. Sanderson.

Attorney for the Defendants : Baboo G. C. Chunder.

[1 Cal. 359]

• APPELLATE CIVIL.

The 26th January, 1876.

PRESENT :

MR. JUSTICE GLOVER AND MR. JUSTICE MITTER.

Gouree Lall Singh.....Plaintiff

•
versus

Joodhisteer Hajrah and others.....Defendants.*

*Regulation VIII of 1819, ss. 8 and 14—Suit for Reversal of Sale—
Service of Notice.*

Where, in a suit to set aside a patni sale under Reg. VIII of 1819, it was proved that the notice of sale was first stuck up in the cutcherry of the ijaradar (the mehal having been let out in ijarah by the patnidar), and on the refusal of the ijaradar's gomasta to give a receipt of service, it [360] was taken down, and subsequently personally served on the defaulting patnidar at his house, which was at some distance from the patni mehal, *held*, that the object of the provisions in Reg. VIII of 1819 as to service of notice of sale is not only to give notice of sale to the defaulter, but also to the under-tenants, and to advertise the sale on the spot for the information of intending purchasers; but though those provisions had not been strictly complied with, yet as the plaintiff (the patnidar) did not allege that in consequence of the defective publication there was not a sufficient gathering of intending purchasers, nor that the under-tenants were ignorant of the sale, and were prejudiced by such ignorance, nor that the mehal was sold below its value, *held*, that the defect did not amount to a "sufficient plea" under s. 14 for setting aside the sale.

Bykantha Nath Singh v. Maharajah Dhuraj Mahatab Chand Bahadur (9 B. L. R., 87), commented on and distinguished.

Baboos Bhowany Churn Dutt and Umbica Churn Bose for the Appellant.

Baboos Mohiny Mohun Roy and Kally Prosonno Dutt for the Respondents.

THE facts and arguments are sufficiently stated in the **Judgment** of MITTER, J., which was as follows:—

Mitter, J.—This is a suit for the reversal of a patni sale under Regulation VIII of 1819. The claim is based upon two grounds, *viz.*, (1) that there was no arrear of rent due from the plaintiff on the day of the sale, the same having been paid to the zamindar two days before the day of sale, and (2) that the notification of sale was not duly published according to s. 8 of Regulation VIII of 1819.

The lower Court has dismissed the suit. Upon the first point, the lower Court has found that the allegation of payment of rent two days before the day of sale is not true, and that the dakhila produced to establish that payment is not genuine. As regards the publication of the notice of sale, what the lower Court finds is this, that it was first stuck up in the cutcherry of the ijaradar (the mehal having been let out in ijarah by the patnidar), but the gomasta of the ijaradar having refused to grant a receipt of the service of the notice to the peon who took it, it was taken down and subsequently personally served upon the plaintiff, the patnidar. The lower Court having come to these conclusions of facts, dismissed the suit.

* Regular Appeal No. 295 of 1874, against a decree of the Subordinate Judge of Zilla East Burdwan, dated the 27th April 1874.

On appeal the correctness of these conclusions of facts has been contested upon the ground that they are against the weight of the evidence on the record. I do not think that this contention ought to prevail. I am quite satisfied with the reasons given by the lower Court in support of these conclusions, and I do not think that we ought to disturb his findings in appeal. We must, therefore, accept them as giving the true facts of the case.

The next question that has been raised in appeal before us is, that, accepting these findings of facts as correct, still the sale cannot stand, as the notification of sale was not published in the manner indicated in cl. 2, s. 8 of Regulation VIII of 1819. The plaintiff does not deny that two notices, as required by this clause, were stuck up in accordance with law in the cutcherries of the zamindar and the Collector, but this case rests upon the ground that no notice was published as also required by the same clause in the mofussil. The clause in question first of all lays it down that the notice of sale should be stuck up in the cutcherry of the Collector. Then it further provides: "A similar notice shall be stuck up at the sudder cutcherry of the zamindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent, to be similarly published at the cutcherry or at the principal town or village upon the land of the defaulter. The zamindar shall be exclusively answerable for the observance of the forms above described, and the notice required, to be sent into the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter or of his manager for the same, or in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood in attestation of the notice having been brought and published on the spot."

Now it is evident from the facts of this case, that the form prescribed above for the publication of the notice in the mofussil has not been strictly complied with, because the notice, [362] though at first stuck up in the cutcherry of the ijaradar, was after a short time taken down and personally served upon the defaulter at his house, which is at some distance from the patni mehal. Therefore the question which we have to determine is whether this defect is such as to entitle the defaulter to ask the Court to reverse the sale upon that ground alone. In order to arrive at a satisfactory conclusion upon this question, we must first determine what is the object for which this provision as to the publication of this notice in the mofussil has been made, because if it be simply to give notice of the sale to the defaulter, it is clear that in this case we ought not to give effect to the contention of the plaintiff, who has got a more direct notice of the sale, as it was personally served upon him. It has been decided by Sir BARNES PEACOCK, C. J., in the case of *Sona Beebe v. Lall Chaud Chowdhry* (9 W. R., 242), that a patni sale should not be set aside for mere formal defects in the publication of the notice if it proved that it has been served upon the defaulter. This case has been quoted with approbation by their Lordships in the Judicial Committee of the Privy Council in the case of *Ram Sabuk Bose v. Kamruce Kumarce Dossee* (14 B. L. R., 394). The same view of the law has been taken by a Division Bench of this Court in the case of *Putambur Panda v. Damoodur Doss* (24 W. R., 433). See also *Matungnee Churn Mitter v. Mooryary Mohun Ghose* (1. L. R., 1 Cal., 175).

Now it is clear that one of the objects of this provision is to give notice of the sale to the defaulter, and so far as that object is concerned, the plaintiff, as I have remarked above, has no valid ground to complain. But the question is,—is that the sole object? I do not think it is. If it were the sole object, we should have naturally expected that handing over the notice direct to

the defaulter or his agent would have been laid down as the ordinary and the principal mode of service, and the sticking up of the notice in his cutcherry, or the publication of the same "at the principal town or village upon the land," would have been laid down as the substituted mode of service to be resorted to, if it be impracticable to effect the service in the first [363] mentioned mode. Then it must be remembered that there is no other provision in the Regulation for advertising the sale in the mofussil except the one under consideration. Then it also must be remembered that important privileges have been given to the under-tenants by the Regulation to protect their rights, and there is no other provision in it of giving notice of the sale to them than the one indicated in the extract I have made from the Regulation. The letter of the law also leads to this conclusion, because it speaks of the notice of sale being published on the spot. It appears to me from these considerations that the object of this provision in the Regulation is not only to give notice of the sale to the defaulter, but also to under-tenants, and further to advertise the sale "on the spot" for the information of the intending purchasers.

We have, therefore, next to consider whether the defects in the publication of the notice of sale in the mofussil in the case have been such as to defeat the object mentioned above. Sec. 14 of this Regulation, which gives to the defaulter the right of contesting the validity of the sale in a Civil Court, provides that the sale should be reversed upon "a sufficient plea" being established. Has the plaintiff established "a sufficient plea" in this case which would entitle him to ask the Court to set aside the sale? It has been found that the notice of the sale was stuck up in the ijaradar's cutcherry and was not taken down until after some time; that the peon, who took it there, asked the gomasta of the ijaradar to grant a receipt of the same, and there was some conversation between them as to whether he (the gomasta) was the right person who should give this receipt, and on his finally refusing to give it that the notice was taken down and brought away to be personally served upon the defaulter. The plaintiff has not established any circumstance in this case to show that this was not sufficient publication of the notice of the sale in the mofussil. He does not state that in consequence of this defective publication of the notice there was not a sufficient gathering of intending purchasers at the time of the sale. Nor does he complain that his under-tenants were ignorant of the impending sale of the parent talook, and were therefore prevented from depositing the arrears of rent to stay the sale. He in [364] his plaint puts the same to valuation upon his patni mehal which it fetched at the auction-sale. Upon the whole, I am not prepared to say that the defects established by the plaintiff in the manner of the publication of the sale notification in the mofussil are such as to amount to "a sufficient plea" within the meaning of s. 14 of Regulation VIII of 1819.

It remains to notice a case—*Bykantha Nath Singh v. Maharajah Dhiraj Mahatab Chand Bahadur* (9 B. L. R., 87)—upon which the learned pleader for the appellant laid great stress in the course of the argument. In that case there was no attempt made by the zamindar to publish the notification of sale in the mofussil. There was further a very grave irregularity in sticking up the notice of sale in the Collector's cutcherry, and it was held that these defects were sufficient to vitiate the sale. I do not think that any inflexible rule of law was laid down there, that any departure from the forms laid down in cl. 2, s. VIII of Regulation VIII of 1819, would be sufficient to entitle the defaulter to set aside the sale. What was virtually held in that case was that the irregularities established there were sufficient under the law to vitiate the sale.

The result therefore is that this appeal must be dismissed with costs.

Glover, J.—Had it not been for the strongly expressed opinion in the case referred to by MITTER, J., in which case, however, the judgment was to a certain extent approved of by the Privy Council, I should have thought that the words of the Regulation were imperative, and made all sales void when there had been no proper service of notice in the mofussil cutcherry. But after these decisions, I do not see how I can retain my opinion, and I am therefore not prepared to dissent from the judgment of my learned colleague.

The appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[STATUTORY REQUIREMENTS AS TO SERVICE OF NOTICE :—

The Privy Council in *The Maharani of Burdwan v. Krishna Kamini Das* (1887) 14 Cal. 365 at 373 14 I. A. 20 observed upon this case as follows :— "The only case cited which is directly in favour of the contention in this case is that of *Gourie Lall v. Joodhisteer Hajrah*, 1. L. R. 1 Cal. 359 : 25 W. R. 141, where it was decided that the regulation was satisfied by service of notice at the house of the defaulter. But the authority of that decision is undermined by its being rested mainly on the case of *Sona Beebe v. Lall Chand Choudhury*, 9 W. R. 242, and the recognition of that case by this Committee in *Ram Sabuk Bose v. Monmohini Dossee*, L. R. 2 I. A. 74. The same case has been again recognised by this Committee in *Maharajah of Burdwan v. Tarasomdari Debia*, L. R. 6 I. A. 19; 1. L. R. 9 Cal. 619 : but it is no authority for the proposition for which it is cited. It has been above pointed out that the formalities which the zemindar has to observe, and the evidence by which that observance has to be proved, are two totally distinct things. All that Sir B. Peacock decided was that if the observance of the requisite formality was distinctly proved, it was not necessary to have the mode of proof which the regulation directs. In the case of *Maharajah of Burdwan v. Tarasomdari Debia*, L. R. 6 I. A. 19; 1. L. R. 9 Cal. 619, this Committee found that the question whether requisite formality had been observed depended on conflicting evidence, but that the statutory mode of proof had clearly not been followed, and they held, that the decision must go against the zemindar, whose business it was to follow the prescribed method. They did not differ from Sir Barnes Peacock nor did they hold that statutory proof was the only proof that could be given. Neither did Sir Barnes Peacock decide or intimate any opinion that one of the important formalities required as preliminary to a sale could be dispensed with. Mr. Justice Glover rests his decision wholly on that of Sir B. Peacock, and its recognition by this Committee. And their Lordships observe that Mr. Justice Romesh Chunder Mitter, who adds other reasoning, is a party to the judgment now appealed from, apparently without dissent."

[365] APPELLATE CIVIL.

The 11th and 12th June, 1873, and 15th June, 1876.

PRESENT :

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE D. N. MITTER.

Adhiranee Narain Coomary.....One of the Defendants.

versus

Shona Malee Pat Mahadai (Plaintiff) and Biddya Dhur.....Defendant.*

Hindu Law—Widow—Maintenance—Lien on Estate of Husband—Bonâ fide Purchaser.

The lien of a Hindu widow for maintenance out of the estate of her deceased husband is not a charge on that estate in the hands of a *bonâ fide* purchaser irrespective of notice of such lien.

A Hindu widow, before she can enforce her charge for maintenance against property of her deceased husband in the hands of a purchaser from his heir, must show that there is no property of the deceased in the hands of the heir.

Debts contracted by a Hindu take precedence of his widow's claim for maintenance, and *semble*, that if a portion of his property is sold after his death to pay such debts, the widow cannot enforce her charge for maintenance against such property in the hands of the purchaser.

Quære.—Whether a Hindu widow, by obtaining against her husband's heir a personal decree for maintenance unaccompanied by any declaration of a charge on the estate, does not lose her charge upon the estate.

THIS was a suit by a Hindu widow for maintenance. The plaint stated that the plaintiff was the widow of the late Raja of Killa Koojung: that Biddya Dhur, the defendant, who had succeeded to the raj in accordance with the custom of the family, refused to pay her maintenance, and she sued him, and on the 11th of February 1862 obtained a decree for maintenance at Rs. 100 per month: that her maintenance had since been paid up to May 18th, 1868: that Biddya Dhur, defendant, had sold the raj (estates) for the payment of his debts, and the defendant Adhiranee had become the purchaser and obtained possession thereof: that Adhiranee had refused to pay the plaintiff's maintenance, and hence she brought this suit for the amount thereof from 19th May 1868 to 14th May 1871, amounting to Rs. 3,586-10-8.

[366] The defendant Adhiranee filed a written statement, in which she submitted that the suit was not maintainable against her: that she was not a party to the suit in which the plaintiff had obtained a decree for maintenance: that the defendant Biddya Dhur was the sole proprietor of the property purchased by her, and neither the plaintiff nor any other person had any interest or proprietary right in the same; and that the property was not liable to the payment of the plaintiff's claim on it.

The defendant Biddya Dhur also filed a written statement denying his personal liability, and submitting that if recoverable at all the claim was recoverable from the defendant Adhiranee, as the decree for maintenance had been made against the property purchased by her, and that he was entitled to his costs, having been unnecessarily made a defendant.

* Special Appeal, No. 1888 of 1872, against a decree of the Officiating Judge of Zilla Cuttack, dated the 2nd May 1872, affirming a decree of the Officiating Subordinate Judge of that district, dated the 23rd December 1871.

The Subordinate Judge of Cuttack decided that the defendant Adhiranee was liable for the claim, and that no liability attached to the other defendant. In support of his opinion he referred to *Mussamat Khukroo Misra v. Jhoomuck Lall Dass* (15 W. R., 263), and *Ramchandra Dikshit v. Savitribai* (4 Bom. H. C., A. C., 73).

On appeal the Officiating Judge of Cuttack upheld the decision of the Subordinate Judge, on the ground "that the precedents quoted by him in a manner (though not directly) support the view that a charge of maintenance decreed to a widow against a former holder of an estate will follow the estate even if it be sold in satisfaction of debts due by proprietors thereof."

The defendant Adhiranee appealed to the High Court, on the grounds that as purchaser of the property at a sale in execution of a decree against the proprietor thereof, she was not liable for maintenance; that the decree for maintenance was a personal decree against the defendant Biddya Dhur, and did not bind her; that the rulings cited were not applicable to this case; that the plaintiff could not claim maintenance from her, until it was clearly proved that she had failed to recover it from the other defendant, who was primarily liable for the same.

Mr. Woodroffe (with him Baboos Juggodanund Mookerjee, [367] Mohesh Chunder Chowdhry, and Chunder Madhub Ghose) for the Appellant.

Baboos Obhoy Churn Bose and Romesh Chunder Mitter for the Respondents.

Mr. Woodroffe. —The appellant as purchaser of this property in execution of a decree is not liable to have the plaintiff's claim for maintenance made a charge on the property. The decree for maintenance was not made against her, and she took the property without notice of the plaintiff's alleged claim upon it. The defendant Biddya Dhur is primarily liable; the decree was passed against him, and he is in possession of the proceeds of the sale of the property which is liable for this claim.

A widow has a right to maintenance from one who takes her husband's property as heir, but irrespective of notice she has no claim against a purchaser at a sale in execution of a decree. The learned Counsel cited the cases of *Srimati Bhagabati Das v. Kanailal Mitter* (8 B. L. R., 225), *S. M. Nistarini Das v. Mukhnilal Dutt* (9 B. L. R., 11) and *Manjula Devi v. Dmonath Bose* (4 B. L. R., O. C., 72). The payment of debts, though a charge on an estate, is not a charge on any specific portion of such estate—*Nilkant Chatterjee v. Peari Mohun Dass* (3 B. L. R., O. C., 7). The cases relied on in the judgment of the lower Court are not applicable. Even if they are, the portions relied on are mere *obiter dicta* in those cases.

Baboo Obhoy Churn Bose for the Respondents.—The question of notice was not raised before, and consequently there being no objection of such a kind, no evidence on the point was offered.

The defendant never alleged she was not aware of the existence of the several members of the family. The property in question was a raj. The cases of *Mussamat Khukroo Misra v. Jhoomuck Lall Dass* (15 W. R., 263) and *Ramchandra Dikshit v. Savitribai* (4 Bom. H. C., A. C., 73), relied on by the lower Appellate Court, are applicable [368] and support the respondents' contention. The claim for maintenance of a Hindu widow remains a charge on the property notwithstanding alienation—*Heeralal v. Mussamat Kousillah* (2 Agra H. C., 42).

Baboo Romesh Chunder Mitter on the same side.—The widow can enforce a claim for maintenance against a purchaser. Notice is immaterial—*Heeralal*

v. Mussamat Kousillah (2 Agra H. C., 42). In a case of forfeiture to Government she has been held entitled to her maintenance as a charge on the property forfeited—*Mussamat Golab Koonwar v. The Collector of Benares* (4 Moore's I. A., 246); see also *Varden Seth Sam v. Luckpatty Royjee Lalluh* (9 Moore's I. A., 303).

Mr. Woodroffe in reply. —The cases cited are distinguishable from the present one. Those are cases of a charge recognized by law being allowed unless the alienee can come in and show he is a *bonâ fide* purchaser for value without notice. Here a specific claim must be made and notice of such claim shown—*Mussamat Goolabi v. Ramtahal Rai* (1 All. H. C., 191). An equitable mortgagee must come in and prove his rights. In *Mussamat Golab Koonwar v. The Collector of Benares* (4 Moore's I. A., 246), the right to maintenance was not disputed: see *Gunga Bae v. The Administrator-General of Bengal* (2 I. J., N. S., 124). Such a charge cannot be enforced in a case of dower in Mahomedan law—*Mussamat Wahidunnissa v. Mussamat Shubratun* (6 B. L. R., 54). With regard to debts being a charge on an estate, see *Brj Bhukan Lal Awustee v. Mahadeo Dobay* (15 B. L. R., 145 note). No authority has been shown which decides that there is a charge for maintenance on all and every part of property alienated if the purchaser has taken without notice of the claim.

Cur. adv. vult.

The Judgment of the Court was delivered by

Jackson, J.—This special appeal was heard by the late Mr. Justice MITTER and myself. We took time to consider our [369] judgment, and, shortly after, the illness of my lamented colleague, which continued for some months and was followed by his death, prevented our giving any joint decision, and the parties subsequently requested that I, as the surviving member of the Division Court, should give my judgment, which they agreed to treat as if it had been the judgment of both Judges. Public avocations have left me little leisure, and delay has occurred which I regret very much, but I have given the case my best consideration, and have now arrived at a conclusion. The facts were these:—The plaintiff, Raneo Shona Malee, was the widow of one Ram Hurry, who in his lifetime was the Rajah of Killa Koojung. He had not been in the direct line of succession, but came in after the demise of his elder brother and of that brother's son. Rajah Ram Hurry, on his death was succeeded by the defendant No. 2, Rajah Biddya Dhur, and he, having refused to allow proper maintenance to the plaintiff, was sued by her, and she recovered a decree for maintenance at the rate of Rs. 100 per mensem. After that the Rajah being greatly indebted, Killa Koojung, which appears to have been the principal ancestral property of this Raj, was sold in execution of a decree, and was purchased by the first defendant, Moharane Narain Coomary, who is the wife of the Maharajah of Burdwan, and the plaintiff alleges that no payment of the amount of her maintenance having been made since the 19th May 1868, she has brought the present suit to recover Rs. 3,586, being the amount due for a little less than three years.

The defendant Moharane pleaded that the decree which the plaintiff had obtained for her maintenance was one personal to the Rajah, defendant No. 2, and had no concern with the immovable property Killa Koojung, which property, she said, had been sold on account of the debts of defendant No. 2 and of his ancestors. The Rajah defendant's answer was, that the decree for maintenance had been given against him with advertence to the profits of the Killa, which he held by inheritance, and this property having now gone out of his hands and passed to the defendant No. 1, he was no longer liable. Without going very fully into the course which the judgment of the first Court took, it

may be stated shortly that, [370] in the opinion of the Subordinate Judge, a claim on the part of a Hindu widow for maintenance is good, not only against the persons allied by relationship to the deceased husband, but also against any person into whose hands the husband's property may have come. In other words, he considered it to be a charge upon the estate. He says:—"There is no evidence to show that there is any other paternal property in the hands of defendant No. 2, from which the said maintenance allowance of the plaintiff can be supplied," and therefore he thought that the second defendant Rajah was not liable, and that the first defendant, who now held Killa Koojung, was liable. He therefore gave a decree against her for the amount claimed. In support of this opinion, he referred to two authorities—of *Mussamut Khukroo Misra v. Jhoomuck Lall Dass* (15 W. R., 263), and the other, a case which he does not seem to have consulted in the original reports, but to have found in the Indian Digest—the case of *Ramchandra Dikshit v. Savitribai* (4 Bom. H. C., A. C., 73).

The defendant Ranees appealed, and the District Judge who heard the appeal affirmed the judgment of the Court below upon what may be called general considerations of equity, but without adding anything to the strength of the decision. The defendant has appealed specially to this Court.

It is not alleged (indeed the contrary appears to be the case) that the defendant had any notice of the claim of the plaintiff to maintenance out of this property at the time when she purchased it, and the question therefore is whether in such circumstances the plaintiff's family and the property being subject to the Mitakshara law, a claim for maintenance would constitute a charge upon the immoveable estate of her husband into whosoever's hands it may have gone, and with or without notice of the claim, so that the defendant is liable to satisfy this demand. I have looked into all the authorities accessible to me, decided cases as well as works on Hindu law, and I am unable to find any authority, either in accepted rule or in decision, which expressly bears out the plaintiff's contention, the only text relied on, that of Catyayana, being much too vague.

[371] It is necessary therefore to set out the result of such cases as have been decided on similar questions by the Courts in Bengal and elsewhere. As regards cases under the Bengal law I think it clear upon the authorities here that no such claim can be supported. The cases cited before us were that already mentioned—of *Mussamut Khukroo Misra v. Jhoomuck Lall Dass* (15 W. R., 263), *Nilkant Chatterjee v. Pearl Mohun Dass* (3 B. L. R., O. C., 7), *Srimati Bhagabati Das v. Kanailal Mitter* (8 B. L. R., 225), *Mangalla Debi v. Dinanath Bose* (4 B. L. R., O. C., 72), and *Nistarni Dasi v. Makhnallal Dutt* (9 B. L. R., 11). As to the case of *Mussamut Khukroo Misra v. Jhoomuck Lall Dass* (15 W. R., 263), I am bound to say I am unable fully to understand it. The head-note, no doubt, states, amongst other things, as the effect of the decision, that a Hindu widow's maintenance is a charge upon the family estate into whosoever's hands the estate may fall. Now the widow, who was the special appellant in that case, had her special appeal dismissed with costs. It is clear, therefore, that whether we might or might not be inclined to concur in the observation made, that was merely a *dictum*, and not a point decided in the case. The case of *Nilkant Chatterjee v. Pearl Mohun Dass* (3 B. L. R., O. C., 7) hears only very distantly upon this case. What the learned Judge decided in that case and what was affirmed by the Court of Appeal was, that although the payment of debts is a charge on the property of a testator, it is not a charge on any specific portion of the estate. The case of *Srimati*

Bhagabati Dasi v. Kanqalal Mitter (8 B. L. R., 225) is as strong against the plaintiff as anything can be. In that case, according to the head-note, PHEAR, J. laid it down that, by the law of Bengal, a Hindu widow "has no lien on the property for her maintenance against all the world irrespective of notice, though she has a right to maintenance out of such property in the hands of anyone who takes it with notice of her having set up a claim for maintenance against the heir;" and the learned Judge observed at page 229:—"In truth, as I threw out in the course of the argument, if the heir has any power of alienation [372] at all, it would be most unreasonable that a *bona fide* purchaser for valuable consideration should be subjected to the possibility of a charge springing up at any time, though it had no definite existence when he purchased;" and afterwards he says:—"Obviously, the consideration received by the heir for the sale of the deceased's property will, so far as the widow's right of recourse to it is concerned, take the place of the property sold." The case of *Mangala Debi v. Dhananath Bose* (4 B. L. R., O. C., 72) is one where the Court of Appeal, referring to a passage in Colebrooke's Digest, 2nd Volume, page 133, or page 238 folio edition, which is a precept of Catyayana, held that Mangala, the widow, could not be turned out by her son from the apartments in which she lived (and which had been the place of residence used and appointed for her by her deceased husband), upon the son's coming of age. In the case of *Nistarni Dasi v. Makhunlall Dutt* (9 B. L. R., 11), MARKBY, J., following the decision of PHEAR, J., in *Bhagabati Dasi's* case, dismissed the suit, which was a suit by a Hindu widow for a declaration of her right to maintenance out of her husband's estate, which had been mortgaged to the defendant by the heir, and on appeal it was held that the suit should not have been dismissed by reason of a mistake in the form of the suit, but that the right of the plaintiff should have been enquired into and such relief allowed as she was entitled to consistently with the case made in her plaint.

Now I proceed to consider the cases decided elsewhere than in Bengal, viz., the Bombay case referred to by the Subordinate Judge, and others which I shall state in order. The case of *Ramchandra Dikshit v. Savitribai* (4 Bom. H. C., A. C., 73), it happens curiously, is explained by the learned Chief Justice Sir RICHARD COUCH, who decided it, during the argument in the case of *Nistarni Dasi v. Makhunlall Dutt* (9 B. L. R., 11). "In that case Savitribai sued the defendant, who was one of three sons of a person named Moreshtar Dikshit, her husband's father, who, she alleged, had supported her after her husband's death, and the defendant contended that as he was only one of three brothers, [373] the suit did not lie against him alone, and the Chief Justice in delivering judgment is reported to have said: "By Hindu law the maintenance of a widow is a charge upon the whole estate, and therefore upon every part thereof. The special appellant is liable for the maintenance." This, as I have said, was explained by the Chief Justice himself in the case of *Nistarni Dasi v. Makhunlall Dutt* (9 B. L. R., 11, at p. 27), where he says:—"The question there was as to whether one brother could be sued alone, and it was held that he could." This case therefore does not help the plaintiff. Then there is the case of *Mussamat Golab Koonwar v. The Collector of Benares* (4 Moore's I. A., 246), relied upon by the plaintiff. In that case three brothers, sons of Ujjib Singh, were charged as being implicated in an insurrection. They were summoned to appear and answer, but they absconded, and thereupon, under Regulation XI of 1796 (since repealed), an order was pronounced by the Governor-General in Council declaring their estate to be forfeited. Thereupon Golab Koonwar seems to have petitioned the Governor-General for the restoration of the estates to her, claiming them as her hereditary property. She was referred by

the Governor-General to the Courts of law. She sued and obtained a decree in the Provincial Court, but that decree was reversed by the Sudder Dewanny Adawlut. Thereupon a further appeal was made to Her Majesty in Council, and amongst the things contended before the Judicial Committee was this, that supposing all other pleas of Golab Koonwur failed, she was at any rate entitled to maintenance out of the whole property of Ujaib Singh whose widow she was, and their Lordships say in the conclusion of their judgment after disposing of the rest of the case:—"The only other question is the right of Mussamut Golab Koonwur to maintenance out of the whole of the property held to be ancestral. Nothing was urged at the bar against this right, and it appears to us that, on the principle of the decree, it ought to have been recognized," and accordingly she was declared entitled to maintenance thereout. Now the ground of that part of their Lordships' decision is explained by PHEAR, J., in giving judgment in the case of *Gunga Bace v. The Administrator-General of Bengal* (2 I. J., N. S., 124). The report begins at page 124, but the page I refer to is 133. PHEAR, J., points out that "the plaintiff's right to maintenance had, by the death of her husband, become an actual charge on the estate in question before the cause of forfeiture had accrued. Her claim was an existing burden on the share which her sons took in those estates at the time that those shares were confiscated, and of course the Government took subject thereto," and looking at the report of the case I find that the forfeiture accrued in the year 1800, whereas Golab Koonwur had become a widow in 1786, some thirteen or fourteen years before, so that it may be fairly supposed that she had been receiving maintenance out of the estate, and it appears from the Privy Council judgment that the Government, as might be expected, did not think fit to object to her so receiving maintenance.

Then there are two cases from the reports of the High Court, North-Western Provinces, which are of great importance, because they bear directly upon the subject-matter, the parties there being also subject to the Mitakshara law. The first case is *Heeralal v. Mussamut Kousillah* (2 Agra H. C., 12). In this case, where the widow succeeded, it appears that the widow had asserted her right to maintenance and objected to the conveyance of the property, so that the purchaser had full notice of her claim, and he had even sought to defeat its operation by causing a stipulation to be inserted in the kabala, that Rs. 1 a month should be paid to the widow in satisfaction of that claim of hers by the vendor. The Court accordingly very naturally held that this constituted a charge of which the purchaser had notice, and that it consequently was binding on the property in his hands, the stipulation as between vendor and purchaser of course not affecting the widow's rights, but it is noticeable that the Court observed that the decree ought to have been against the heir first, and failing him against the other defendant holding the property, and they altered the decree accordingly. Now it was contended in special appeal before us with reference to this case that, where the lien existed, notice was immaterial. I observe, however, [375] that the learned Judges in deciding that case laid distinct stress upon the fact of notice, and it appears to me very reasonably. The other case from the North-Western Provinces is *Mussamut Goolabi v. Iamtulal Bai* (1 All. H. C., 131). In that case the converse decision took place. The learned Judges observe, speaking of the judgment of the Court below:—"Admitting the widow's right against her deceased husband's property, and that it avails, and is a charge on such property in the hands of a purchaser by private sale who buys from the descendants of the husband with notice of the widow's claim as has been decided in the case of *Heeralal v. Mussamut Kousillah* (2 Agra H. C., 42) which

I have just cited in the Courts below, the Judge distinguishes the present case. The purchaser buying at a sale in execution of a decree bought the rights and interests of the judgment-debtor in the 2-anna share which was sold, and which the widow seeks to charge in his hands with her maintenance. At the time of the sale, and subsequently in a regular suit, the widow, who is now appellant, claimed one-half of the 2-anna share as her own property and put forward no claim to maintenance." There the learned Judges say:—"The special circumstances of the property which has thus been redeemed by the son after his father's death, and which the latter had never held except in its encumbered condition, and the conduct of the widow in asserting her right as proprietor to three-fourths of it, and making no mention of any claim on account of maintenance, are certainly distinguishing circumstances in the present case. The Judge held that a purchaser buying under such circumstances was justified in believing that no claim for maintenance would be advanced. The proprietary title relied on was wholly inconsistent with such a claim. We think his conclusion, that the widow could not enforce her right against the purchaser, is open to no legal objection, and his decree should be maintained;" so that, finding the purchaser to have bought the property under circumstances which did not lead him to suppose that any claim for maintenance would be advanced, they refuse to enforce that claim against the property in his hands.

Then a case was cited of *Varden Seth Sam v. Luckpatty Royjee* [376] *Lallah* (9 Moore's I. A., 303, at p. 322). That was a case of an equitable mortgage, and their Lordships observe:—"The question to be considered is, whether the third and sixth defendants respectively possessed the land free from that lien, whatever its nature. As one who owns property subject to a charge can, in general, convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to defeat such prior charge. Let it be conceded that a purchaser for value *bona fide* and without notice of this charge, whether legal or equitable, would have had in these Courts an equity superior to that of the plaintiff, still such innocent purchase must be not merely asserted, but proved in the cause, and this case furnishes no such proof." Now upon that I think it may be observed, deferring entirely to what is stated by the Judicial Committee there, that the holder of a lien on specific property is in a different position from a person possessed of a right which is held to constitute a charge on the general estate of a deceased person. In the former case the innocent purchase has no doubt to be proved before the prior charge can be defeated. In the latter I should be inclined to hold that the purchaser must be affected with notice of the charge, and so the North-Western Provinces Court appears to have held.

Now, one of the arguments used by the Subordinate Judge in favour of his judgment is this:—He says: "As the plaintiff could lay claim against him into whose hands the property belonging to her husband first passed, so she can prefer a similar claim against the female defendant, as the said property has now passed into her hands." That argument seems to amount to this, that the suit against this purchaser is no more than a logical sequence of the first suit against the heir. But is that so? It appears to me there is a distinction, because the widow, in bringing her first suit against the heir, was in this position, that she had a claim for maintenance firstly against the estate of her deceased husband, nextly against her husband's relations. Now as against the Moharane, the purchaser of this property, she had no personal claim whatever. Therefore, I think, there is no analogy between her claim in the two cases. It was a point of some importance [377] raised upon the defendant's answer, that the debts which led to the sale of this property were not entirely the debts of the

present Rajah. That is a statement which at least is exceedingly probable, and if these debts were partly ancestral, I think it must be said that the widow's right to maintenance would be subject to the duty of paying those debts, that is, that her claim to maintenance would be upon the residue after paying such debts and would be regulated by the amount thereof, and the other claims to maintenance then valid. It is also as it seems to me a matter of doubt whether the widow by obtaining a definite personal decree against the Rajah did not modify the nature of her right so as to place herself in an inferior position as regards the lien over the property which she originally had. Why did she not, in bringing her first suit have it declared that the maintenance which she claimed was a charge upon the husband's estates and amongst other things upon Killa Koojung? and this suggests a very cogent reason, as it seems to me, why the Court should not be ready to recognize such claims against purchasers of estates from Hindu heirs. The consequence of admitting such a claim as this would probably be to bring in a crowd of other claimants to the great peril of, and possibly fraud upon, the purchaser. From the statements made in the plaint, it seems pretty clear that this Raj has changed hands several times in a comparatively short space of time. It seems that of the persons mentioned Junardon first became Rajah. On his demise, his son, Lukshindur, succeeded. After his decease, the plaintiff's husband became Rajah, and after him came defendant No. 2 whose precise relationship is not clear, but who is spoken of as being the nephew of the plaintiff's husband. The result of that would be that there might easily be many Ranees, all as widows having claims to maintenance upon this estate, of all which claims the purchaser would have no notice at all, and he might be overwhelmed with claims of that description. Again, the Subordinate Judge, when saying that it does not appear that any other ancestral property was in the hands of the Rajah defendant, quite omits to notice the claim which the plaintiff might have made against the surplus proceeds of this property when sold. Why did she not get those attached and obtain an [378] order for the payment of her maintenance thereout. There is nothing on the face of either of these decisions to show that the whole of the Rajah's estate has been sold, and considering that the plaintiff's first claim was undoubtedly upon the Rajah, it lay upon her to show that his estate has been exhausted before she could come upon the property in the hands of the first defendant. On all these grounds, it appears to me that the plaintiff's suit as against the Maharanee defendant was not good, that the judgments of the two Courts below were erroneous, and that those judgments ought to be reversed with costs.

Appeal allowed.

NOTES.

[FOLLOWING PROPERTY FOR MAINTENANCE :—

The circumstance of the purchaser's having notice of the claim does not suffice to entitle the widow to follow the property. Whether the purchaser had or had not notice, he is unaffected when the sale is for payment of debts, etc.; :—(1877) 2 Bom., 494.

When the maintenance has been expressly charged on the purchased property, it will be liable although it be shown that there is property in the hands of the heirs sufficient to meet the claim, but the property will not be liable if the transfer was made to satisfy a claim for which the ancestral property is liable by Hindu Law and which under that law takes precedence of that of maintenance :—(1882) 4 All., 296 F.B.

The widow can follow the property when the alienation was made in fraud of her right :—(1880) 5 Bom., 99.

She can also follow the property when the alienation is made pending a partition suit on which she is entitled to a share though it is in lieu of maintenance :—(1899) 27 Cal. 77 ; (1900) 27 Cal., 551.

The right to maintenance was held not to require registration under Registration Act XX of 1866 :—(1881) 3 Mad., 184.]

[1 Cal. 379]

The 28th March, 1876.

PRESENT :

MR. JUSTICE GLOVER AND MR. JUSTICE MITTER.

Arfunnessa.....One of the Defendants

versus

Peary Mohun Mookerjee.....Plaintiff.

Resumption, Suit for—Onus Probandi—Auction-Purchaser.

Certain lands which had been let out in putni were, on default by the putndar in payment of rent, sold by auction under Reg. VIII of 1819 and purchased by M who granted them in putni to the plaintiff. In a suit for resumption on the allegation that the defendants were in possession of a portion of the lands as invalid lakhiraj by withholding payment of the mal rent thereof from after 1793, the defence was that the lands in dispute were valid rent-free lands existing as such from before 1790. Held that, on the grounds of the decision of the Privy Council in *Harshav Mukopadhyaya v. Madab Chandra Babu* (8 B. L. R., 566; S.C. 14 Moore's I. A., 152), the principle that the onus is on the plaintiff to show that the lands are mal applies to cases where the plaintiff, as in the present case, is the representative of an auction-purchaser.

SUIT for establishment of mal right by resumption of certain lands which the plaintiff alleged were invalid rent-free lands. The lands in question were purchased by the Maharajah of Burdwan in 1862 at a Government revenue-sale, and let out in putni to Bani Madhub Bandopadhyaya, but on his default in payment of rent, they were sold by auction under Reg. VIII of [379] 1819 and purchased by the Maharajah who granted them in putni to the plaintiff, and he, alleging that the defendants were in possession of a portion of the lands as invalid rent-free lands by withholding payment of the mal rent thereof from after 1793, brought the present suit for resumption of the lands.

The defence was that the lands in dispute were valid rent-free lands existing as such from before 1790 : that the defendants had purchased them at auction-sales at various times, and that they had not made the lands lakhiraj by misappropriating the mal right. The Munsif held that the onus of proof was on the defendants, but that they had shown the lands to be rent-free, and he therefore dismissed the plaintiff's suit. On appeal, the Subordinate Judge confirmed that decision. Subsequently on review he allowed a portion of the plaintiff's claim, holding that the defendant had failed to establish his case with reference to it.

The defendant, Arfunnessa, appealed from the decision given on review, on the ground among others that the Courts below were wrong in throwing the

* Special Appeal No. 992 of 1875, from a decision passed by the Subordinate Judge of East Burdwan, dated the 30th December 1874, modifying a decree of the Munsif of Katwa, dated the 19th June 1873.

burden of proof on the defendants; and that the plaintiff must first prove his allegation that the lands were mal before the defendant could be called upon to show they were lakhiraj.

The arguments are sufficiently stated in the **judgment** of MITTER, J.

Babuoo *Shamlal Mitter* and *Annund Gopal Palit* for the Appellant.

Baboo *Aushotosh Mookerjee* for the Respondent.

Mitter, J.—This was a suit for resumption of 7 bighas 15 chittacks of land held by the defendant under an alleged lakhiraj title. The plaintiff is the representative of an auction-purchaser, and the suit was commenced within twelve years from the date of auction-purchase. The plaintiff alleged that the land in suit appertained to the mal estate, and was held under the pretence of a lakhiraj title by withholding payment of mal rent only from a comparatively recent time. The defendant alleged that the lands in suit were valid lakhiraj. At first both [380] the Courts below dismissed the plaintiff's suit, notwithstanding that they held that the *onus* of proof in such a case as this was upon the defendant. The lower Appellate Court, on an application of review having been made, has given to the plaintiff a decree for a portion of the land, holding that the defendant has failed to establish his case with reference to it. The defendant has preferred this special appeal against that decision.

The only question raised before us is that the lower Courts were wrong in throwing the burden of proof upon the defendant. We think this contention is valid, and is supported by a Full Bench decision of this Court—*Parbat Churn Mookerjee v. Raj Krishna Mookerjee* (B. L. R., Sup. Vol., 162), and a decision of the Judicial Committee of the Privy Council in *Harhar Mukopadhyay v. Madab Chandra Babu* (8 B. L. R., 566, S. C., 14 Moore's I. A., 122).

The learned pleader for the respondent, on the other hand, contends that the Full Bench decision quoted above does not apply to this case, because the plaintiff represents an auction-purchaser, and it has been so decided by this Court in three cases—*Forbes v. Sheikh Mean Jan* (3 W. R., 69), *Shamlal Ghose v. Sekunder Khan* (3 W. R., 182), and *Nobolal Khan v. Adheranee Narain Kunwaree* (5 W. R., 191). The first two cases fully support his argument, and it can be inferred from the report of the third case, that the learned Judges, who admitted the application of review referred to in it, were also of that opinion.

But we think that the question before us has been conclusively set at rest by the Privy Council judgment referred to above. Although from the report of that case it does not appear whether the plaintiffs there any way represented auction-purchasers for Government revenue or not, yet an examination of the grounds upon which it is based shows that its principle is applicable to cases of ordinary nature as well as of auction-purchases.

In the first part of the decision, the remarks of the Judicial Committee who passed it proceed to examine the provisions of the Regulations bearing upon the question, and the result according to that examination was that suits for resumption of [381] invalid lakhiraj lands that existed at the time of the permanent settlement were dealt with under the provisions of a special and exceptional Regulation, *viz.*, Reg. II of 1819. In such suits there is a presumption in favour of the plaintiff arising out of the declaration made in the Regulations that "the ruling power" was entitled *prima facie* "to a certain

proportion of the produce of every *biga*," that in these exceptional cases the defendant has generally to support the burthen of proof.

"The invocation of the 30th section of Reg. II of 1819" they observe "is not mere matter of form to be rejected as surplusage. The effect of it is to cause the case to be tried according to the procedure and presumptions prescribed by that enactment and the enactments in *pari materia* greatly to the advantage of the plaintiff, and consequently to the prejudice of the defendant" (8 B. L. R., 578; and 14 Moore's I. A., 172).

This was not a suit under the 30th section of Reg. II of 1819, and in fact by the provisions of s. 14 of Act XIV of 1859 (which provisions have been re-enacted in the present Limitation Act), such a suit now cannot be maintained with success. Because once you admit that the lakhiraj tenure existed at the time of the permanent settlement, and this must be admitted to bring the case within Reg. II of 1819, you are hopelessly barred. Therefore the presumption which arises in such suits in favour of the plaintiff, and which relieves him from any burthen of proof further than to establish that the land in suit is within the ambit of his estate, does not arise in favour of the plaintiff in this case by reason of the special provisions of the lakhiraj regulation mentioned above. Then let us see whether that presumption avails the plaintiff in any way in a suit like the present which was brought upon the allegation, that the lands sought to be resumed did not form any existing lakhiraj tenure at the time of the permanent settlement, but were assessed with revenue and constituted a part of his mal estate. The presumption in question carries the plaintiff's case no further than this, that every biga of land, within the ambit of his estate under the provisions of the lakhiraj regulation, was liable to be assessed with Government revenue, and the [382] title to especial exemption must be made out by the party setting it up. But this is not sufficient to start a case for the plaintiff in a suit of the present description, because there is no presumption that every biga of land within the ambit of an estate must be deemed to have been assessed with revenue until the contrary is proved. The following passage from the Privy Council report referred to above shows that it is upon this ground that the Judicial Committee have held that the burden of proof in these cases is upon the plaintiff.

"Again their Lordships think that no just exception can be taken to the ruling of the High Court, touching the burthen of proof, which in such cases the plaintiff has to support. If this class of cases is taken out of the special and exceptional regulation concerning resumption suits, it follows that it lies upon the plaintiff to prove a *prima facie* case. His case is that his mal land has since 1790 been converted into lakhiraj. He is surely bound to give some evidence that his land was once mal" (8 B. L. R., 579; and 14 Moore's I. A., 173, 174).

Then further on they observe:—"Mr. *Doyme* argued that the defendants had admitted that the lands in question were within the appellant's estate. But such an admission is obviously not sufficient to meet the burthen of proof thrown upon the plaintiff. It was at most an admission that the lands were within the ambit of the estate, not that they had ever been mal lands."

Now these are the grounds upon which their Lordships of the Judicial Committee have held that the burthen of proof is upon the plaintiff, and unless we hold that in the case of an auction-purchaser as soon as it is proved that a particular plot of land is within the ambit of his estate, there arises a presumption in his favour that it was assessed with revenue at the time of the

permanent settlement, there seems to be no valid reason why we should hold that the grounds are not applicable to the present case. Therefore, notwithstanding the decisions of *Forbes v. Sheikh Meanjan* (3 W. R., 69), *Shamlal Ghose v. Sekunder Khan* (3 W. R., 182), and *Nobolal Khan v. Adheranee Narain Koonwaree* (5 W. R., 191) cited on behalf of the respondent, we must hold on the authority of the [383] Privy Council decision quoted above that the lower Courts have erred in relieving the plaintiff from the burthen of proof which ordinarily falls upon him. How far has the plaintiff been able to discharge that burthen it is not for us in special appeal to decide. We must, therefore, reverse the decree of the lower Appellate Court so far as it is favourable to the plaintiff, and remand the case to that Court for re-trial as regards the particular portion of the claim which was decreed in his favour. Costs to abide the result.

Glover, J.—I concur in this judgment, and, in doing so, I do not forget that I at one time held a different opinion.

Appeal allowed.

NOTES.

[ONUS—

In resumption proceedings, in respect of lands within the ambit of a zamindari which are claimed by the tenant to be lakhiraj the *onus* is upon the plaintiff to prove that they are mal : —(1883) 9 Cal., 813.]

[1 Cal. 383]

APPELLATE CIVIL.

The 4th April, 1876.

PRESENT :

MR. JUSTICE BIRCH AND MR. JUSTICE MORRIS.

In the Matter of the Petition of Soorja Kant, Acharj Chowdry."

Appeal—Req. VIII of 1819, s. 6—24 & 25 Vict., c. 104, s. 15.

There is no appeal from an order made by the Civil Court under s. 6 of Regulation VIII of 1819.

Per BIRCH, J.—A party who has preferred an appeal to the High Court when the law gave him no right of appeal, is not entitled upon the hearing to ask the Court to treat it as an application for the exercise of its extraordinary jurisdiction under s. 15 of 24 & 25 Vict., c. 104.

THE appellants in this case were the owners and zamindars of an estate called Shershabad. The respondent, having acquired by purchase a putni tenure within this estate, applied to the zamindars to give effect to the transfer by registration of his name in the zamindari serishtah or office, but being refused made an application to the Civil Court of the district where the property was

* Miscellaneous Regular Appeal No. 367 of 1875, against the order of the Officiating Judge of Zilla Dinagepore, dated the 14th of August 1875.

situated, under the provisions of s. 6, Regulation VIII of 1819.* The District Judge, upon such application, issued the order, from which the present appeal was brought, directing the zamindars to give effect to [384] transfer without delay in accordance with the law. The Judge's order was drawn as follows :—
 " For the above reasons this case is decreed in favour of applicant. An injunction will issue on the zamindar under s. 6, Regulation VIII of 1819, to accept the security tendered, and give effect to the transfer without delay."

The zamindars appealed to the High Court from the above order.

Baboo Jadub Chunder Seal for the Appellants.

Baboos Mohinee Mohun Roy and Golap Chunder Sircar for the Respondent.

The arguments are sufficiently set forth in the **Judgment** of the Court, which was delivered by

Birch, J.— This appeal is preferred against a summary order of the District Judge passed under s. 6 of Regulation VIII of 1819, directing the zamindar to accept the security tendered, and to give effect to the transfer without delay.

A preliminary objection has been raised that no appeal lies to this Court from such an order ; and we are of opinion that the objection must prevail. The pleader for the appellant has been unable to show us any law which authorizes an appeal from an order under s. 6. His argument is that an appeal lies, because the Judge has used the word 'decreed,' and has drawn up an order in the form of a decree directing that an injunction should issue. We think that the fact of the Judge having dealt with the application in this manner does not entitle the appellant to come up here in appeal when the law does not provide for an appeal from an order passed under s. 6 of Regulation VIII of 1819.

It is then urged by the appellant's pleader that if we are against him on this point, we should still, under the circumstances of this case, exercise the extraordinary powers vested in this Court by s. 15 of the Charter Act.

Speaking for myself I must say that it is not in my opinion open to parties, when they find that they have adopted a wrong [385] course and filed an appeal when no appeal is allowed by law, to turn round and say that the Court is bound to exercise its extraordinary jurisdiction. Upon this application, as to whether there may be grounds for interference under s. 15 or not, I pronounce no opinion. All that I say is that I decline to treat this petition of appeal as an application to us to exercise our extraordinary powers under s. 15.

Appeal dismissed.

* [Sec. 6 :—It shall be competent to the zamindar, or other superior to refuse the registry

Zamindars may refuse sanction to transfer till fee and security be tendered.

and the party tendering it shall be dissatisfied with such rejection, he shall be competent to

Sufficiency of security, if contested to be determined by appeal to Civil Courts.

appeal therefrom by petition or common motion in the Civil Court of the district, which authority, if satisfied of the sufficiency of the security tendered, shall issue an injunction on the zamindar to accept it and give effect to the transfer without delay. It is hereby provided that the rules of this and of the preceding section shall not be held to apply to transfers of any fractional portion of a putnee talook, nor to any alienation other than of the entire interest, for no apportionment of the zamindars reserved rent can be allowed to stand good unless made under his special sanction.]

[1 Cal. 385],
APPELLATE CIVIL.

The 10th April, 1876.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE MITTER.

Futeok Parooee.....One of the Defendants

versus

Mohender Nath Mozoomdar.....Plaintiff.

Costs—Special appeal - Order in discretion of Lower Court.

Where, in a suit for defamation, a decree was given for the plaintiff for nominal damages, but he was ordered to pay the defendant's costs, *held* that the order as to costs was in the discretion of the Court below, and therefore no special appeal would lie from such order. The rule as laid down in *Grudhari Lal Roy v. Sunder Bibi* (B. L. R., Sup. Vol., 496) being that an order as to costs cannot be interfered with in special appeal unless it is illegal.

Semle--When the Court is of opinion that the plaintiff is not entitled to any substantial damages, it is not bound to award him nominal damages.

SUIT for Rs. 100 as damages for defamation. The plaintiff had previously instituted proceedings for criminal trespass in respect of the same matter in the Criminal Court against the defendants, which led to their being convicted and fined Rs. 5 each. The Munsif found that, under the circumstances, the plaintiff was entitled to damages, and assessed the amount at Rs. 15. He gave the plaintiff a decree for this amount with costs. On appeal by the defendants the Judge was of opinion that "as the plaintiff had already prosecuted the defendants criminally, and they had been fined to such an extent as the Magistrate thought proper, the present suit, although not contrary to law, was clearly a vexatious one, and the plaintiff ought not to [386] recover more than nominal damages." He, therefore, modified the decree of the Munsif by giving the plaintiff a decree for four annas as damages, and ordered him to pay all the costs both in the lower Court and on appeal.

The plaintiff preferred a special appeal to the High Court from this decision, on the grounds that it was erroneous in law in holding him entitled to only nominal damages, that the defendants ought to have been ordered to pay the costs of the suit; or that at any rate the plaintiff ought not to have been ordered to pay the defendants' costs.

It appeared that the costs would amount to about Rs. 21.

The appeal came before BIRCH, J., who held that as it was a special appeal he could not go into the evidence to see whether or not the Judge came to an erroneous finding on the facts, but being of opinion that the costs had been awarded on an erroneous principle, he modified the decree appealed from by giving the plaintiff the costs in both the lower Courts, and ordered the defendants to pay the costs of the special appeal.

The defendant Futeok Parooee appealed under s. 15 of the Letters Patent on the ground that the special appeal having failed in every other respect, the order of the District Judge in respect of costs ought not to have been set aside, and that such order having been in the discretion of the District Judge it could not have been set aside in special appeal unless it was an illegal order.

* Appeal under s. 15 of the Letters Patent of 1875, against the decree of BIRCH, J., dated the 20th of August 1875, in Special Appeal No. 2756 of 1874.

Baboo *Aushootosh Mookerjee* for the Appellant.

Baboo *Hemchunder Banerjee* and *Umakally Mookerjee* for the Respondent.

The contentions and the cases cited appear in the **Judgment** of the Court, which was delivered by

Markby, J.—This was a suit to recover damages for defamation. The matter had already been the subject of criminal proceedings. The Subordinate Judge gave the plaintiff a decree for nominal damages; but being of opinion that the suit was a vexatious one, directed the plaintiff to pay the costs of the litigation.

[387] The case having come up to this Court on special appeal, Mr. Justice BIRCH was of opinion that there was no ground upon which he could interfere with the decree for nominal damages, but being of opinion that the plaintiff ought not to have been made to pay the costs of the suit set aside the order of the Subordinate Judge as to costs, and directed that the plaintiff should recover the costs of the litigation.

It is contended before us that, in special appeal, this Court cannot interfere with the discretion of the Courts below as to costs: and that in this case the award of costs to the defendant notwithstanding that the plaintiff obtained a decree for nominal damages, was within the discretion of the Court below.

Upon the first point we are of opinion that the question is concluded by the decision of the Full Bench in *Gridhari Lal Roy v. Sundar Bibi* (B. L. R., Sup. Vol., 496). It was there laid down that this Court could, in regular appeal, review the exercise of the discretion of the lower Court as to award of costs; but that in special appeal this Court could not interfere unless the order made as to costs was illegal. We have no reason to doubt that this rule, which has also been approved in Bombay in *Amirsabab Hafizulla v. Jamshedji Rustam* (4 Bom. H. C., A. C., 41), followed in *Desaji Lakhmaji v. Bhavanudas Narotamdas* (8 Bom. H. C., A. C., 100); but the opposite view was taken by the Madras High Court in *Sri Dantuluri Narayana Gajapati Razu Garu v. Surappa Razu* (3 Mad. H. C., 113), has been since generally acted on in this Court. The only instances in which there is any apparent departure from it are in the cases of *Mussamat Bibee Moseehun v. Mussamat Bibee Munoorun* (24 W. R., 69) and *Ooma Churn v. Grish Chunder Banerjee* (25 W. R., 22), but the Full Bench decision does not seem to have been there referred to, and we have no reason to suppose that the learned Judges intended to question a rule thus authoritatively laid down. We may also observe that the attention of Mr. Justice BIRCH was not called to the Full Bench decision when the present case was before him. On the other hand, quite recently, a Judge of this Court, acting on the Full Bench decision refused to review in special appeal the discretion of the Court below as to costs.

[388] We think that we ought to follow the Full Bench decision, and to hold that a special appeal will not lie against any order as to costs, which it was within the discretion of the lower Courts to make. It, therefore, remains to consider whether, when a decree had been given for nominal damages, the Court had a discretion to award costs to the defendant. We are of opinion that it had. The Court below thought that though the words complained of had been spoken, the plaintiff was not entitled to any damages, and that to bring this suit after criminal proceedings had been taken in the same matter was vexatious. In substance, therefore, the defendant succeeded in the Court below. Perhaps it would have been better under these circumstances to have

dismissed the suit altogether, the Court in such a case not being bound to award nominal damages. But we are not aware of any law which prevents the Court, if it thinks that the suit is a vexatious one, and that no damage has really been sustained, from giving nominal damages to the plaintiff, and awarding costs to the defendant. The words of s. 187 leave the discretion of the Courts as to costs wholly unlimited, and it would be impossible to say that such an award of costs was illegal.

We, therefore, reverse the order of Mr. Justice BIRCH, and dismiss the special appeal.

Appeal allowed.

NOTES.

[APPEAL IN RESPECT OF COSTS—

Where the matter is purely within the discretion of the Courts no appeal lies ; but where a question of principle is involved an appeal will lie :—(1885) 12 Cal., 179.]

[1 Cal. 388]

ORIGINAL CIVIL.

The 7th July, 1876.

PRESENT :

MR. JUSTICE PONTIFEX.

Suttya Ghosal

versus

Suttyanund Ghosal and others.

Majority Act (IX of 1875), s. 3 - Minor - (Guardian ad litem.

The appointment of a guardian *ad litem* is sufficient to make the minor party subject to s. 3, Act IX of 1875 and to constitute his period of majority at 21, at any rate so far as relates to the property in suit, notwithstanding that such minor would but for such appointment have attained majority at 18.

By the decree in this suit, which was brought in 1871 for partition of the estate of Raja Kallysunkur Ghosal, deceased, [389] it was, amongst other things, declared that Bosoomutty Dabee, one of the defendants in the suit, was entitled to a certain share in the estate ; and that a monthly sum of Rs. 425 should be paid to her husband for her maintenance and support ; and Raja Suttyanund Ghosal and Cowar Sutyakrishna Ghosal were appointed receivers in the suit. At the institution of the suit Bosoomutty Dabee was an infant,* and her husband was appointed by the Court her guardian *ad litem*. The present application was made by her husband and guardian on her behalf for an order that the receiver should pay to him as her guardian the sum of Rs. 4,000 out of her share of the estate to meet extra expenses which had been incurred for Bosoomutty Dabee and her youngest son. Bosoomutty Dabee was, at the time of the application, of the age of 18 years and 2 months.

Mr. Bonnerjee appeared in support of the application.

Mr. Macrae for the receivers.

Mr. R. Allen for Tarrasoondery Dabee, another defendant in the suit.

The application was consented to by all the parties to the suit, but the receivers were unwilling to pay the sum required to the husband, but were desirous that it, as well as the monthly sum allowed for her maintenance, should be paid to Bosoomutty Dabee herself, she having attained her majority.

Mr. *Bannerjee* submitted that, under the Majority Act, IX of 1875, s. 3, Bosoomutty Dabee was still a minor, and remained so until she attained the age of 21 years.

Mr. *Macrae* contended that the words of s. 3 did not apply to a person for whom merely a guardian *ad litem* had been appointed, but only to guardians appointed under Act XL of 1858 and Act XXVII of 1860. The appointment of guardians under those Acts is very different from the appointment of a guardian *ad litem* in a suit such as the present. It could not have been the intention that a minor should be liable to the [390] disqualification attaching to minority being prolonged by a temporary appointment like that of guardian *ad litem*, yet that might be the result of such an appointment in respect of a minor who would otherwise have attained majority at 18, but who notwithstanding the suit was finally determined would still remain a minor until 21.

Pontifex, J.—Act IX of 1875 was passed for the purpose of attaining greater certainty respecting the age of majority, but itself causes the uncertainty out of which this application arises. S. 3 of the Act is as follows:—"Every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act, or in any other enactment, be deemed to have attained his majority when he shall have completed his age of 21 years, and not before."

The suit in which this application is made was instituted before 1872, and when the present applicant was a minor under the age of 18 years. She was made a defendant to the suit, which was for partition. She was at the time a married woman, and her husband, who would have been her natural guardian, was appointed by this Court her guardian *ad litem*. By the decree in the suit it was, amongst other things, ordered, that Rs. 425 out of her share of the income of the estate, which was the subject of the suit, should be paid monthly to her husband as her guardian. The lady having now attained the age of 18, applies for the payment to her in future of the said Rs. 425 and for a sum of Rs. 4,000 out of the accumulations of her share of the minor. The question arises whether she is still a minor. In my opinion she is, for the decree in the suit made her a ward of Court, and I think the appointment by the Court of her husband as guardian *ad litem* was sufficient to bring her within s. 3 of the Majority Act, 1875, at all events so far as relates to the property in suit. I shall, however, order the sum of Rs. 4,000 now applied for and the future maintenance to be paid to her personally, as her guardian consents to such payments being made. The receiver will get his costs, and [391] the infant's costs will be paid out of her share of the estate. Mr. Allen's client's costs will be paid out of her share.

Attorney for the Applicant : Baboo *Joykissen Gangooly*.

Attorneys for Tarrasoodery Dabee : Messrs. *Swinhoe, Law & Co.*

Attorney for the Receivers : Mr. *Carruthers*.

[1 Cal. 391]

PRIVY COUNCIL.

The 11th February, 1876.

PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND
SIR R. P. COLLIER.

Sonet Koor.....Plaintiff

versus

Himmut Bahadoor and others.....Defendants.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

*Istemrari Mokurrari Tenure—Death of grantee without heirs—Escheat—
Recognition of Tenancy.*

Lands belonging to a zamindari granted by the zamindar under an absolute hereditary mokurrari tenure, do not, on the death of the grantee without heirs, revert to the zamindar ; nor does the zemindar, under such circumstances, take by escheat a tenure subordinate to and carved out of his zamindari.

Where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, subject to any trusts or charges affecting it ; and there is nothing in the nature of a mokurrari tenure which should prevent the Crown from so taking it subject to the payment of the rent reserved under it.

The recognition by the owner of lands of the interest of parties in possession by the receipt of rent from them, constitutes a tenancy requiring to be determined by notice or otherwise before such parties can be treated as trespassers.

THIS was an appeal from a judgment and decree of a Division Bench of the Calcutta High Court (L. S. JACKSON and AINSLIE, J.J.), dated the 23rd May 1871, reversing a decree of the Subordinate Judge of Zilla Gaya, dated the 30th March 1870.

[392] The material facts of the case were as follows :—

Modenarain Singh, Rajah of Tekaree, was proprietor of the Mouzah Pranpore in the district of Gaya. He was a Hindu, and had two Hindu wives, Ranee Sonet Koor and Ranee Asmedh Koor. Having had no children by either of these ladies, they on his death succeeded to his estate, which by arrangement between themselves they took in shares of $7\frac{1}{2}$ annas and $8\frac{1}{2}$ annas respectively.

By Buratee Begum, a Mahomedan woman living in his house, Modenarain Singh had a daughter, Shurfoonnissa, and also other children, named Ikbah Bahadoor, Himmut Bahadoor, and Bismillah Begum. Shurfoonnissa, the eldest of these children, was born on the 2nd Magh 1248 (January 1841). Six days after her birth, Modenarain Singh executed in her favour a mokurrari grant of the Mouzah Pranpore, belonging to his zamindari, to be held by her as absolute (*moostakil*) mukurraridar from generation to generation, subject to the payment of a reserved rent of sicca rupees 301 by the year. Shurfoonnissa died very shortly after the creation of this tenure, but from the date of the grant, and subsequent to her death, rent at the reserved rate was received, and

continued to be received, by Raja Modenarain from Buratee Begum. On the death of Raja Modenarain in the year 1857, similar payments continued to be made by Buratee Begum to the Ranees Sonet and Asmedh Koorer of their proportionate shares of the reserved rent ; and on the death of Buratee Begum in the year 1860, rent continued to be paid in like manner by her surviving children down to the year 1865. But in the end of that year an attempt was made by the Ranees to put an end to the tenure by ousting Jodhun Singh, who was in possession of the mouzah under a lease granted in 1862 by Ikbal Bahadoor. In the proceedings arising out of this attempt, the Ranees alleged that the mokurrari grant to Shurfoonnissa was for her life only, and that, on discovering her death, which they said did not take place until after that of Raja Modenarain, they had entered into possession of the mouzah. The Magistrate of Gya finding that receipts had been granted by the Ranees for the mokurrari rent of the year 1865, and that possession was in fact held by Jodhun Singh, by an order passed under s. 318 of the [393] Code of Criminal Procedure, and dated the 7th February 1866, directed that the possession of Jodhun Singh should be maintained, and referred the Ranees to a civil suit.

No further steps were taken by the Ranees Asmedh Koorer, but on the 6th February 1869, Ranees Sonet Koorer instituted the present suit, in which she made Jodhun Singh, Himmut Bahadoor, Bismillah Begum, and Mussamut Sahabzadee Begum, the widow of Ikbal Bahadoor, defendants. In her plaint she set forth that the grant to Shurfoonnissa of Mouzah Pranpore was only for life ; that Shurfoonnissa died without heirs in November 1857 ; that by her death, the plaintiff as taking a $7\frac{1}{2}$ annas share of her deceased husband's estate was entitled to possession of a proportionate share of the mouzah ; that together with Ranees Asmedh Koorer, after hearing of the death of Shurfoonnissa, she had held direct possession of the mouzah till dispossessed by the Magistrate's order of the 7th February 1866, from which date her cause of action arose. She accordingly claimed to recover from the defendants direct possession of $7\frac{1}{2}$ annas share of the Mouzah Pranpore.

The defendants pleaded that the plaintiff had never had direct possession of the mouzah after the death of Shurfoonnissa, which took place more than twelve years before the date of her suit, and that she was consequently barred by limitation ; that the grant to Shurfoonnissa was hereditary, perpetual, and absolute, and did not on her death revert to the grantor or his representatives, but would pass on failure of nearer heirs to the Crown by escheat ; that the right to recover possession, supposing it to have arisen to the zamindar on Shurfoonnissa's death, could not now be enforced, since the plaintiff's husband and afterwards she herself, had acquiesced in the possession and enjoyment of the tenure by the defendants, from whom they had accepted payment of the reserved rent : and further that they (the defendants) were in possession as the lawful heirs of Shurfoonnissa.

The Subordinate Judge of Gya, in whose Court the suit was brought, gave judgment for the plaintiff. He found that the mokurrari grant to Shurfoonnissa was in perpetuity, and not merely for life ; that Shurfoonnissa died early, and that [394] subsequently to her death the defendants had been in possession on payment of rent. But he held that as Shurfoonnissa was illegitimate the defendants were not her heirs ; that the zamindar on her death had a right to resume possession of the tenure which did not revert to the Crown by escheat, and that the zamindar's right was not lost by the acceptance of rent from the defendants, and was not barred by limitation.

The plaintiff's claim was accordingly decreed, but on appeal to the High Court the decree of the lower Court was reversed by the following judgment:—

“The lower Court has held that the grant to Shurfoonnissa was not merely for life, but in perpetuity. But inasmuch as she died childless, and in a recent decision of this Court—*Mussamat Shahabzadi Begum v. Mirza Himmud Bahadur* (4 B. L. R., A. C.,* 103)—it was held that in the circumstances of this family no right of inheritance under Inameah law vests in the surviving brother or sister, the Subordinate Judge came to the conclusion that the grant had become inoperative, and that the grantor had a right to resume it. It was contended before him, that even supposing the defendants not to be rightful heirs, yet the plaintiff would have no right to resume the grant as the property would be liable to be taken by the ruling power as an escheat, and that so long as the party rightfully entitled abstained from pressing his claim, the defendants were entitled to retain possession undisturbed. This plea was overruled on the ground that the defendants in possession were mere trespassers, and that as the legal right to the property is either in the grantor or the Crown, the former, in the absence of any claim by the latter, is entitled to maintain the suit. The defendants also pleaded limitation, but this plea was overruled.

“Mr. Kennedy, who appeared for the special appellants, stated that the main objection to the finding of the lower Court is in respect of that portion in which the Subordinate Judge lays down, that as the succession is vacant the grantor is entitled to re-enter. For the purposes of this appeal we may confine ourselves to this objection.

“The Court below holds that the mokurrari tenure was granted in perpetuity and not for life, and this finding has not been questioned by way of cross-appeal or under s. 348, Act VIII of 1859.

“The grant is made to Shurfoonnissa and her children from generation to generation, and in it she is described as absolute (*moostakul*) mokurraridar.

[395] “Tenures created in these terms and not in any way limited by other special conditions are always treated as of the most absolute character, and are every day transferred both by private sale and in execution of decree. Had Shurfoonnissa conveyed the estate to another, the grantor could not have ousted the assignee. Supposing she had died leaving a husband and children, this estate would have descended according to the ordinary rules of Mahomedan law, and no change in the order of succession would have been caused by the use of the words ‘to her children from generation to generation.’ It is, at least, extremely doubtful, whether the grantor could have altered the course of descent established by law, if he had intended to do so. It is, however, sufficient to say that the terms of the grant are those ordinarily employed in creating an estate governed by those rules, and that if it had been the intention of the grantor to limit the grant in some other mode, he would have specifically stated this intention. In the absence of any words of limitation we cannot hold that the Rajah intended to create anything but an estate in perpetuity with absolute power to the grantee to deal with it as she thought proper, and that he never contemplated the possibility of failure of issue, or intended to interfere with the ordinary course of descent.

“It is hardly necessary to consider the conduct of Rajah Modenarain, which has been referred to as showing that he never thought that his grant was less than absolute; but it certainly was not in any way inconsistent with an intention to grant a mokurrari tenure without any reservation: he made no attempt to resume it on the death of his daughter, but allowed her mother to enjoy it, and it is admitted that up to 1272, seven years after his death, receipts for the reserved rent continued to be granted in the daughter's name, and the mokurrari tenure as originally established was treated as subsisting.

“There is a dispute as to the precise date of Shurfoonnissa's death, the direct evidence on this point on either side is unsatisfactory, but looking to the examination of the Ranees, there is no room to doubt that the plaintiff's case is false, and that in fact Shurfoonnissa

died at an early age. We find that Buratee Begum lived within the Rajah's mansion at Tekaree, and that the particular apartment or building occupied by her stood between the apartments of the Ranees. Those ladies admit, that they know of the existence of the three later born children, and used to see them about the house, but profess never to have set eyes on the eldest. Yet, if the statement in the plaint is true, Shurfoonnissa had attained the age of seventeen years before she died; and it is incredible [396] that these ladies should have known nothing of her. It may not be established with certainty that Shurfoonnissa died on 10th Cheyt 1249, as alleged by defendants, but there can be no doubt that she died in the lifetime of her father, and not two months after him as alleged by plaintiff.

"As it appears to us that the plaintiff has altogether failed to show that any right to resume the grant on failure of issue was reserved to the grantor, we hold that the judgment of the Court below cannot be maintained. The plaintiff can succeed only on the strength of her own title, and not on the weakness of that of the defendants. She is bound to show that she was the party entitled to take the estate when it became vacant on the death of Shurfoonnissa before she can ask the Court to eject the defendants who are in possession.

"The Subordinate Judge seems to think that there is something in the nature of a mokurrari grant which renders it capable of resumption, if there be no known heir of the last holder; but no authority has been shewn to support this opinion. It would hardly be contended that a man who makes a gift has a better title than a stranger to the thing given, if the donee after accepting and holding it for a time should abandon it. The Rajah created a certain estate, and impressed the stamp of perpetuity on it for the express purpose of making a free gift of it to his daughter, and the fact that she had to pay a certain rent, or in other words that the gift was of a part only of the profits of the land, does not make it anything less than a gift. He reserved to himself a certain right over the lands given, namely, the right to receive a fixed rent, but he absolutely divested himself of any other right. The transfer of the property to a stranger in no way affects the right reserved, which attaches to the land in whosoever hands it may be, and is therefore at all times adequately secured. If the rent be not paid there are proper legal remedies, but resumption of the grant is not among these, where there is no express stipulation to that effect.

"We think that the plaintiff has failed to establish any title to resume the mokurrari grant, and therefore without entering into the other questions involved in this suit, we admit the appeal, and reversing the judgment of the Court below dismiss the plaintiff's suit with the costs of both Courts."

From this judgment the plaintiff appealed to Her Majesty in Council.

Mr C. W. Arathoon for the Appellant.—This mokurrari [397] tenure not being an independent estate, but being carved out of the larger estate of the zamindari of Tekaree, has no independent existence, and consequently reverts, on failure of heirs, to the zamindar, or escheats to him as the superior lord, rather than to the Crown. The grant was made for the maintenance of Shurfoonnissa and the heirs of her body. On her decease without heirs, the object of the grant failed, and the tenure merged into the larger original estate. The High Court were mistaken in supposing that in granting a mokurrari lease the zamindar had divested himself of all rights in the lands leased except the right to the reserved rent. The defendants were in the position of mere trespassers against whom the heir of the grantor was entitled to possession. In support of his contentions he referred to Williams on Real Property, 7th edn., p. 116, and to the case of *Raja Itameswar Nath Sing v. Haralal Sing* (1 B. L. R., A. C., 170).

Mr. Doyne and Mr. John Cutler for the Respondents.—Assuming that the respondents, who are the parties in possession, have no legal title, the appellant

has failed to show any title in herself which would support her claim to resume the mouzah in dispute. According to the appellant this particular grant is to be taken as something wholly different from other mokurrari tenures, and is to be regarded as the creation of an estate tail with reversion to the original grantor in case the grantee should die without heirs of her body; and this view is supported by reference to the doctrines of the feudal law in England. But the English feudal law has no force in India, and there is no analogy between an English estate tail and an Indian mokurrari. The present grant was an absolute conveyance subject to the payment of the reserved rent. The estate taken by Shurfoonnissa might have been sold by her, and the purchaser would have taken the same estate subject to the same payment. Failure to pay the rent would not have operated to destroy the estate, since the only remedy of the zamindar would have been to cause it to be seized and sold to the highest bidder under the provisions of Act X of 1859.

[398] On the failure of nearer heirs the tenure did not revert to the grantor, but escheated to the Crown; see *Gridhari Lall Roy v. The Government of Bengal* (1 B. L. R., P. C., 44). There is no authority for extending to the zamindar the right to take by escheat.

Assuming that on the death of Shurfoonnissa a right accrued to Raja Modenarain to resume his grant, that right was abandoned by him, and the tenure of Buratee Begum and afterwards of the respondents was recognized and affirmed by acceptance of rent for a long period of years. Such acceptance amounted to a re-grant of the tenure to Buratee Begum and to the respondents.

Mr. Arathoon replied.

Their Lordships' **Judgment** was delivered by

Sir J. W. Colvile.—The question raised by this appeal, though short, is somewhat novel, and there appears to be little positive authority upon it.

It appears that Raja Modenarain Singh, being a Hindu zamindar, but having an illegitimate family by a Mahomedan lady domiciled in his house, granted the mokurrari in question in the name of one of the infant daughters of that family, Shurfoonnissa Begum. The grant was clearly intended to create an absolute and hereditary mokurrari tenure, inasmuch as it contains the essential words, "generation to generation," which in documents of that kind have always been considered to have that effect; and their Lordships do not find in the particular document any special terms which would distinguish it from a grant of an ordinary mokurrari istemrari tenure. It is clear on the evidence that Shurfoonnissa Begum died before her father, and not very long after the creation of the tenure; and further, that after her death, the father during his life, and afterwards his widows, who, by the Hindu law, are his heirs, continued to receive the rent reserved from those in possession of the lands, the receipt for such rent being, with one exception, taken in the name of Shurfoonnissa, the original grantee, and in that exceptional case in the name of Buratee Begum, [399] her mother. One of the questions raised by Mr. Doyne is, what effect ought to be given to that reception of rent as a recognition of the tenure and an answer to the present claim to resume the lands included in it.

From this receipt of rent after the death of Shurfoonnissa, which must have been well known in the family, an inference may undoubtedly be drawn that the zamindar either originally intended to make the grant for the benefit generally of his illegitimate family, or after the death of his daughter was willing that it should have that effect; and it is difficult to suppose that the widows were

not for some time willing to act on some such view of the transaction. It is impossible, therefore, to treat the parties in possession as mere trespassers. The recognition of their interest by the receipt of rent from them would constitute some kind of tenancy*requiring to be determined by notice or otherwise. Their Lordships, however, are not prepared to say that this circumstance is of itself sufficient to defeat the claim of the plaintiff in this suit. They think that the ground upon which the decision of the High Court is to be supported, if supported at all, is that the plaintiff in the suit is not the person who, assuming the parties in possession to have no legal title, is entitled to recover the land by the destruction of the tenure. That, of course, raises the question which the High Court has dealt with; namely, whether, on the death of Shurfoonnissa without heirs, the right to the possession of the land reverted to the original grantor, or whether the tenure on such a failure of heirs should be taken to have escheated to the Crown.

*The doctrine of escheat to the Crown in the case of a vacant inheritance was much considered by this Court in the case of *The Collector of Masulipatam v. Cavalry Vencata Narainapah* (8 Moore's I. A., 500). In that case the property in question was a zamindari. The last male zamindar had died, leaving a widow, who took a widow's estate, and upon her death there were no heirs of her husband to inherit the zamindari. The zamindar was, however, a Brahmin; and the point raised in the suit was that on that ground the estate was not subject to the law of [400] escheat. This contention was founded on the text of Manu, which says:—"The property of a Brahmana shall never be taken by the King: this is fixed law;" and also on a passage in Narada, where it is said:—"If there be no heir of a Brahman's wealth on his demise it must be given to a Brahmana, otherwise the King is tainted with sin." It seems to have been admitted in that case that the British Government had at least the same rights that the ruling power would have had under the Hindu law, the question being whether that limitation which the Hindu law was said to impose on the right of the Hindu Raja or King was to prevail against or fetter the rights of the Crown. Lord Justice Knight BRUCE, delivering the judgment of this Committee, said:—"It appears to their Lordships that, according to Hindu law, the title of the King by escheat to the property of a Brahmin dying without heirs ought, as in any other case, to prevail against any claimant who cannot show a better title; and that the only question that arises upon the authorities is whether Brahminical property so taken is in the hands of the King subject to a trust in favour of Brahmins." And in a subsequent passage of the judgment he went on to say:—"Their Lordships, however, are not satisfied that the Sudder Court was not in error when it treated the appellant's claim as wholly and merely determinable by Hindu law. They conceive that the title which he sets up may rest on grounds of general or universal law. The last owner of the property in question in this suit derived her title under an express grant from the Government to her husband, a Brahmin, whom she succeeded as heiress-at-law. If upon her death there had been any heirs of her husband, those heirs must have been ascertained by the principles of the Hindu law; but by reason of the prevalence of a state of law in the mofussil, which renders the ascertainment of the heirs to take, on the death of an owner of property a question substantially dependent on the status of that owner. Thus the property being originally, and remaining alienable, might have passed by acts *inter vivos* in succession to British subject to foreign European owner, to Armenian, to Jew, to Hindu, to Mahomedan, to Parsee, or to any other person, whatever [401] his race, religion, or country. According to the law administered by the Provincial Courts of British India, on the death of any owner being

"absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to the last owner. This system is made the rule for Hindus and Mahomedans by positive Regulation: in other cases it rests upon the course of judicial decisions." And the final conclusion of the Committee was this:—"Their Lordships' opinion is in favour of the general right of the Crown to take by escheat the land of a Hindu subject, though a Brahmin, dying without heirs; and they think that the claim of the appellant to the zamindari in question (subject or not subject to a trust) ought to prevail unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow Lutchme-davamah in her lifetime. In the latter case the Government will of course be entitled to the property, subject to the charge." In a subsequent case relating to the same estate, *Cavalay Vencata Narainapah v. The Collector of Masulipatam* (11 Moore's I. A., 619), the question was between the Collector, representing the Government, and a person claiming to have a valid and subsisting charge by an act of the widow—a charge which the widow was competent to create; and it was held that the Government took subject to the charge, and the suit was dismissed, but without prejudice to the right of the Collector, as representing the Crown, to redeem the charge and recover the estate. The property, no doubt, in this case was a zamindari; but the decision seems to establish the principle, that where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, but will take it subject to any trusts or charges affecting it. There, therefore, seems to be nothing in the nature of the tenure which should prevent the Crown from so taking a mokurrari, subject to the payment of the rent reserved upon it.

It has been argued, however, that this mokurrari, not being an independent zamindari, but being carved out of a zamindari, stands upon a peculiar footing, and that, upon the failure of heirs, the zamindar takes by right of reversion, or, if not strictly [402] by right of reversion, that the tenure escheats to him as the superior lord rather than to the Crown. The mokurrari was clearly an absolute interest. It was also an alienable interest. It might have been seized and sold, as Mr. *Doyne* has shown, under Act X of 1859, even in a suit for rent. It could not have been forfeited for the non-payment of rent; for in such a case the zamindar could only have caused it to be seized, put up for sale, and sold to the highest bidder. It is, therefore, property which, like that in the case above cited, might have passed to any purchaser, whatever his nationality, or by whatever law he was to be governed. It cannot, their Lordships think, be successfully argued that, having so passed, the estate would have determined upon the death of Shurfoonnissa (supposing it had been sold in her lifetime) without heirs; for the grant contains no provision for the lessee of the estate created in such event. There seems, therefore, to be no ground for saying that the lands have reverted in the proper sense of the term to the zamindar; and the only question is, whether, on the failure of heirs of the last possessor, he is entitled to take a tenure subordinate to and carved out of his zamindari by escheat.

Their Lordships are of opinion that there is no authority upon which the power of taking by escheat can be attributed to the zamindar. The principles of English feudal law are clearly inapplicable to a Hindu zamindar. On the other hand, it is clear that, if the zamindar has not such a right, the general right of the Crown subsists, and must prevail.

On the whole, therefore, their Lordships think that the High Court have come to a correct conclusion in holding that, supposing the parties in possession

have nothing but their possession to depend upon (a question on which their Lordships give no opinion) the superior title, under which alone they can be ousted from possession of the lands, is not in the zamindar or his representatives, but in the Crown. They will, therefore, humbly advise Her Majesty to affirm the decree under appeal, and to dismiss the appeal with costs.

Appeal dismissed.

Agent for the Appellant : Mr. J. L. Wilson.

Agents for the Respondents : Messrs. Barrow Barton.

NOTES.

[ESCHEAT—

“According to the law of England a corporate body is dissolved by the total loss of all its members, but on such dissolution there is no escheat to the Crown either of its lands or its rent-charges. And the reason is that on the dissolution of the corporation the cause of the grant fails. The effect of a dissolution on the corporation's rent-charges is that they become extinguished : *Viner's Abridgement*, Rent, B. b, plac. 2—It is no doubt true that so far as the English law of Escheat is founded on the principles of feudal law it furnishes no conclusive clue to the operation of the law of Escheat in India, but this rule as to the property of dissolved corporations appears to us to be founded on a broader basis than that furnished by the technicalities of the feudal law; and to furnish a useful guide in the circumstances of the present case ”:—(1903) 28 Bom., 276.

“The applicability of this doctrine becomes the more apparent if we consider the result that follows on the death of one who is the grantee of an annual payment out of land to last during the term of his life; clearly, it sinks into the land on his determination. So if the grantee is a community, and the grant is to last during the term of its existence, on its dissolution a similar result follows”:—*Ibid.*

Zamindar cannot redeem mortgage made by his tenant, when he dies heirless, as the Crown takes the tenancy.—(1908) 39 All., 488 --5 A. L. J., 578 --(1908) A. W. N. 210.

PERMANENT TENURE—

Unless a right of re-entry is reserved, the landlord has no estate left in him to enable him to maintain a suit in ejectment on the lessee alienating in breach of a condition restraining alienation—(1890) 17 Cal., 826.

The doctrine in (1902) 29 Cal., 363 that a tenant, even a permanent tenant of land, cannot acquire a right of easement by prescription in other land of his lessor, is erroneous.]

[403] ORIGINAL, CIVIL.

The 27th July, 1876.

PRESENT :

MR. JUSTICE PONTIFEX.

Hem Chunder Chunder

versus

Frankristo Chunder.

Order on Receiver to sell—Attachment in Mofussil of Property in hands of Receiver—Execution of decree.

By a decree of the High Court obtained by *DM* in November 1871 in a suit on a mortgage brought by him against *BC* and *PC*, it was ordered that the suit should be dismissed against *PC*; that the amount found due on the mortgage should be paid to *DM* by *BC*; that the mortgage property, some of which was in Calcutta and some in the mofussil, should be sold in default of payment, and any deficiency should be made good by *BC*. The property in Calcutta was sold under the decree, and did not realize sufficient to satisfy the decree. *DM* thereupon, in August 1873, obtained an order for the transfer of the decree to the Mofussil Court for execution: after the transfer *BC* died in December 1874, leaving a widow and an adopted son his representatives, against whom the suit was revived. The decree, however, was returned to the High Court unexecuted.

In a suit for partition of the estate of *RC* deceased, brought by *PC* against *BC* in the High Court, a decree was made in February 1871 for an injunction to restrain *BC* from intermeddling with the estate or the accumulations, and for the appointment of the Receiver of the Court as Receiver, to whom all parties were to give up quiet possession. *BC* was in that suit declared entitled to a moiety of the property in suit.

Held, on application by *DM* to the High Court for an order that the Receiver should sell the right, title and interest of the widow and son of *BC* in the estate in his hands to satisfy the balance of his debt, that *DM* was entitled to an order that their interest should be attached in the hands of the Receiver, and that the Receiver should proceed to sell the same.

Property in the hands of the Receiver of the High Court cannot be proceeded against by attachment in the mofussil.

THIS was an application in this suit on notice on behalf of one Denonath Mitter for an order that the Registrar or the Receiver should sell the share of Roymoney Dossee and Hem Chunder Chunder in certain specified properties in the hands of the Receiver, of which a portion was in Calcutta and a portion in the mofussil, sufficient to pay the balance due to Denonath Mitter, in respect of a decree obtained by him, dated 29th [404] November 1871, in a suit brought by him against Bissonath Chunder, since deceased, and Frankristo Chunder. That suit was one on a mortgage, and the decree contained, amongst other things, an order, that the suit should be dismissed against Frankristo Chunder, for payment of the sum found due on the mortgage with costs by Bissonath Chunder to Denonath Mitter, for sale of the mortgaged property on default of payment, and for payment by Bissonath of any deficiency in the sale-proceeds to pay the debt. A sum of about Rs. 30,000 was found due to the plaintiff, and, default having been made in payment thereof, the property in Calcutta was sold by the Registrar and realized Rs. 23,000, which sum, less

commission, was paid to Denonath Mitter. In August 1873, Denonath petitioned the High Court for an order that the decree should be transferred to the Court of the 24-Pergannas for execution to obtain satisfaction of the balance. After it had been transferred, Bissonath died in December 1874, leaving Hem Chunder, his adopted son, and a widow, Roymoney Dossee, his representatives, against whom the suit was revived. The decree, however, was returned to the High Court unexecuted.

By a decree dated 13th February 1871 made in a suit brought by Prankristo Chunder against Bissonath Chunder and others for partition of the estate of Ramtonoo Chunder, deceased, an injunction was granted, restraining Bissonath Chunder from intermeddling with the estate of Ramtonoo or the accumulations thereof; the Receiver of the Court was appointed Receiver of the estate, and all parties ordered to give up quiet possession to him, and he had since been in possession thereof. Bissonath was, in that suit, declared entitled to a moiety of the estate in the hands of the Receiver, and Denonath Mitter not having been able to obtain satisfaction of the balance due to him from the estate of Bissonath made the present application to realize the same by sale by the Receiver of the right, title and interest of Hem Chunder and Roymoney in the property, or in so much thereof as would be sufficient to pay his debt.

Mr. *Kennedy*, in opposing the application, contended that the procedure laid down by Act VIII of 1859 was the proper and [405] only course which should have been adopted in this case. Under Act VIII there must be an attachment in the usual way of the property. That the property was in the hands of the Receiver is immaterial. It might have been attached in his hands. The present application is not one for attachment. There is no other way of attaching than under Act VIII. The application, therefore, cannot be granted in the form asked for.

Mr. *Macrae* contended that the application was in proper form, and was one which the Court could grant. The proceeding by attachment was not one which was open to the applicant in this case, as the property was in the hands of the Receiver of this Court: there are cases to show that, when such is the case, no attachment can be obtained in a Mofussil Court. Such a proceeding would be a contempt of this Court.

Pontifex, J.—In this case before 1871 there was a suit for partition of the estate of Ramtonoo Chunder. In that suit Bissonath Chunder was a defendant. By a decree in that suit, dated the 13th of February 1871, the Receiver of the Court was appointed Receiver of the estate, and there was the usual order, restraining the defendants in that suit and persons claiming under them from intermeddling with the estate pending partition, and it was further ordered that quiet possession should be given to the Receiver. Bissonath Chunder has since died, and his representatives have been made parties to the suit.

Under these circumstances, and while the Receiver is still undischarged, one Denonath Mitter, a judgment-creditor in a suit on a mortgage against Bissonath Chunder, now seeks satisfaction of his decree against Bissonath's share of the property under partition, and finds himself powerless to execute his decree against such share without the assistance of the Court, because the estate is in the hands of the Receiver. It is, therefore, absolutely necessary for him to come to this Court for assistance. It seems to me that unless I grant this application, Denonath Mitter will be unable to execute his decree

against the property of Bissonath, so as to obtain satisfaction of his judgment-debt. He cannot proceed in the usual and ordinary way under Act VIII [406] to attach and sell the property in the mofussil, because it is in the hands of the Receiver of this Court.

I will make an order that Bissonath's interest in the property in the hands of the Receiver must be considered as attached, and that the Receiver proceed to sell that interest, and for the purpose of carrying out the sale I will order Bissonath's representatives to join in any conveyance which may be necessary : the sale proceeds to be paid into Court in this suit to await the further orders of the Court.

Application granted.

Attorney for the Applicant : Baboo Shamaldhow Dutt.

Attorney for Hem Chunder and Roy-money : Mr. Remfrey.

NOTES.

[In (1898) 26 Cal., 127, it was held that a judgment-creditor can sell properties in the hands of a Receiver of the Court in execution of a mortgage-decree, although he cannot execute a decree against such properties by way of attachment and sale. This case was distinguished on the ground that in the Mofussil Courts execution could be had only by way of attachment and sale.]

[1 Cal. 406]

APPELLATE CIVIL.

The 22nd February, 1876.

PRESENT :

MR. JUSTICE KEMP AND MR. JUSTICE PONTIFEX.

Lallah Ramesshur Doyal Singh.....Plaintiff

versus

Lallah Bissen Doyal and another.....Defendants.

*Damages, Suit for --Joint Undivided Proprietors--Revenue
Sale --Act XI of 1859.*

No suit for damages as between joint owners of undivided estates will lie, in consequence of the sale of the whole estate through the default of one or more of such owners in paying their shares of the Government revenue.

THIS suit was for damages, amounting to Rs. 10,478. The plaintiff alleged that he was the proprietor of a 4-anna share in a mokurrari right in certain mouzahs appertaining to lot Mehal Hakimpore, Pergunnah Chowssa, Zilla Shahabad. He alleged that the parent estate Hakimpore was sold for arrears of Government revenue, owing to the neglect of his co-sharers in the mokurrari in paying up their quota of Government revenue. He further alleged that the entire 16 annas of the mouzah, which comprised the mokurrari, were let out in perpetual mokurrari by the Rajah of Buxar to Lallah Mewa Lal, the common [407] ancestor of the parties to this suit, at a fixed annual jumma of Rs. 401 ; that after the death of the ancestor, both parties to this suit in right of

* Regular Appeal No. 258 of 1874, against a decree of the Subordinate Judge of Zilla Shahabad, dated the 26th of June 1874.

inheritance were in possession of the mokurrari, and that the practice amongst the co-sharers was to pay their respective quotas of Government revenue to the Collector direct under an agreement with the superior landlord to that effect; that under this alleged arrangement between the co-sharers, the plaintiff had to pay a 4-anna share of the Government revenue, the defendant No. 1 a 4-anna share, and the defendant No. 2 an 8-anna share: that on the 28th of March 1872, being the last safe day for the payment of Government revenue, the plaintiff paid in his quota: but the defendants having neglected to pay their respective shares of the Government revenue, the parent estate, Mehal Hakimpore, was sold at auction for arrears of revenue, and the price paid was Rs. 50,000, and that the whole of the surplus sale proceeds, after deducting the Government revenue due up to the 28th of March 1872, had been taken out of Court by the superior malik, the zamindar. The plaintiff valued his suit and assessed his damages at the proper selling price of his 4-anna share in the mokurrari as prevalent in the pergunnah in which the mokurrari was situated.

The Subordinate Judge dismissed the suit, and the plaintiff appealed to the High Court.

Mr. R. E. Twidale and Baboo Tarruck Nath Dutt for the Appellant.

Mr. H. E. Mendes and Baboos Rashbehary Ghose, Tarruck Nath Palit, and Kashy Kunt Sen for the Respondents.

On the appeal coming on, a preliminary objection was taken on behalf of the respondents, that no suit would lie between joint owners of undivided estates for damages sustained by the estate in consequence of the default of one or more of the co-proprietors in paying their share of the Government revenue, and the cases of *Odoit Roy v. Radha Pandey* (7 W. R., 72) and *Gungapersaud Sahee v. Madhoppersaud Sahee* (13 S. D. A., 1244) were referred to.

[408] Mr. Twidale for the appellant contended that the words of the proviso added to s. 33 of Act XI of 1859 were large enough to justify the bringing of this suit.

The Judgment of the Court was delivered by

Kemp, J. (who, after stating the facts as above, continued).—In the case alluded to, of *Odoit Roy v. Radha Pandey* (7 W. R., 72), NORMAN and SETON-KARR, JJ., held that a suit would not lie between joint owners of undivided estates for damages sustained by the whole estate in consequence of the default of one or more of the co-proprietors in paying their shares of the Government revenue. As already observed, this case followed a decision of the Sudder Court of 1857 in the case of *Gungapersaud Sahee v. Madhoppersaud Sahee* (13

* [Sec. 33 :—No sale for arrears of revenue or other demand, realizable in the same manner as arrears of revenue are realizable, made after the passing of this Act, shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of: and no such sale shall be annulled upon such ground, unless such ground shall have been declared and specified in an appeal made to the Commissioner under section 25 of this Act: and no suit to annul a sale made under this Act shall be received by any Court of Justice unless it shall be instituted within one year from the date of the sale becoming final and conclusive, as provided in section 27 of this Act; and no person shall be entitled to contest the legality of a sale after having received any portion of the purchase-money:]

Provided, however, that nothing in this Act contained shall be construed to debar any person considering himself wronged by any act or omission connected with a sale under this Act, from his remedy in a personal action for damages against the person by whose act or omission he considers himself to have been wronged.]

S. D. A., 1244). We think that the rule laid down in those decisions is a proper one; and further we find that, under the provisions of Act XI of 1859, s. 40,* the plaintiff could have protected his interests by having his mokurrari right registered. He, also under the said Act, could have paid in the Government revenue due on account of the shares of his co-proprietors in the mokurrari, and thus saved the estate from sale. We find, on turning to the kyofeut of the collectorate amlah, which was called for by the Collector at the time when Bissen Doyal Singh, the defendant No. 1, petitioned to be allowed to save the property from sale by paying the revenue due on the 28th March 1872, that the balance then due was a very small one, under Rs. 100. There was, therefore, no difficulty whatever in the plaintiff avoiding the sale by paying the sum then due on account of Government revenue. Following, therefore, the ruling in *Odori Roy v. Radha Pandey* (7 W. R., 72) and that of the Sudder Dewany Adawlut of 1857 alluded to above, we dismiss the plaintiff's suit.

Then there is a further question for consideration, namely, whether the defendants are not entitled to their costs in this suit. A cross-appeal has been made to this Court on that point, and we think that the defendants ought to get their separate costs in this litigation.

[409] We dismiss the appeal of the plaintiff with costs, and modify the decree of the Court below to this extent, that we decree costs to each of the two defendants in this case.

Appeal dismissed.

NOTES.

[See *Allaf Ali v. Lalji Mal* (1877) 1 All., 518, F. B., where the question was as to what allowances in respect of mesne profits may be made in favour of a trespasser.]

* [Sec. 40:—The holder of any taluqdari or other similar tenure, such as is described in section 38 of this Act, desirous of registering it, shall apply by petition to the Collector of the district to which the estate belongs.

The application shall state which description of registry is desired, and shall contain the following particulars so far as the same are ascertainable:—

- (1) the pergunnah or pergunnahs in which the tenure is situated;
- (2) the nature of the tenure;
- (3) the name or names of the village or villages whereof the land is composed, or wherein it is situated;
- (4) the area of the land comprised in the tenure, with its boundaries in complete detail;
- (5) the amount of rent payable annually for the tenure, and whether the rent is fixed for a term of years or in perpetuity, and the duties, if any, required to be performed on account of it;
- (6) the date of the deed constituting the tenure or the date when the tenure was created;
- (7) the name of the proprietor who created the tenure;
- (8) the name of the original holder of the tenure;
- (9) the name of the present possessor, and if he be not the original holder, the mode in which he succeeded to the tenure, whether by inheritance, gift, purchase, or otherwise, and whether he holds jointly or solely.

Holders of such farms as are described in the said section may apply in like manner for registry of the same. The application shall contain such of the foregoing particulars as are applicable to farms.]

[1 Cal. 409]

APPELLATE CIVIL.

The 28th June, 1876.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Manessur Dass and another.....Plaintiffs

versus

The Collector and Municipal Commissioners of Chapra.....Defendants.*

Beng. Act III of 1864, s. 33 -- Municipal Commissioners---Appeal against Assessment - Jurisdiction of Civil Court.

A suit to set aside an order made on an appeal under s. 33 of Bengal Act III of 1864 to the Municipal Commissioners against a rate assessment, and to reduce the tax levied by them under that Act, on the ground that they have tried the appeal in an improper way, and have exceeded their powers and acted contrary to the provisions of the Act, cannot be maintained in the Civil Courts. The decision of the Commissioners in such an appeal is absolutely final.

THIS suit was brought to reduce the chowkidari tax levied under Beng. Act III of 1864 on certain houses belonging to the plaintiffs, situated in Mohulla Doulutgunj, No. 27, in Pergunnah Manghi, which had been, in 1871, assessed at Rs. 144 a year, and had so continued until 1873, in which year the tax was raised to Rs. 216. The value of the houses had not, in the interval, increased, nor had any change of form been made. The plaintiffs preferred an appeal to the Municipal Commissioners against the enhancement, which was rejected by them on the 7th of July 1873, whereupon the plaintiffs brought this suit for the reduction of the tax, praying that necessary enquiries should be instituted, the state and value of the houses enquired into, and a decree passed in their favour by setting aside the orders of the Municipal Commissioners.

The contention of the defendant was, that the Civil Courts had not the power to set aside the orders of the Municipal [410] Commissioners regarding assessment of taxes under Beng. Act III of 1864; that the adjudication by the Municipal Commissioners upon the appeal made to them by the plaintiff was final: that the Municipal Commissioners being legally competent to modify or raise taxes, the action on their part in raising the tax on the plaintiffs' houses after consideration of the state and value of the houses and the means of the owners was right and legal.

The Munsiff decided that ss. 25 and 26, Beng. Act III of 1864, furnishing a rule that assessments were to be made upon an estimated amount of annual rent at the rate of 7-8 per cent. per annum, and no other rule being given, the Municipal Commissioners, in having taken into consideration the means of the owners of the houses in fixing the rate, had acted contrary to and beyond the powers vested in them by that Act: and on the authority of *Brindaban Chunder Roy v. The Municipal Commissioners of Serampore* (19 W. R., 309), held that the Court had jurisdiction to entertain this suit, and ordered a reduction of Rs. 72 which had been imposed in the year 1873 and made without it being shown that any improvement or change of form in the houses had taken place or any special cause for enhancement existed. The Judge, on appeal, held that, under s. 33, Beng. Act III of 1864, the Civil Court had not the power to entertain the suit, and reversed the decree of the Munsiff.

* Special Appeal No. 360 of 1865, against a decree of the Judge of Zilla Sarun, dated the 6th January 1875, reversing the decree of the Munsiff of Chapra, dated the 5th January 1874.

From this decision of the Judge the plaintiffs appealed to the High Court. Mr. *G. Gregory* for the Appellants.

Mr. *Ingram* (with him the Senior Government Pleader, Baboo *Unoda Persad Banerjee*) for the Respondents.

The **Judgment** of the Court was delivered, without calling on the respondents, by

Garth, C.J. - We think there is no ground for this appeal, and speaking for myself I should be very sorry to think that there existed any doubt whatever about this question.

By the 26th section of Beng. Act III of 1864, the Municipal [411] Commissioners are empowered to impose certain rates on houses, buildings and lands, which rates are to be paid by the owners, and by the 27th section those rates are to be assessed according to what may be considered the fair annual value of the property.

When the valuation is completed, lists are to be made, showing the rates at which each property is assessed, and when the assessment is made for the first time or increased, a special notice is to be given to the owner and occupier, of the amount at which the property is assessed, and an appeal is then given against the assessment, which, by the terms of s. 33, is to be heard before not less than three of the Municipal Commissioners. If an appeal is not made against the assessment, the assessment itself is final. If an appeal is made against the assessment, the adjudication of the Commissioners upon that appeal is also final, and in order more effectually to secure the finality of the adjudication, there is a special provision in the same section, that no person shall contest any assessment in any other manner than by appeal as hereinbefore provided.

Now, in this case, the plaintiff is attempting, by means of a civil suit, to re-open the question of the assessment of his house, which has been heard on appeal, and decided by the Municipal Commissioners. It is said that the Commissioners have tried the appeal in an improper way, and that they have exceeded their powers and acted contrary to the provisions of the Act. But even supposing that they had, the Civil Court has no right to interfere. Some actions may, no doubt, be brought against the Commissioners for a great variety of acts which they may do under colour of their statutory powers and under a mistaken view of their duties, but not an action of this kind. Their decision upon an appeal against a rate assessment is absolutely final. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[JURISDICTION IN RESPECT OF MUNICIPAL ASSESSMENT.]

Where the assessment is altogether *ultra vires* an action would lie. — *Kameshwar Pershad v. The Chairman of the Bhabua Municipality.* (1900) 27 Cal. 849.]

[412] ORIGINAL CIVIL.

The 1st July, 1876.

PRESENT :

MR. JUSTICE MARKBY.

Miller

versus

The Administrator-General of Bengal.

*Succession Act (X of 1865), ss. 4 and 44† — Husband and Wife—
Parties with English domicile married in India—Succession
to moveable property.*

HM, a British subject, having his domicile in England, married in Calcutta, in April 1866, *C*, a widow, who at the time of the marriage had also an English domicile. *C*, after her marriage with *HM*, became entitled as next-of-kin to shares in the moveable properties of her two sons by her former marriage: these shares were not realized nor reduced into possession by *C* during her life. *C* died in 1872, leaving her husband, but no lineal descendants. In March 1874, *HM* filed his petition in the Insolvent Court, and all his property vested in the Official Assignee. In April 1875, letters of administration of the estate and effects of *C* were, with the consent of *HM*, granted to the Administrator-General of Bengal, by whom the shares to which *C* became entitled as next-of-kin of her sons were realized. In a special case for the opinion of the Court under Ch. VII, Act VIII of 1859, *held*, that the domicile of the parties being in England, the English law was to be applied, and therefore the Official Assignee as assignee of the estate of *HM* was entitled to the whole fund realized by such shares in the hands of the Administrator-General.

Sec. 4 of the Succession Act does not apply in respect of the moveable property of persons not having an Indian domicile.

THIS was a special case stated for the opinion of the Court under Ch. VII of Act VIII of 1859, by the agreement of the Official Assignee and assignee of the estate and effects of one Howard Mark, an insolvent, as plaintiff, and the Administrator-General of Bengal, as defendant.

The facts as stated in the case were as follows :—

" On the 7th of April 1866, the said Howard Mark, a British-born subject, having his domicile in Great Britain, and not in India, intermarried with Caroline Augusta, the widow of one W. B. Harvey, deceased. The said marriage took place in Calcutta. The said Caroline Augusta had previously to, and at the time of, her said marriage, a domicile in Great Britain, [413] and not in India, and such domicile continued down to the time of her death. Caroline Augusta Mark died in Bengal on the 30th of September 1872 intestate, leaving her surviving her husband, the said Howard Mark, but no lineal descendants. Howard Mark, on the 2nd March 1874, filed his petition in the Court for the Relief of Insolvent Debtors at Calcutta, and his estate and

* [Sec. 4 :—No person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.]

† [Sec. 44 :—If a person whose domicile is not in British India marries in British India a person whose domicile is in British India, neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in British India at the time of the marriage.]

effects became thereby vested in the plaintiff as the Official Assignee of the Court. Howard Mark died on the 28th February 1875. Caroline Augusta Mark, subsequently to her marriage with Howard Mark and before her death, became, on the respective deaths of W. B. B. Harvey and D. Harvey, her two sons by her marriage with her former husband W. B. Harvey, entitled to share in the respective estates of her two sons as one of their next-of-kin. The said shares were not realized or reduced into possession by her during her lifetime, nor by Howard Mark, but were realized by the Administrator-General under the letters of administration hereinafter mentioned. On the 11th of September 1875, letters of administration to the estate and effects of Caroline Augusta Mark were, with the consent of Howard Mark, granted by the High Court to the Administrator-General of Bengal, and there is now in the hands of the defendant as Administrator-General and administrator of the estate and effects of Caroline Augusta Mark a sum of Rs. 6,224-10-9, being the proceeds of the shares aforesaid."

The question for the Court was whether, in the events that have happened, A. B. Miller, as assignee of the estate and effects of Howard Mark, was entitled to the whole of the said fund now in the hands of the Administrator-General of Bengal as administrator of the estate and effects of Caroline Augusta Mark.

Messrs. *Kennedy and Ingram* for the Official Assignee.

Mr. *Evans* for the Administrator-General.

Mr. *Kennedy* contended that the Official Assignee was entitled to the whole fund. It is admitted by the Administrator-General that the Official Assignee is entitled in any event to one-half. The wife was admittedly domiciled in England, not in India. Succession to her moveable property would be, therefore, regulated by the law of England by s. 5 * of Act X of 1865, which would entitle the husband to the whole: the domicile being admitted, s. 19 of that Act does not apply. It is said that, by virtue of s. 4, the Administrator-General is entitled to the moveable property left by Mrs. Mark: but in such a case as this, where the parties were domiciled in England, s. 4 will not apply. That section is not dealing with right of succession to property: that question is dealt with later in the Act. It only deals with the creation of rights *inter vivos*. Rights arising out of marriage are regulated by the *lex loci contractus*, except in special cases. But the rights of the parties with respect to any moveable property are still governed by the law of the domicile: for instance, persons married in France, but domiciled in England, are not subject to the Code Napoleon. An exception is made by the Indian Legislature, but that exception is not the present case. The intention is clearly shown by s. 44, by which the 4th section is interpreted. If a person domiciled in England marry an Eurasian woman in India, the section would apparently apply;

* [Sec. 5:—Succession to the immoveable property in British India of a person deceased is regulated by the law of British India, wherever he may have had his domicile at the time of his death.]

Law regulating succession to a deceased person's immoveable and moveable property, respectively.

Succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death.

ILLUSTRATIONS.

(a) A, having his domicile in British India, dies in France, leaving moveable property in France, moveable property in England, and property, both moveable and immoveable, in British India. The succession to the whole is regulated by the law of British India.

(b) A, an Englishman, having his domicile in France, dies in British India, and leaves property, both moveable and immoveable, in British India. The succession to the moveable property is regulated by the rules which govern, in France, the succession to the moveable property of an Englishman dying domiciled in France, and the succession to the immoveable property is regulated by the law of British India.]

but how would the Courts in England deal with the wife in such a case suing in her own name on a promissory note made in England? It is doubtful whether such an action would be held to be maintainable; I mean irrespective of the Married Woman's Property Act. If an Eurasian went to England and married there, I think s. 4 would apply, but s. 44 would not, because marriage in India would not have occurred. [MARKBY, J.—You mean s. 4 would apply here.] Yes, in the Courts here: the sections relating to marriage do not apply where the domicile is in England—see Story's Conflict of Laws, ss. 186, 193. Section 4 was not intended to apply to anyone not domiciled in India: it was intended to leave persons domiciled elsewhere than in India in the position in which they were before, on marriage—see note to s. 44: see also s. 283 as to payment of debts.

By s. 5 succession to moveable property is to be regulated by the law of domicile: the right of the husband in the property [415] of his deceased wife is succession within the meaning of that section. In former times the Ordinary was absolutely entitled to the property of intestates, and was not liable to account to anyone: subsequently the Ordinary was enabled to depute the administration to the "next and most lawful friend of the deceased" who was accountable to the Ordinary. But the Civil Courts had to obtain statutes to effect this—see 31 Edw. III, c. 11, and 21 Hen. VIII, c. 5, s. 3; see also 22 & 23 Car. II, c. 10, and 29 Car. II, c. 3, s. 25. The husband was entitled as administrator, not as next-of-kin—see also *Fortre v. Fortre* (1 Showers, 327) and *Proudley v. Fielder* (2 M. & K., 58): these cases show that in any case the husband takes the property of the wife deceased as administrator. After the Statute of Distributions, it was expressly declared by 29 Car. II, c. 3, s. 25, that the husband's right to succeed to his wife's property should not be affected by the Statute of Distributions. If the husband died without taking out administration, the Courts would grant administration to the next-of-kin of the wife, but such administrators were regarded as trustees for the representatives of the husband—2 Wms. on Executors, 7th ed., 1488, and the case of *Humphrey v. Bullen* (1 Atkins, 458). [MARKBY, J.—Was that right of the husband the *jus mariti* or the *jus successionis*?] It was true succession—see 2 Wms. on Executors, 7th ed., 410, and Bacon's Abridgment, Title Executors and Administrators, F., page 479.

Mr. Evans for the Administrator-General. —Sec. 4 is not restricted to persons domiciled in India, nor is the Succession Act itself so limited—see the provisions as to making wills; it has never been contended that a person making a will in India would not be bound to make it according to the Indian Act, there is a difference, for instance, as to attesting a will, see s. 50. Sec. 225 shows another difference: administration is now always granted under the Succession Act in all cases. The argument on the other side would limit it to persons domiciled in India: then by what law are persons in India with an English domicile to have administration granted to them, or of their estates? [416] The only limitation of s. 4 is in s. 331 of the Act which makes it inapplicable to any marriage made before 1866—see the preamble to the Married Woman's Property Act (III of 1874), and the last paragraph of s. 2,* which show that the Legislature was of opinion that s. 4 was so largely applicable that if not restricted it would have applied to Hindus, Mahomedans, &c. Supposing the husband does not take by succession but by the *jus mariti*, then if s. 4 takes

This Act to constitute the law of British India in cases of Intestate or Testamentary Succession.

* [Sec. 2:—“Except as provided by this Act or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of Intestate or Testamentary Succession.”]

away the *jus mariti* in India, it would be doubtful whether s. 5 as to succession would be operative in all cases. It is submitted that s. 4 is of general application; the Act is a general law for the whole of British India. It is not subject to the law of domicile; it deals itself with the law of domicile. The only exception to it is by implication in s. 44. The framers of the Act appear to have been of opinion that there would be a difference in cases of marriage in India when one party was domiciled in England and one in India. Again, all persons would be entitled to have their marriage rights saved according to the law of the country in which they had their domicile: those would be saved just as much as those of persons domiciled in England. If the Legislature had intended it to be excepted, they would have said so in express words, as they have in other cases, for instance, as to domicile. S. 44 is not sufficient to create a limitation by implication of a general section in a general Act.

As to the position of the husband, the correct view is laid down in Bacon's Abridgment, Title Executors and Administrators, F. 480. If s. 4 does apply in this case, then it puts a stop to the principle which was the origin of the position of the husband. He must now get administration here under the Succession Act, in which there is no provision for him to convert the effects to his own use; he has to distribute them according to the Act. The position of the husband on his wife's death by English law was by virtue of his right during her life; but if these rights are taken away here by s. 4, his position cannot be the same.

Mr. Kennedy in reply.—“Succession” is applicable both to testamentary and intestate estates. The intention of the Succession Act is not to conflict with the law of domicile. As to a [417] married woman taking out letters of administration, see ss. 183 and 189: she needs the previous consent of her husband. Taking ss. 5 and 207 in connection, it would appear that, as to moveable property, the Court in India would be the Court of administration, but the succession would follow the law of the domicile. If two portions of a statute are inconsistent, the later section would prevail, as in wills a later clause would invalidate a preceding inconsistent one.

Cur. adv. vult.

Markby, J. (after stating the facts, continued):—It is admitted between the parties that the Official Assignee as such assignee is entitled to half of the said fund.

The argument before me has turned entirely upon the construction of the Succession Act, especially of s. 4, and it has been assumed throughout the argument that the questions which arise relate to moveable property. S. 4 of the Succession Act provides that “no person shall by marriage acquire any interest in the property of the person whom he or she marries, or become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried.” It is contended for the plaintiff, that that section must be read as if it had run thus: “No person having a British-Indian domicile shall by marriage acquire, &c.” Mr. Evans for the defendant contends that the section governs every marriage in India. There has not been, as far as I

Persons to whom probate cannot be granted.

*[Sec. 183:—Probate cannot be granted to any person who is a minor, or is of unsound mind, nor to a married woman without the previous consent of her husband.]

Persons to whom letters of administration may not be granted.

Sec. 189:—Letters of administration cannot be granted to any person who is a minor, or is of unsound mind, nor to a married woman without the previous consent of her husband.]

am aware, any previous discussion as to the meaning of this section, and I must therefore be guided by the general frame and scope of the Act. In order fully to understand this, it seems to me necessary to consider, from a somewhat general point of view, how marriage in a foreign country affects the moveable property of the parties thereto.

Now what was the law before the Succession Act was passed? The law of India would not be easy to ascertain. It was probably the law of England, except so far as a personal law, could be claimed by the members of any particular class: or some persons might say that there was no law of India—no *lex loci* at all. But it is not necessary now to inquire which of these [418] two views is correct. It is more important to consider what was the law of Europe and America, for it is clear that the Succession Act was based upon the general principles current among persons of the Christian faith.

Now where, as in the present case, a man and woman having the same domicile marry during a temporary sojourn in a foreign country, and do not evince any intention to change their domicile, the law of all Christian countries is unanimous as to the interest which they acquire in the moveable property of each other. It is that interest which is given them by the law of the country wherein they are domiciled at the time of the marriage. Upon this point all the authorities are, as far as I am aware, absolutely concurrent. This is in fact a branch of the more general proposition that moveables are always in contemplation of law supposed to be situate in the country where the owner has his or her domicile; and that principle can, in the present case, be applied without difficulty, because we are not embarrassed in the present case by any distinction between the domicile of the husband and the domicile of the wife, or by any change of domicile at or after the marriage. All these complications are avoided in the simple case which we are considering. I need only observe that the rule of law is not that moveables have no *situs*. They have a *situs*, but that *situs* is the domicile of the owner. This is, I believe, the true mode of stating the principle. The authorities in support of this proposition amongst the Civilians (as they are usually called) are innumerable; they will be found collected in Burge on Colonial and Foreign Laws, Vol. I, p. 632, where also the American authorities are referred to. For the English law, I may refer to *Enohin v. Wylie* (10 H. L. C., 1) and the remarks of Lord WESTBURY at page 15. He was there speaking of succession. But the rule is general: the rights which arise upon all occasions, whether upon marriage or succession, whether by the act of the parties or by the operation of law, are as to moveable property governed by the law of the domicile where, in contemplation of law, the moveables are situate.

It would, indeed, be unnecessary to insist upon this, which is [419] an elementary proposition, were it not that in the case of marriage, Story, by representing the disagreement amongst lawyers as to the incidents of marriage to be far more extensive than it really is, and by not separating those propositions upon which they are agreed from those upon which they are not agreed, has thrown the matter into some confusion. The subject of our present consideration is laid down by Story for discussion in s. 135 of the Conflict of Laws, and is taken up again in s. 143. In s. 144, he narrows it to the cases where there has been no change of domicile. But even here he appears to find himself unable to draw any certain conclusion whatsoever from the multitude of authorities which he proceeds to quote. The passage relied upon by Mr. Kennedy in his argument (s. 186) is only put forward by Story as the doctrine maintained in the State of Louisiana, which, Story thinks, would *probably* be adopted

in other parts of America. This exaggeration of the difficulties of the subject is mischievous. There are difficulties and conflict, but not upon all points. The exact state of the authorities is far more clearly stated by Burge in the work already referred to (ch. vii, s. 8). It will be there seen that where there is no change of domicile, the conflict of authority is confined almost entirely to the question whether the *communio bonorum* operates upon property situate in a country where the law does not recognize that incident of marriage. But neither this controversy, nor any controversy of an analogous kind, arises as to moveable property where husband and wife have the same domicile. The difficulty lies in extending the marriage laws of a country beyond the limits of that country. But in the case under consideration, this difficulty does not arise, for as Pothier says (speaking both of moveables and immoveables): "Toutes ces choses qui ont une situation réelle ou feinte sont soujettis à la loi ou coutume du lieu où elles sont situées ou censées d'être." And further on, after describing what are moveables, he says: "Toutes ces choses suivent la personne à qui elles appartiennent, et sont par conséquent régies par la loi ou coutume qui régit cette personne, c'est à dire par celle du lieu de son domicile." (Poth. Obl., ch. 1, ss. 2, 23, 24.) Mr. Burge quotes a number of civilians to the same effect: the only shadow of a [420] difference being whether this rule belongs to real law or to personal law; but the distinction, important as it is sometimes, for our present purpose need not be considered.

Bearing these plain and incontestable principles in mind, there is (as it appears to me) no difficulty in comprehending the frame and scope of the Succession Act. It was impossible in dealing with the rights which arise upon death to ignore the consideration of the rights which arise upon marriage. For the rights which arise upon marriage only assume their real importance when the marriage tie is dissevered. And the first and most necessary thing to be done by the Succession Act in reference to marriage was to declare the *lex loci* of India as to the interest acquired upon marriage by the parties thereto in the property of each other. Until that was declared, no sound legislation could take place. This is done by the 4th section. That section contains the *lex loci* of India. And I may observe that it was placed exactly where it is placed now by the very learned persons who originally framed that Act. But it is not (as it appears to me) necessary, in order to prevent the operation of this section upon the moveable property of parties not having an Indian domicile to add any words to that section. It does not operate upon that property any more than the marriage laws of England operate upon the moveable property of parties not having an English domicile. The *lex loci* of India, like the *lex loci* of all other countries, is applicable to the immoveable property of foreigners sojourning but not domiciled here, but not to their moveable property. It was not necessary for the Legislature, when laying down the *lex loci*, to reserve in express terms a principle of law which is universally recognized. That this general principle was not intended to be disturbed is clearly shown by s. 44, which resolves in a particular way an old standing dispute as to the application of the principle. The preponderance of authority had been in favour of making the domicile of the husband, or at least that of the marriage, govern the rights of the parties where the domicile of the husband and wife were different. The Succession Act, where either of the parties has an Indian domicile, very reasonably submits all their rights both as to moveables and immoveables, to the territorial [421] law of India. To that extent the *jus gentium*, or common law of nations, has been set aside or modified. From this point of view, it is easy to see why s. 4 and s. 44 are kept apart. The two sections deal with different subjects. The former declares the general *lex loci* of India; the second lays down a special

rule to govern a particular case. It is not a modification of the *lex loci*, but a declaration of the law in a particular case.

From this point of view, nothing remains for the decision of the present case but to apply to this property the law of England, where, in contemplation of law, the property is situate; and there is no dispute that by the law of England the husband would be entitled to the whole. Whether this, strictly speaking, be *jure mariti* or *jure successionis*, is immaterial. S. 283* merely repeats and applies to a particular case the rule of law to which I have referred, and it might, perhaps, have been better omitted from the Act as in the original draft, in fact it was.

I therefore consider that Howard Mark was entitled at his wife's death to the whole of the immoveable property of his wife, and that the funds, now in the hands of the defendant, belong entirely to the plaintiff as assignee of Mr. Mark's estate.

The plaintiff, therefore, as Official Assignee, is entitled to recover the same, and there will be the ordinary money-decree for the amount. The costs on scale No. 2 will be paid out of the estate.

Judgment for plaintiff.

Attorneys for the plaintiff: Messrs. *Dignam and Robinson.*

Attorneys for the defendant: Messrs. *Chauntrell, Knowles, and Roberts.*

NOTES.

[In *P. G. Hill v. Administrator-General of Bengal* (1896) 23 Cal. 506, it was held that "sections 4 and 44 of the Succession Act 1865, read together, should be understood as laying down a general rule as to the immediate effect of marriage in respect of moveable property belonging to each or either of the married persons not comprised in an ante-nuptial settlement, and not as laying down a rule intended to affect the law of succession."]

Application of moveable property to payment of debts, where the deceased's domicile was not in British India.

* [Sec. 283.—If the domicile of the deceased was not in British India, the application of his moveable property to the payment of his debts is to be regulated by the law of the country in which he was domiciled.]

ILLUSTRATION.

A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal, leaving moveable property to the value of 10,000 rupees, immoveable property to the value of 5,000 rupees, debts on instruments under seal to the amount of 10,000 rupees, and debts on instruments not under seal to the same amount. The debts on the instruments under seal are to be paid in full out of the moveable estate, and the proceeds of the immoveable estate are to be applied as far as they will extend towards the discharge of the debts not under seal. Accordingly, one-half of the amount of the debts not under seal is to be paid out of the proceeds of the immoveable estate.

By Act VI of 1889, the words **British India** were substituted for the words "The country in which he was domiciled," and the Illustration was repealed.]

[422] APPELLATE CIVIL.

The 20th, 22nd, 23rd and 27th March and 10th April, 1876.

. PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Sham Churn Auddy.....Plaintiff

versus

Tariney Churn BanerjeeDefendant.

Easement—Prescription—User—Limitation Act (IX of 1871), s. 27.

In a suit for declaration of the plaintiff's right of way over a lane leading from a public road to a door in the plaintiff's house, which lane the defendant, who resided at the end of the lane, had obstructed so as to prevent access to the plaintiff's house, it appeared that the house in respect of which the easement was claimed belonged in 1855 to one HC, during the time of whose occupation there was user of the right of way over the lane to the door, until he had the door bricked up. In April 1865 the house was sold by HC, and in June 1867 was conveyed by the purchaser to the plaintiff. From the blocking up of the door until the plaintiff's purchase no user was proved. The suit was brought in June 1875, about a month after the erection by the defendant of the obstruction complained of. *Held*, both in the Court below and on appeal, that the owner of the dominant tenement having, with the intention of preventing the use of the way, created an obstruction of a permanent nature which rendered such use impossible, the way could not be said, during the continuance of such obstruction, to have "been openly enjoyed" within the meaning of s. 27 of Act IX of 1871, and that accordingly, though there had been no interruption within the meaning of that section, a right to the way had not been established under the Act.

APPEAL from a decision of PHEAR, J., dated the 6th December 1875. The suit was brought on the 18th June 1875.

The facts were sufficiently stated in the **Judgment** appealed from, which was as follows :—

PHEAR, J.—This is, according to the terms of the plaint, a suit for the determination of the plaintiff's right of way over a blind lane leading out of Hiddaram Banerjee's Lane to the back door of, and to a privy in, the plaintiff's house No. 1, Mudden Dutt's Lane. The plaint goes on to say that the plaintiff is possessed of the House No. 1, Mudden Dutt's Lane, and is entitled to a right of way at all times of the year for himself and his servants from the said house to Hiddaram Banerjee's Lane and from Hiddaram Banerjee's Lane to the said house over a blind lane forming the eastern boundary of the said house; and the plaintiff complains that the defendant, on or [423] about the 28th June 1874, wrongfully obstructed the said way by building a wall in front of and blocking up the said back door; and on or about the 21st May 1875 by building a wall in front of and blocking up the said privy; and on or about the 6th June 1875 by building and partly completing a wall across and blocking up the entrance to the said blind lane. The easement which he thus claims and for obstruction of enjoyment of which he now brings this suit is specifically described as follows :—"To the east of the said house and premises and between the same and a house numbered 50 Hiddaram Banerjee's Lane, belonging jointly to the plaintiff and his brothers Roop Chund Auddy and Prem Chund Auddy as members of a joint Hindu family, is a lane leading to the land and premises of the defendant hereinafter called the blind lane." The back entrance of the said "house No. 48, Hiddaram Banerjee's Lane,

opened on to the said blind lane, and at the north-east corner of the said house was a privy, an entrance to which also opened on to the said blind lane."

"For upwards of twenty years, the owners and occupiers of the said house and premises No. 48, Hiddaram Banerjee's Lane, were in the constant habit of passing from Hiddaram Banerjee's Lane over the said blind lane to the back door or entrance of the said house, and of repassing from the said door over the said blind lane to Hiddaram Banerjee's Lane, and their mehters have for the same period been in the constant habit of passing to and fro over the said lane for the purpose of clearing the said privy and carrying the night-soil therefrom."

The plaintiff does not expressly say that the soil of the land belongs to the defendant; but he nowhere asserts for himself any proprietary right to it or to any portion of it, and all he claims is an easement; and the defence is that the plaintiff is not entitled to that easement. It is thus incumbent on the plaintiff in the first place to establish his right. The only title to the easement, which he puts forward is title acquired by user under s. 27 of Act IX of 1871. The words of the section are as follows:—"Where the access and use of light or air to and for any building has been peaceably enjoyed therewith as an easement and as of right without interruption and for twenty years, and [424] where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption and for twenty years, the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof, and of the persons making or authorizing the same to be made."

* The enjoyment which the plaintiff seeks to prove by evidence in order to establish title under this section is certainly of a very imperfect character indeed.

He has only comparatively lately become owner of the premises to which the alleged easement is incidental. The history of the premises appears to be shortly this.

In 1855 one Haram Chunder acquired the property from the Sens. Ten years after, namely, on the 4th April 1865, the premises were purchased by Madhub Chunder Seal in the name of Kallee Churn Seal. On the 26th August 1866, Madhub Chunder Seal died, and in the following year, on the 26th June, his executors and Kallee Churn Seal conveyed to the plaintiff. But it appears so far as one can judge by the evidence given that the house which has gone through these transitions of ownership has not been occupied as a residence by any one for several years. The plaintiff himself has not resided in it, though he says he did for a time occupy a room of it for a special purpose, and in January 1871 he pulled down the old house, a greater portion of which had

already fallen down, and built another on the site. It is to this new house that the plaintiff [425] says the easement is incidental by reason of s. 27 of the new Limitation Act. It seems to me that the evidence adduced by the plaintiff falls short of proving any enjoyment of the right for any portion of the period of twenty years. The words of the section are "has been peaceably enjoyed therewith as an easement and as of right without interruption and for twenty years." The plaintiff himself has given his evidence, but he could not possibly speak personally to the enjoyment of the right which constitutes the easement described in his plaint. The actual user in the case of one branch of the easement is by servants of the lowest class and mehters, and that of the other branch by a limited portion of a Hindu family. No single witness has been brought by the plaintiff who possesses the character of either the one set of persons or the other. No mehter or servant of any occupier of No. 1, Mudden Dutt's Lane: no members of any family, who have enjoyed occupation of the house, have been brought by him to depose to actual personal user, but a succession of almost worthless witnesses have been called to speak as spectators from a distance of the exercise of these rights by persons who have the specified status. I need hardly say this is not the way in which an attempt to burthen another man's estate under the section is to be proved. However what was defective in the plaintiff's case was supplied by the defendant. Two of the sons of Haran Chunder Chunder who had lived in the house for the ten years between 1855 and 1865, did speak to an enjoyment of such an easement as that described in the plaint by the then owner of the house their father in the persons of his servants and the members of his family. This does not, however, bring the enjoyment further than 1865 or thereabouts, and does not cover more than half the period which the plaintiff must make out in order to satisfy the requirements of the Act. The period must determine within two years immediately preceding the institution of the suit. It is on this argued by the plaintiff that, even if there be a gap, so far as the evidence goes, in the actual enjoyment of the easement, I mean if the enjoyment by actual user cannot be carried down to within two years of suit, still the cessor of the enjoyment has been voluntary on the part of the owner of the premises [426] or at any rate is not shown to be attributable to the act of any other person than the claimant. Therefore, within the terms of the explanation attached to s. 27, the actual enjoyment of the easement must be carried constructively down to the very time of bringing the suit. It seems to me by this argument that the "explanation" of the Act is somewhat strained. On the facts of the case I have no doubt whatever, that if there was an easement during the earlier part of Haran Chunder's possession of the house, it was entirely abandoned and was intentionally put an end to before he died, by the blocking up of the doors. The very measure of the easement is that afforded by the two doorways by which access to the land of the defendant is obtained, and the purpose for which the user of the land, after access to it through those doors, is exercised; and it is, I think, impossible to doubt on the evidence of the two sons of Haran Chunder as well as the other witnesses in the case that Haran Chunder did in fact completely block up those two doors which gave access from his house to the defendant's land by bricks and mortar, and that the privy remained closed, and the door shut up from that time onward. There is nothing in the evidence to indicate that these have been used since the time of Haran Chunder. When the privy was closed, and there was in fact no privy, and the doors were built up, there was no capacity on the part of Haran Chunder to enjoy the easement, the object and means which measured the easement were gone, and I think in that state of things no construction derived from the explanation of the section will enable me to say

that the easement was being peaceably and openly enjoyed. I say nothing of what the effect of the abandonment might be *qua* abandonment. It is probable in that sense it could not be materially operative, unless something had been done by the defendant on the faith of the abandonment which should make the abandonment a cause of estoppel against the plaintiff's preferring his claim. I give no decision on the point, and it is not necessary for me to do so, because I think the abandonment in the shape of effectually stopping up and putting an end to the means of [427] access to the land of the defendant had the effect of putting an end to the continuous enjoyment of the easement, whether actual or constructive.

This is not a question as to the continuous existence of a non-used right; but as to the continuity of user which is to establish or evidence a right, and it seems to me there cannot be, even constructively, *user* of a way to and for the purposes of a privy which does not exist, or limited to the hack or servant's entrance of a house which has no such entrance. And therefore that the plaintiff has failed to make out the basis of his right which is necessary to satisfy s. 27 of the Limitation Act. This disposes of the case I think; but I may add that I am of opinion the plaintiff, by his own account, has failed to make out any easement to the privy on the north-east corner. No doubt an easement is not lost by a slight variation in the enjoyment of it, but the materiality of the variation must be judged of by consideration of the burthen on the servient owner. And the variation of burthen is very material, when a melter's business is claimed to be carried from the north-east corner through the whole of the blind lane to the high way instead of from the middle of the blind lane to the same limit, *i.e.*, just half the distance. As the plaintiff has failed to establish the right claimed, his suit must be dismissed with costs.

From this decision, the plaintiff appealed on the following grounds:— "That in the case of a lane between two closes used as a way, the presumption is that the soil *ad medium filum viæ* belongs to the owner of the land on each side, if the user has been as a road, and not in the exercise of a claim of ownership: that, under the circumstances, the *onus* of proof had been wrongly thrown on the plaintiff, whereas there was sufficient evidence to shift the burden on to the defendant; that the decision was against the weight of evidence, and the defence set up at the hearing totally different from that put forward in the written statement: and that there was ancient user proved, and no evidence of any interruption of the alleged right of way of the plaintiff or his predecessors by reason of any obstruction by the act of some person other than the claimant until within two years of the institution of the suit."

[428] Mr. Pifford and Mr. Evans for the Appellant.

The Advocate-General, *Offy.* (Mr. Paul) and Mr. Bonnerjee for the Respondent.

The following cases were referred to in argument: *Moore v. Rawson* (3 B. & C., 332), *Bateman v. Bluck* (18 Q. B., 870; 17 Jur., 386; 21 L. J., Q. B., 406), *Liggins v. Inge* (7 Bing., 682), *Stokoe v. Singers* (8 E. & B., 31), *Lady Holland v. The Kensington Board of Works* (L. R., 2 C. P., 565), *Monmouth Canal Company v. Harford* (1 Cr. M. & R., 614), and *Bright v. Walker* (1 Cr. M. & R., 211).

The Judgment of the Court was delivered by

Garth, C. J.—This is a suit brought by the plaintiff for the purpose of establishing a right of way for himself and his servants from a public road

called Hiddaram Banerjee's Lane over a 'piece of ground, which is called a blind lane, to a kirkee door and privy in the plaintiff's house.

The defendant, whose residence is situated at the end of the blind lane, has built up a wall, against the plaintiff's kirkee and privy doors, and also across the entrance from the blind lane to Hiddaram Banerjee's Lane, so as to prevent all access from Hiddaram Banerjee's Lane to the plaintiff's house.

It does not very clearly appear from the evidence to whom the land called the blind lane belongs. The plaintiff has made an attempt to claim one-half of it as his own, upon the ground, that as it was a road lying between his house and his neighbour's, the presumption of law was that he was entitled to the half of it, *usque ad medium filum* of the space between the two houses.

We think, however, that there is nothing in this point. The supposition that the plaintiff is the owner of the soil is quite inconsistent with the right of way, which he claims in his plaint. It is also inconsistent with the plaintiff's own title-deeds, which state the blind lane to be the boundary of his property, [429] and, lastly, the presumption upon which the plaintiff founds his claim is only applicable to a highway and not to a private occupation road, such as the blind lane is alleged to be.

The only question in the case, therefore, is whether the plaintiff is entitled to the right of way which he claims in the plaint.

(After stating the facts, His Lordship continued):—

Upon this state of facts, the learned Judge in the Court below has decided, and we consider rightly, that the plaintiff has failed to establish a twenty years user of the way which he claims within the meaning of the 27th section of the Limitation Act, and that the discontinuance of the user, which was caused by the bricking up of the wall, has had the effect of preventing the acquisition of the statutory right.

In the view which we have taken of the cases, we should have thought it unnecessary to do more than express our acquiescence in the judgment of the Court below, and in the reasons for that judgment, were it not that in the argument before us, which has occupied a considerable time, some confusion appears to have arisen as to the construction of the 27th section, and the meaning of the terms "interruption," "abandonment," and "discontinuance" as applied to the present case.

There was here neither an "interruption" nor an "abandonment" (properly so called) of the easement claimed. The term "interruption" in s. 27 means an obstruction or prevention of the user of the easement by some person acting adversely to the person who claims it. The expression is altogether inapplicable to any voluntary discontinuance of the user by the claimant himself. This is abundantly clear from the explanation given in the Act itself. The term "abandonment," on the other hand, as applied to easements, means generally the voluntary and permanent relinquishment by the dominant owner of a right which he has actually acquired. This will be found satisfactorily explained in Gale on Easements (2nd edition), 353, and in the judgment of the Court in *Moore v. Rawson* (3 B. & C., 332). In this sense there was no abandonment here, because the plaintiff's right was never [430] actually acquired. It was only in course of acquisition by user at the time when the doors were bricked up.

"Discontinuance" more properly describes what occurred at that time: not a "discontinuance" by adverse obstruction, as the term is somewhat

inappropriately used in the explanation to the 7th section, but such a voluntary discontinuance of the user of the easement as prevents the statutory right being acquired.

The reason why such a discontinuance of user defeats the right is, that no one can be said to be in the open enjoyment of an easement, who has purposely, and with the manifest intention of preventing the user of it, created some obstruction of a permanent character which renders the enjoyment of the easement, so long as the obstruction lasts, impossible. This is very different from the mere non-user for a time of an easement, which the owner might, if he pleased, enjoy during every hour of that time, but which, for some good reason, he does not care to enjoy, as for instance, where the owner of a house ceases to use a way to it, because the house is for a time unoccupied, or where a farmer desists for a time from exercising a right of pasture, because he happens to have no pasturable cattle, or because by reason of drought or some other cause the herbage is scanty or unwholesome.

What the owner of the house has done in this case, is to incapacitate himself by his own act from any possible use or enjoyment of the way in question : and it seems quite impossible to say, that during the time this incapacity continued, he was openly enjoying the easement, and claiming right thereto within the meaning of the 27th section.

It was then suggested by the plaintiff's Counsel that, although the statutory right might not have been acquired, there was evidence in the case showing that the easement had been enjoyed for upwards of twenty years previously to the bricking up of the wall, and that the plaintiff was entitled to claim a right by prescription at common law, by asking the Court to presume an ancient grant in his favour. Upon looking into the case, however, it appears that the evidence in favour of any such prescriptive right is so slight as hardly to justify the Court [431] under any circumstances in finding for the plaintiff upon that ground, but in this case there are very cogent reasons for not admitting any claim upon this basis.

In the first place the plaintiff, in his plaint, distinctly founds his claim upon a twenty years user, and in conducting his case in the Court below, it is admitted that he relied on no other ground than the statutory title.

The defendant, therefore, would very naturally abstain from cross-examining the plaintiff's witnesses, or adducing any evidence himself, except for the purpose of defeating the claim in the way, and the only way, the plaintiff sought to advance it, and he would now be placed in a very unfair position if we were to allow the plaintiff, upon this ingenious suggestion now made for the first time to change his position altogether, and rest his case upon a point which was never contemplated by either of the parties in the Court below.

The Court are by no means disposed to encourage a contention of this kind, and the result is that we entirely agree with the judgment of the Court below, and dismiss the appeal with costs on scale No. 2.

Appeal dismissed.

Attorney for the Appellant : Mr. Leslie.

Attorney for the Respondent : Baboo G. C. Chunder.

[1 Cal. 431]
APPELLATE CIVIL.

The 16th July, 1876.

PRESENT :

MR. JUSTICE MARKBY.

In the matter of the Petition of Feda Hossein and others.*

*Act VI of 1874 (Privy Council Appeals Act)—Letters Patent, 1862, cl. 39—
24 & 25 Vict., c. 104, s. 9—24 & 25 Vict., c. 67 (Indian Councils' Act),
s. 22—Powers of Indian Legislature*

The provision in s. 5 of Act VI of 1874 that where there are concurrent decisions on facts, the case must, in order to give a right of appeal to the Privy Council, involve some substantial question of law, is not *ultra vires* of the power of the Indian Legislature as being a curtailment of the jurisdiction given to the High Courts by the Letters Patent, 1865, cl. 39.

[432] Clause 39 of the Letters Patent of 1865 does not rest for its authority on the 24 & 25 Vict., c. 104, and was not inserted in pursuance of that Act; consequently, any power which it gives to admit an appeal to the Privy Council from a decision of the High Court on its Appellate Side, is not one of the powers which the High Court is, by the first part of s. 9 of 24 & 25 Vict., c. 104, commanded to exercise.

S. 22 of 24 & 25 Vict., c. 67, must be read with ss. 9 and 11 of 24 & 25 Vict., c. 104. By the express words of s. 9 all previously existing powers were reserved to the High Court provided the Letters Patent did not interfere with them, and as to these powers the Governor-General in Council is expressly empowered to legislate. Even if therefore the power to admit an appeal to the Privy Council were conferred by the Letters Patent, under the authority of 24 & 25 Vict., c. 104, it was, not being a new power, subject to the legislative control of the Governor-General in Council.

The *ratio decidendi* in *The Queen v. Meares* (14 B. L. R., 106) dissented from.

Where there were two concurrent decisions on facts, an application to appeal to the Privy Council was refused, the right of appeal from a decision of the High Court on its Appellate Side, simply on the ground that the subject-matter of the suit was above Rs. 10,000 having been taken away by Act VI of 1874, s. 5.

APPLICATION by petition for admission of an appeal to the Privy Council, or to grant leave for such appeal (the application was for admission of the appeal under the law in force before the passing of Act VI of 1874, on the ground that that Act was *ultra vires*; or, in case the Court should consider the Act binding for leave to appeal under s. 5, on the ground that the suit was one involving a substantial question of law), from a judgment of the High Court affirming a decision of the District Judge of Purneah.

The petitioner was the plaintiff, and his suit was dismissed in both Courts upon the merits.

The petition set forth that the value of the property involved in the suit exceeded Rs. 10,000; that though Act VI of 1874 passed by the Governor-General in Council provided among other things that "where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law," still, inasmuch as such provision was wholly unauthorized and beyond the competency of the Governor-General in Council to make, the petitioner was clearly entitled to the right of appeal [433] under the provisions of the Letters

* Privy Council Appeal No. 15 of 1876, in Regular Appeal No. 238 of 1874.

Patent; that, in fact, there were substantial questions of law involved in the suit; and that "considering the value of the property and complicated facts of the case and legal questions involved therein," leave should be granted to the petitioner, the case being a fit one for appeal to the Privy Council.

The application came on for argument on the 30th of June 1876.

Mr. *Kennedy* and Mr. *M. P. Gasper* (Mr. *R. T. Allan* with them) appeared in support of the petition.

Mr. *Woodroffe* and Mr. *Evans* (Mr. *Twidale* with them) appeared to oppose it.

Mr. *Kennedy*.—S. 5 of Act VI of 1874* (the Privy Council Appeals Act) has imposed a restriction on the right of parties to appeal to Her Majesty in Council, when the High Court or any other Court of final appellate jurisdiction affirms the decision of the Court immediately below. It declares by implication, that where there are concurrent decisions on facts, the case must involve some substantial question of law in order to give a right of appeal to the Privy Council. But cl. 39 of the Letters Patent of 1865 gives an appeal as of right to the Privy Council, provided the sum or matter at issue is of the amount or value of not less than Rs. 10 000. The restrictive enactment of the Governor-General in Council is *ultra vires*. The Council's Act (24 & 25 Vict., c. 67) was passed in the same Sessions as the Charter Act (24 & 25 Vict., c. 104). S. 22 of 24 & 25 Vict., c. 67, declares the power of the Governor-General in Council to make laws and Regulations "for all Courts of Justice whatever," and at the same time provides that he shall have no authority to pass any law or Regulation which shall affect the provisions of any Act passed in the same Sessions with the Council's Act. S. 9 of 24 & 25 Vict., c. 104, provides that the High Courts established under the Act "shall have, and exercise all such civil, criminal, admiralty, . . . jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice [434] in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid direct and grant," and that the newly established Courts shall exercise all the powers possessed by the abolished Courts subject only to the provisions of the Letters Patent. The admission of an appeal to the Privy Council is a power "in relation to the administration of justice," and as the Letters Patent (cl. 39) give an appeal as of right in cases above a certain amount, the question consequently arises, had the Governor-General in Council the power to curtail the jurisdiction of the High Court to admit such appeals?

The Charter Act enacts that the High Court shall have and exercise such jurisdiction as Her Majesty shall by Her Letters Patent appoint. It is true the details of the jurisdiction of the High Court are not contained in the statute itself. It merely authorizes Her Majesty to define the jurisdiction, but it directs the Court to exercise that jurisdiction when it shall have been so defined. When, therefore, Her Majesty issued the Letters Patent, even if they be not incorporated in the Act, they remained an absolute and fixed thing upon which

* [Sec. 5.—In each of the cases mentioned in clauses (a) and (b) of section four, the amount or value of the subject-matter of the suit in the Court of First Instance must be ten thousand rupees or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum or upwards,

or the decree must involve directly or indirectly some claim or question to, or respecting, property, of like amount or value, and where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law.]

the Act fastened the jurisdiction. And consequently the enactment made by the Governor-General in Council disallowing the High Courts from admitting appeals in cases where the Letters Patent expressly directed them to admit such appeals, is *ultra vires*, and not binding.

The question how far the Governor-General could derogate from the jurisdiction of the High Courts was argued in the case of *The Queen v. Mearns* (14 B. L. R., 106). COUCH, C.J., in that case observes that he thought it unlikely that the mere mention in the Letters Patent of a certain jurisdiction should be intended to take away from the Governor-General's Council powers which it formerly possessed, and inferring that, as this would be the necessary result of holding that the Act did fasten the jurisdiction upon the subjects defined in the Letters Patent, he refused to give effect to what is transparently the plain meaning of the words; saying merely that the words in the Councils' Act, "provisions in the Act," which are not to be [435] affected, do not apply to what was not in the High Courts' Act itself.

The effect of this construction would be not only to subject the High Court to the Supreme Council, but also to the Local Councils; so that, whilst no jurisdiction was prescribed by the Letters Patent, it could only be affected by the Indian Council; the moment, however, it was conferred it became also subject to the powers of the Local Councils. It is impossible to attribute such an intention to the Legislature. If it was the intention to subject the jurisdiction of the High Court to the legislative powers of the Governor-General in Council, what meaning should be attached to s. 17 of the Act (24 & 25 Vict., c. 104), which contains an express provision for the purpose of altering the Letters Patent. [MARKBY, J.—As I understand COUCH, C.J., he holds that the Governor-General in Council is not prohibited from altering the provisions of the Letters Patent except so far as he is prohibited from doing so by the last clause of s. 9 of 24 & 25 Vict., c. 104.] That was my first view. And comparing s. 43 of 3 & 4 Will. IV., c. 85, with s. 22 of the present Indian Councils' Act, it will be found that there are important omissions or variations in the latter; for example, in s. 43 of the former Act, there occur the words "for all Courts of Justice, whether established by Her Majesty's Charter or otherwise, and the jurisdiction thereof," which are entirely omitted in 24 & 25 Vict., c. 67. The Chief Justice of Bengal had, under 16 & 17 Vict., c. 95, been added to the Legislative Council. His omission under 24 & 25 Vict., c. 67, must have had some connection with the omission of the words mentioned above. But whatever the reason may be, according to the principle by which statutes are construed, the omission of those words ought to furnish a strong argument in favour of the present contention. This was not before COUCH, C.J., in *Queen v. Mearns* (14 B. L. R., 106). The Chief Justice in that case thought that "provisions of any Act passed in the present Sessions of Parliament or hereafter to be passed" refer to provisions of the Act itself. But the argument which he deduces from s. 42 of the Councils' Act militates against his position, for the [436] words used in s. 42 are similar to the words in s. 22. If

* [Sec. 17.—It shall be lawful for Her Majesty, if Her Majesty shall so think fit, at any time within three years after the establishment of any High Court under this Act, by her Letters Patent to revoke all or such parts or provisions as Her Majesty may think fit of the Letters Patent by which such Court was established, and to grant and make such other powers and provisions as Her Majesty may think fit, and as might have been granted or made by such

first Letters Patent or without any such revocation as aforesaid by like Letters Patent to grant and make any additional or supplementary powers and provisions which might have been granted or made in the first instance.]

"provisions of any Act" therefore are not to be taken as meaning provisions of the Letters Patent as part of the Charter Act, there is no reason why the Bombay and Madras Councils should not have the same power to restrict the jurisdiction of the High Courts as the Supreme Council. [MARKBY, J., referred to the Privy Council decision in the *Bhaunagar* case (L.R., 3 I.A., 102) as to the *ultra vires* of part of the Indian Evidence Act.] Cl. 44 of the Letters Patent is worthless, unless it forms a substantive part of the Act itself. [MARKBY, J.—Is it certain that that part of the Letters Patent which relates to the Privy Council is not from other authority than that conferred by the Charter Act, which does not contain any power of constituting Courts other than Courts in India?] If the Letters Patent were not made under the Act, then it must follow they were made without authority. [MARKBY, J.—The Queen had power to make them, had she not?] Yes, but the Governor-General in Council has not the power to bind the Privy Council. It is not one of the Courts mentioned in s. 22 of the Councils' Act. [MARKBY, J.—But there is no power in the Letters Patent to admit an appeal.] No, but that was one of the powers in existence from before. The Supreme Court had the power to allow or admit an appeal, and COUCH, C. J., in the case of *Abul Kasim Koonjee v. Fatima Bibi*, reluctantly ordered security in an appeal to the Privy Council, thinking that s. 30 of Supreme Court Charter was still in force.

The Indian Legislature's taking away the power of the High Court to admit an appeal to Her Majesty would not only amount to an interference with the Letters Patent, but would be a distinct contravention of a positive direction to do a certain act, that is, to admit the appeal. The Letters Patent were made by the Queen under the Act. No Legislature of limited powers can pass any statute so as to make the provisions of 24 & 25 Vict., c. 104, simply non-existing. Under s. 17 of the Charter, power is reserved to Her Majesty alone to revoke or modify Her Letters Patent as she might think fit. Can it be supposed that whilst vesting the Queen with the power of revocation, the next day the Imperial Legislature should allow the Indian Legislature to [437] stultify the provisions of the Letters Patent. Where a power is given the ability to perform it must also be given as incident to it: and the doctrine that an execution of a power is to be treated as a portion of the instrument creating the power, is universally applicable: Sugden on Powers, chap. ii, para. 2. In the *Goods of Bibee Muttra* [Morton's cases (Mont. Ed.) 191, at p. 216], Sir T. FRANKS laid down "the principle that a Charter granted by an Act of Parliament, is an Act of Parliament, and applying that principle to this case, it is contended that the Letters Patent form a component part of the Imperial Act. *The North British Railway Company v. Tod* (12 Cl. & Fin. 722 at p. 732), also illustrates incorporation of a document into an Act of Parliament. [MARKBY, J.—Supposing the provisions of the Letters Patent were incorporated with the Act, would not the decision in *Meares' case* remain untouched: in other words, did not s. 9 subject all existing powers to the powers of the Governor-General in Council?] Yes; but under the especial provisions of the Charter Act, and not otherwise. Besides, there is a distinction between this case and *Queen v. Meares*, inasmuch as the Charter Act did vary the powers of the High Court over European subjects. [MARKBY, J.—Was not the intention of the Legislature to confer on the Indian Legislature all existing powers, but not to give any power applicable to future circumstances, as is usually the intention in statutes giving powers?] I submit there was no such intention; for s. 17 of the Charter Act reserves expressly to the Queen a power of revocation, and supposing the Queen exercised her power in conflict with any Act of the Indian Legislature, would not she be able to override such Act? [MARKBY, J.—She would

be trespassing on the powers of the Indian Legislature, so lately held by the Queen's Bench in a case of an order in Council.] The Charter Act gives her the power. It leaves to her an indeterminate residuum of power which she alone can exercise, and which enables her to modify her own directions. The words "save as by such Letters Patent may be otherwise directed," in s. 9, clearly show that the High Court was subjected to the powers of the Indian Legislature only to a limited extent, that is, so far as [438] such subjection is not inconsistent with the express directions of the Letters Patent. The Chief Justice in *Queen v. Meares* (14 B. L. R., 106) refers to 34 & 35 Vict., c. 34. This Act shows that it was necessary to confirm the statutes passed by the Indian Legislature by a special enactment of the Imperial Parliament. The argument therefore comes to this that the effect of those Acts of the Indian Legislature is to direct the High Court not to do a thing which the Letters Patent especially empowers—nay directs—the Courts to do : and therefore the taking away of such power from the High Court is *pro tanto* repealing the Letters Patent.

Mr. Woodroffe *contra*.—Cl. 39 of the Letters Patent, upon which so much stress has been laid, contains no special regulation regarding appeals to the Crown independently of previous Acts or rules. It simply declares what had been already declared before, that in cases where the value of the matter at issue was Rs. 10,000, or upwards, or where the High Court should certify the case to be a fit one for appeal,—“subject,”—and this is most important—“always to such rules and orders as are now in force.” Now s. 9 of 24 & 25 Vict., c. 104, does not contain any direction regarding appeals to the Privy Council. It has been contended that they fall under the words “administration of justice”; but when the previously existing rules on the subject are examined, it will be seen that these words have no relation to appeals to the Crown; but such right has been much curtailed and circumscribed by statutory directions. The first statute which interfered with this right was 25 Hen. VIII, c. 19, recited in 3 & 4 Will. IV, c. 41. S. 18 of 13 Geo. III, c. 63, by which the Supreme Court was established, directed that the Charter granted under that Act should provide the conditions for appeals to the King in Council. S. 30 of the Charter (Sm. & Ryan's Rules and Orders, p. 33) made such provisions as were at the time deemed “proper and reasonable.” Coming [439] to 3 & 4 Will. IV, c. 41, by which “the Judicial Committee” was constituted, we find s. 24 declaring that “it shall be lawful for His Majesty in Council from time to time to make any such rules and orders as may be thought fit for the regulating of the mode, form and time of appeal” from the Courts of Judicature in India; but otherwise making no change in the directions of s. 30 of the Supreme Court Charter. On the 10th of April 1838, an order in Council was signed, by which all the previously existing rules regarding valuation, &c., were rescinded, and the minimum limit of Rs. 10,000 among other things was definitely fixed in order to give an absolute right of appeal (Sm. & Ryan's Rules and Orders, App. ciii). These rules and orders were in force in the Supreme Court at the time of its abolition. The High Courts' Act contained no provision regarding appeals to the Privy Council. Cl. 39 of the Letters Patent, whilst reserving the prerogative of the Queen to admit appeals to herself, simply continued the old rules, that is what had been fixed by the order in Council referred to above. Those rules therefore were in no sense of the term ‘part and parcel’ of the Letters Patent so as to take them out of the legislative power of the Governor-General in Council. The argument therefore founded on Sir J. FRANK'S dictum in *The Goods of Bbee Muttra* [Morton's

cases (Mont. Ed.), 191, at p. 216], falls to the ground, even on the assumption that the Letters Patent form a part of the Charter Act. But is Sir J. FRANK right in his view that a Charter granted under an Act is a part of the statute? RUSSELL, C. J., expressly declined to coincide with Sir J. FRANK's view. In order to determine whether the Letters Patent form a part of the High Courts' Act, it must first be considered whether the Queen by her Charter could enlarge or diminish the provisions of the statute. It can hardly be contended that she could do this. But as long as the decision in *Queen v. Meares* (14 B. L. R., 106) stands, there is no need of discussing whether the Letters Patent form a part of the Act. COUCH, C. J., expressly decided that "the provisions of any Act" referred to the Act itself, and not to any [440] thing which arose out of the Act. And the other Judges (PHEAR and MORRIS, JJ.) concurred in his view. Besides, the wording of s. 11 of 24 & 25 Vict., c. 104, shows clearly that the Legislature did not intend the Letters Patent to form part of that Act. That the Indian Legislature has the power to modify and alter the jurisdiction of the High Court vested in them by the Letters Patent, was decided in *Madhub Chunder Poramanick v. Rajcoomar Dass* (14 B. L. R., 76). COUCH, C. J., in that case held that the words "until otherwise provided" in cl. 18 of the Letters Patent of 1862, taken in connection with the 44th clause of the Charter of 1865, where it is expressly declared that the provisions in it are subject to the legislative powers of the Governor-General in Council, show that the Government here in its legislative capacity has the power to make the alterations (14 B. L. R., pp. 83-84).

Mr. Evans on the same side. -Cl. 39 of the Letters Patent simply authorizes Her Majesty's subjects to appeal to the Crown, but does not lay down any rules to regulate the procedure except the words, "subject to such rules as are in force." The High Courts' Act had left the rules which existed at the time perfectly intact, subject to the legislative powers of the Governor-General in Council as well as of Her Majesty in Council. The rules existed not by virtue of the High Courts' Act but prior to, and independently of, the same, and therefore the abolition of the Supreme Court and the substitution in its place of the High Court effected no change in them. That the old rules continued in force is clear from what was said by PEACOCK, C. J., in *Gobardhan Barmono v. Srimati Mani Bibi* (5 B. L. R., 76). Therefore it is clear that the rules regulating the admission of an appeal to the Privy Council do not in any sense form part of the Charter by which the High Court was constituted. Those rules were merely for the purpose of conveniently judging which cases should go to the Privy Council. Act VI of 1874 does not take away the common law right of appeal to the Crown. It simply provides a mode of getting a [441] credential by the litigant regarding the subject-matter of the suit. It is submitted, therefore, that the Act in question is not *ultra vires*, and that the admission of appeals to the Privy Council by the High Courts must be regulated by the procedure provided in it. If the petitioner is aggrieved he can apply to the Judicial Committee for special leave to appeal, for this Act in no

* [Sec. 11 -- Upon the establishment of the said High Courts, in the said Presidencies

Existing provisions applicable to Supreme Courts to apply to High Courts.

respectively, all provisions then in force in India of Acts of Parliament, or of any orders of Her Majesty in Council, or Charters, or of any Acts of Legislature of India, which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal, Madras and Bombay, respectively, or to the Judges of those Courts, shall be taken to be applicable to the said High Courts, and to the Judges thereof respectively, so far as may be consistent with the provisions of this Act, and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council.]

way curtails or could curtail the prerogative of the Queen to allow an appeal where the ends of justice make it necessary; *Queen v. Joykissen Mookerjee* (9 Moore's I. A., 191).

Mr. *Kennedy* in reply.—S. 11 of 24 & 25 Vict., c. 104, bears strongly in favour of my construction. The wording of s. 9 is completely different from that of s. 11, which refers simply to the procedure, whilst the former section refers to the jurisdiction of the Court and not to the *lex fori*.

Markby, J. (after stating the nature of the application, continued):—This, it will be observed, is not an application in the form required by Act VI of 1874, and it has been stated that the petition was so drawn expressly in order to raise the question whether the provisions of that Act were binding.

I may say at once that no case for granting special leave to appeal has been made out.

An attempt was also made to obtain, upon this petition, a certificate under Act VI of 1874, that a substantial question of law was involved in the case; and I was asked to grant this certificate, should I think that Act to be binding. But it was subsequently admitted that upon this petition, this alternative course could not be pursued.

The question therefore which remains is, whether the petitioners, in spite of Act VI of 1874, have a right of appeal, simply upon the ground that the property is above the value of Rs. 10,000. There is no doubt that the petitioners would have had that right prior to the passing of Act VI of 1874, and the petitioners contend that the Governor-General in Council had no power to deprive them of that right by legislation. Questions of this kind are of great importance, and if there [442] is any doubt, as there must sometimes be, about the validity of an Act of a Legislature, the powers of which are not supreme, it is extremely desirable that the doubt should be at once fully discovered. If the doubt is unfounded, the sooner it is removed the better. I do not, therefore, regret that this question has been raised, and especially as I have had the advantage of a very able argument to assist me in coming to a conclusion.

The line of argument taken on behalf of the petitioner in order to establish that I am bound to admit this appeal is as follows:—The 39th clause of the Letters Patent of 1865 (it is said) gives an appeal to the Privy Council provided the sum or matter at issue is of the amount or value of not less than Rs. 10,000. Those Letters Patent were issued by Her Majesty under the provisions of the 24 & 25 Vict., c. 104. By s. 9 of that Act, each of the High Courts established under that Act is bound to exercise "all such powers and authority for and in relation to the administration of justice as Her Majesty may by such Letters Patent grant and direct." The admission of an appeal to the Privy Council is a power in relation to the administration of justice, and as the Letters Patent give an appeal as of right, when the value is Rs. 10,000, the admission of this appeal is a power which this Court is commanded by the Act to exercise. And although by Act VI of 1874 the Governor-General of India has directed otherwise, this cannot nullify the directions contained in the Imperial Act, because the Governor-General in Council is expressly prohibited by s. 22 of 24 & 25 Vict., c. 67, from making any law or regulation which shall repeal or in any way affect the provisions of that Act or of any Act passed in that Session of Parliament. Both Acts were passed in the same Session of Parliament, and therefore both Acts, as well as

the Letters Patent, are to be read for this purpose, as if Act VI of 1874 had never passed. This is the argument for the petitioners.

To this argument the following objections are taken by Mr. *Woodroffe* and Mr. *Evans* who appeared on behalf of the defendants in the suit to oppose the granting of this petition. 1.—That the provisions contained in the Letters Patent are [443] not any of them provisions of the 24 & 25 Vict., c. 104, and are therefore not at all within the restriction contained in s. 22 of 24 & 25 Vict., c. 67. 2.—That by the express words of s. 9 of 24 and 25 Vict., c. 104, any power or authority thereby reserved to the High Courts is made subject to the legislative powers of the Governor-General in Council. 3.—That the Letters Patent confer no power on this Court to admit an appeal to the Privy Council. 4.—That the 24 & 25 Vict., c. 104, confers on Her Majesty no power to give an appeal to herself in her Privy Council, and that is, so far as she has done so by the Letters Patent, it must be in virtue of her prerogative or of some previous Act of Parliament, and that for this reason also the restriction contained in s. 22 of 24 & 25 Vict., c. 67, does not apply.

It is most convenient to deal with the two last objections first, and I will consider them together. I think it desirable to call to mind what the position of a Judge of this Court is, when sitting here to admit an appeal to the Privy Council. I am speaking of appeals from the decisions of this Court on its appellate side. The position of a Judge admitting an appeal from the decision of this Court in its original jurisdiction may be the same, but the history of the matter is different, and I do not wish to embarrass the case by unnecessary considerations. A Judge sitting here to admit appeals from the decisions of its Court on the appellate side has in the majority of cases no independent authority whatsoever. The case has been finally heard and determined by a Division Bench of the Court, which in theory of law is a decision of the High Court. All that a Judge of this Court can in most cases do after that, is to assist the parties in bringing their appeal before the Privy Council. Of course, an Act of the Imperial Parliament, or a provision of the Letters Patent, issued in pursuance of an Act of Parliament or an order issued by Her Majesty in Council, might confer upon this Court, or a Judge of this Court, not only power to admit or reject an appeal, but might make the right to appeal dependent upon that admission or rejection. But if that has been done in any case whatever, it is certainly only in some one or more of the cases in which this Court has power to declare that the [444] case is a fit one for appeal: and this class of cases is now out of consideration. Moreover, whether the Governor-General in Council has or has not the power to restrict by legislation the right of appeal to the Privy Council, he has never yet thought fit to do so. In all legislation upon the subject, including Act VI of 1874, full and unqualified exercise of the sovereign's pleasure in the admission or rejection of appeals has been preserved. The question before me therefore does not touch the right of appeal at all; it only touches the proceedings of this Court in forwarding the appeal.

The appeal to the Privy Council from the Court of *Sudder Dewanny Adawlut* (which this Court on its appellate side represents) was granted by the 21 Geo. III, c. 70. Probably it exists independently of that statute—*Salik Ram v. Azim Ali Beg* (8 Moore's I. A., 274). But, as Mr. *Ritchie* clearly points out in an opinion quoted at length in the report to which I have just referred, the Courts here have no power to *admit* or *allow* an appeal unless expressly authorized to do so by competent authority. I am very glad to find an opinion I had myself formed supported by that of so able and experienced a lawyer.

The power to admit an appeal was (as far as I am aware) first conferred upon the Sudder Dewanny Adawlut by Reg. XVI of 1797, s. 2; certain restrictions were placed upon the exercise of that power by the orders of Her Majesty in Council of 10th April 1838, passed in pursuance of 3 & 4 Will. IV, c. 41; and the practice of the Court in the admission of appeals has also been regulated by certain rules of the Court itself, made by the Sudder Dewanny Adawlut on the 17th December 1858, and by this Court on the 30th of July 1870. But there is nothing whatever in 24 & 25 Vict., c. 67, which would prevent the Governor-General in Council altering or repealing any of those provisions.

It is argued that the words "subject always to such rules and orders as are now in force" in cl. 39 of the Letters Patent, incorporates those provisions into the Letters Patent, and so removes them from the sphere of legislation by the Governor-General in Council. I shall hereafter state other reasons why I do not think this to be the case. Apart from other considerations [443] I think the contention is well founded that cl. 39 of the Letters Patent was not inserted in pursuance of the 24 & 25 Vict., c. 104. The Queen was only empowered by this Act to establish by Letters Patent a High Court of Judicature at Fort William in Bengal, and similar Courts elsewhere in India. The power contained in 13 Geo. III, c. 63, to give by the Letters Patent a right of appeal to the Privy Council, is not repeated in 24 & 25 Vict., c. 104, and I do not see in the later Act any words from which such a power could be inferred. I do not say that these provisions in the Letters Patent are therefore invalid, all I say is they do not rest for their authority upon 24 & 25 Vict., c. 104. This is further shewn by the unlimited power reserved to Her Majesty by cl. 39 to alter the provisions of that clause at any future time, which would be contrary to s. 17 of the 24 & 25 Vict., c. 104, if she were acting in pursuance of that statute. I consider, therefore, that even if all the other propositions upon which the argument for the petitioners is founded are correct, still it is not established that the admission of an appeal to the Privy Council is one of those powers which this Court is by the first part of s. 9 of 24 and 25 Vict., c. 104, commanded to exercise. I think its existence is entirely independent both of that Act and of the Letters Patent.

I think it right, however, not to leave the rest of the argument unnoticed, which bears upon the general construction of the 24 & 25 Vict., c. 104, and the 24 & 25 Vict., c. 67. I agree with a good deal that Mr. Kennedy has said upon this subject, though I do not put exactly the construction upon these two Acts which he contends for. I understand him to argue that no powers which the Letters Patent profess to confer upon this Court can be touched by the Governor-General of India in Council whether they be new or old. Mr. Kennedy admits that this is contrary to the ruling in *Queen v. Meares*

* [Sec. 2:—All persons desirous of appealing from a judgment of the Court of Sudder Dewanny Adawlut to the King in Council, under the authority

Petitions of Appeal to the King in Council shall be presented to the Sudder Dewanny Adawlut within six months; and such appeal to be admitted, provided the judgment appealed against shall, exclusive of costs, be £5,000 sterling.

for this purpose contained in the 21st section of the Statute 21, George III, Cap. LXX are required to present their petition of appeal to the Court of Sudder Dewanny Adawlut, either themselves or through one of the authorised pleaders of that Court, duly empowered to make such petition in their behalf, within six calendar months from the date on which the judgment appealed against may have been passed; and provided also the judgment appealed against shall, exclusive of costs of suit, be of the value of five thousand pounds (to be calculated as hereinafter mentioned) the Court of Sudder Dewanny Adawlut are to admit the appeal, and proceed upon it as directed in the following sections, of this regulation under the several restrictions therein prescribed.]

(14 B. L. R., 106), which he considers to lay down that the Governor-General of India in Council has unlimited legislative authority in regard to all the provisions of the Letters Patent. This has, I believe, been generally considered to be the result of the reasoning in the decision of *Queen v. Meares* (14 B. L. R., 106), and had I been able to accept that reasoning in [446] its entirety, there would have been no necessity for me to do anything more than to express my assent to it and upon the authority of this case to overrule any contrary contention. But though I fully concur in that decision, I have considerable difficulty in accepting the reasoning by which it is supported if it really goes to that extent. And as I am compelled to refer to *Queen v. Meares* (14 B. L. R., 106), it is, I think, better that I should state frankly wherein that difficulty consists.

In order to do this it is necessary that I should state my own view of the 24 & 25 Vict., c. 104. It seems to me to have been the intention of the framers of that Act to make it clear by the Act itself what were the future powers of the Indian Legislature in relation to the High Courts. There are three sections in which reference is made to legislation in India, the 9th (in the second clause) the 11th and the 13th. The two first preserve to the Governor-General of India in Council, and to him alone, the same legislative powers as he had before. The last confers a new power on the High Court, and confers a new power on the Governor-General in Council, and on him alone, to legislate in respect of it. It would therefore seem that Parliament had signified in what respects the High Court should be subject to legislative authority in India, and what that legislative authority should be. And it is not unimportant to observe that this (with the insignificant exception contained in s. 13) is precisely the legislative authority which existed before the Act was passed.

But, if we accept the reasoning in the decision of *Queen v. Meares* (14 B. L. R., 106) to the extent to which it has been pressed, we shall find that the legislative authority over the High Courts in India is wholly different from that indicated by 24 & 25 Vict., c. 104, and from what it was before, and that it has been changed, not directly, as we should expect if any change were intended, but indirectly. It is said in *Queen v. Meares* (14 B. L. R., 106) that the meaning of the words "any provisions of any Act passed in the present Session of Parliament or hereafter to be passed" in s. 22 of 24 & 25 Vict., c. 67, is "provisions in the Act (i.e., 24 & 25 Vict., c. 104) itself, and does not include provisions in [447] the Letters Patent. If that means that under the words of s. 22 itself all the provisions in the Letters Patent can be altered by the Governor-General in Council, and that for this purpose it is not necessary to resort to chapter 104 at all, then it would seem, that not only the Governor-General in Council, but the Governors of the other Presidencies in Council, and the Lieutenant-Governor of Bengal in Council, may legislate for the High Courts. For if s. 22 contains no restriction in this respect, neither does s. 42. Surely if that had been intended, ss. 9 and 11 would not have contained provisions which in that case would have been not only unnecessary, but positively misleading. If that had been the intention, either 24 and 25 Vict., c. 104, would have been wholly silent about legislation in India, leaving that matter as it stood under c. 67; or else wherever the Council of the Governor-General was mentioned the other Councils would have been mentioned also; and the words "subject and without prejudice to, &c.", in the second part of s. 9 would have been made to govern the whole clause.

I admit the force of the observation in *Queen v. Meares* (14 B. L. R., 106) that it could not have been intended that the powers of the Court if inserted

in the Letters Patent should be beyond the reach of the Governor-General in Council, whilst the same powers, if not inserted in the Letters Patent, should be subject to his legislative control. But it seems to me that it is not necessary in order to avoid this result to hold that s. 22 of 24 and 25 Vict., c. 67, does not contain any prohibition against interfering with the provisions of the Letters Patent. That section must be read with ss. 9 and 11 of the 24 and 25 Vict., c. 104. By the express words of s. 9 of 24 and 25 Vict., c. 104, "save as by such Letters Patent may be otherwise directed" the former powers are reserved to this Court by the Act, provided the Letters Patent do not interfere with them, and as to all these powers the Governor-General in Council is expressly empowered to legislate. I think we hold those former powers under the Act, and not under the Letters Patent, and that the Act itself has rendered them subject to the legislative control [448] of the Governor-General in Council. If (as was possible) Her Majesty had not chosen to confer any new power or authority on the High Court, they would then have remained in all respects subject as before to the legislative control of the Governor-General in Council. On the other hand, if she chose (as indeed was actually done) to leave all the old authority substantially as it was with some slight changes, in that case the control of the Governor-General in Council is to some extent curtailed. The line appears to me to be drawn exactly as a Supreme Legislature might be expected to draw it. Whatever is left untouched by the Letters Patent to be thereafter issued, the Indian Legislature may deal with as before; but whatever Her Majesty may chose to alter or create, that the Legislature must not interfere with. This was necessary even though the changes to be introduced by Her Majesty might turn out to be few and trivial, because otherwise Parliament would have been delegating at the same moment to two separate persons, Her Majesty in Council and the Governor-General in Council, co-ordinate authority to deal with the very same subject-matter, a condition of things clearly to be avoided. When the old powers of the abolished Courts were merely repeated in the Letters Patent, it was, of course, understood by Her Majesty that these were subject to be altered by the Governor-General in Council, and very likely it is because this is done to so very large an extent, that the legislative powers of the Governor-General in Council are in the 44th clause of the Letters Patent expressly recognized.

I repeat that this view does not touch the decision of *Queen v. Mearns* (14 B. L. R., 106); it only affects the reasoning by which it is supported. In the view that I take of the matter, the provisions of the Letters Patent there in question being one which left the jurisdiction of this Court exactly where it was before, it was by the second clause of s. 9 expressly made subject to the legislative control of the Governor-General of India in Council.

On the other hand, it seems to me scarcely likely that if Parliament had intended that the Provincial Councils should [449] have full power to legislate for the High Courts, it would have excluded those Councils from the control of these Courts in so insignificant a matter as the exercise of the powers of the Court by single Judges or Division Benches, which is an express provision of the Act itself (s. 13), and therefore can only be touched by the Governor-General in Council, who is alone mentioned in that section.

A strong argument against any construction of the Acts of Parliament of 1861 which would place the High Courts under the control of the Provincial Legislatures appears to me to be afforded by the Act passed ten years afterwards (34 and 35 Vict., c. 34). That Act recites that it is expedient that the power of making laws and regulations conferred on Governors of

Presidencies in India in Council should in certain respects be *extended*, and then proceeds to enact that the Provincial Legislatures may confer jurisdiction over European British subjects upon Magistrates in certain cases. This, as is pointed out, in *Queen v. Meares* (14 B. L. R., 106), is inconsistent with the Governor-General in Council not having the like power. It is equally inconsistent with the Provincial Legislature having previously had such general authority as, it has been said, results from the construction of the Acts adopted by the reasoning in *Queen v. Meares* (14 B. L. R., 106).

But though I cannot go the length of holding that the powers of the High Court in India are subject to the legislative control of all the Provincial Councils, or of the Governor-General in Council in all respects, I am still of opinion, that they are to a considerable extent subject to the legislative control of the Governor-General in Council, not under c. 67, s. 22, but under c. 104, ss. 9 and 11. Mr. Kennedy's argument, therefore, in my opinion, fails on the second objection taken to it by the defendants, though not on the first. Even if the power to admit an appeal were conferred by the Letters Patent, it is not a new power, and it has therefore in my opinion been made by Parliament expressly subject to the legislative control of the Governor-General in Council, but not of any other legislative authority in India.

It was argued against this view of the legislative authority [450] of the Governor-General in Council, that it is indicated by a comparison of the phraseology of s. 22 of the 24 and 25 Vict., c. 67, with the phraseology of the 3 and 4 Will. IV, c. 85, s. 43, that the High Courts were not to be subject to any legislative authority in India. The difference in the two sections is, that whilst the former Act expressly declares all Courts to be so subject, in the latter Act these words are omitted. I do not think that it is a sound method of construing Acts of Parliament to control the effects of general powers which are conferred, because special powers are *not* conferred. To confer any special powers was in this case wholly unnecessary, and the Legislature may well have thought when passing the second Act that it was a mere waste of words to do so. Nor indeed does this argument, even if sound, affect my view of the matter, for the power of the Governor-General in Council to legislate for the High Courts rests in my opinion not on the 24 and 25 Vict., c. 67, but on the 24 and 25 Vict., c. 104.

For all these reasons it seems to me that this application must be rejected with costs.

Application refused.

NOTES.

[1. Upon the point as to the powers of the Indian Legislature to affect the High Courts Act, see *The Empress v. Burah* (1878) 4 Cal., 172 P. C. reversing (1877) 3 Cal., 63 F. B. See also *The Secretary of State for India in Council v. Moment* (1913) 24 M. L. J., 489.,

2. On the "substantial question of law," required for leave to appeal, see (1895) 20 Bom., 699.]

[1 Cal. 450]

APPELLATE CRIMINAL,

The 23rd August, 1876.

PRESENT :

Mr. JUSTICE MACPHERSON AND Mr. JUSTICE MORRIS.

The Queen .

versus

Baijoo Lall and others.

In the Matter of the Petition of Baijoo Lall and another.*

*Criminal Procedure Code (Act X of 1872,) s. 471—Act XXIII of 1861, s. 16 —
Order sending Case to Magistrate for enquiring into Offence of giving
False Evidence—Preliminary Enquiry—Vagueness of Charge.*

Although s. 16 of Act XXIII of 1861 gives Civil Courts powers similar to those conferred on Civil and Criminal Courts alike by s. 471 of the Criminal Procedure Code, the whole law as to the procedure in cases within those sections is now embodied in s. 471 of the Criminal Procedure Code.

In a suit brought to recover possession of certain property, the Judge decided one of the issues raised in the plaintiff's favour, but on the important [451] issue as to whether the plaintiff ever had possession, he found for the defendant. The plaintiff was not examined, but on the issue as to possession he called two witnesses. The Judge disbelieved their statements, and considering that the plaintiff had failed to prove his case, he gave judgment for the defendant, without requiring him to give evidence on that issue. In the concluding paragraph of his judgment, the Judge directed the depositions of the two witnesses above referred to, together with the English memoranda of their evidence, to be sent to the Magistrate with a view to his enquiring whether or not they had voluntarily given false evidence in a judicial proceeding, and he further directed the Magistrate to enquire whether or not the plaintiff had abetted the offence of giving false evidence, on the ground that as the witnesses were the plaintiff's servants he must personally have influenced them, and also to enquire whether the plaint which the plaintiff had attested contained averments which he knew to be false. On a motion to quash this order, *held*, that under s. 471 of the Criminal Procedure Code, the Judge has no power to send a case to a Magistrate except when, after having made such preliminary enquiry as may be necessary, he is of opinion that there is sufficient ground (*i.e.*, ground of a nature higher than mere surmise or suspicion) for directing judicial enquiry into the matter of a specific charge, and that the Judge is bound to indicate the particular statements or averments in respect of which he considers that there is ground for a charge into which the Magistrate ought to enquire, and that the order was bad, because the Judge had made no preliminary enquiry and because it was too vague and general in its character.

THIS was an application to quash an order of the Judge of Gya sending the plaintiff in a Civil suit and two of his witnesses to a Magistrate for enquiry into charges of giving false evidence and of abetment of that offence. In that suit the present petitioner, Baijoo Lall, sought to recover possession of certain property from which he alleged the defendant in the suit had illegally evicted him. He claimed as sub-lessee of one Rajun Kunwar who, he stated, was lessee of the property under Ranees Sunut Kunwar, the owner thereof. Amongst

* Criminal Motion, No. 189 of 1876, against the order of the Judge of Zilla Gaya, dated the 22nd June 1876.

other issues raised in the case was an issue as to whether Ranee Sunut Kunwar had executed any lease to Rajun Kunwar: another issue was whether the plaintiff had ever been in possession. Evidence was gone into at the trial, and the Judge decided the former issue in favour of the plaintiff, but on the important issue as to possession he found for the defendant; and for that reason he dismissed the suit. Upon the issue as to possession no witnesses were called for the defendant, and the only witnesses called for the [452] plaintiff were two persons, Juggernath Singh and Nowrangī Lall, the former of whom joined in the present application. The Judge disbelieved the statements of these two witnesses, and, considering that the plaintiff had failed to prove his case, gave judgment for the defendant without calling upon him to go into evidence on that issue.

In the concluding paragraph of his judgment the Judge ordered as follows:—

"The depositions of Juggernath Singh and Nowrangī Lall, together with the English memoranda of their evidence, will be sent to the Magistrate with a view to his enquiring whether or not they have voluntarily given false evidence in a judicial proceeding; and as the witnesses are the servants of the plaintiff in this suit, Baijoo Lall, he must presumably have influenced them. I further direct that an enquiry be made by the Magistrate whether or not the said Baijoo Lall has abetted the offence of giving false evidence in a judicial proceeding; and also whether the plaint, which he has attested, contains an averment which he knew to be false. In the course of that enquiry it may be well that the Magistrate should examine those witnesses who were cited by the defendants to rebut the plaintiff's allegation of possession, but whom I considered it unnecessary to examine as the plaintiff's witnesses so completely broke down."

The petitioners, Baijoo Lall and Juggernath Singh, now moved the High Court to quash this order on the following grounds:—That there was no evidence to show that the statements of Juggernath Singh were false or that Baijoo Lall had abetted the offence of giving false evidence, and the mere circumstance that his witnesses had deposed in his favour did not warrant the inference that he had abetted such an offence; that the enquiry as to whether the plaint contained an averment which the plaintiff knew to be false was too general and vague, especially where important issues had been decided in the plaintiff's favour; that the Judge had failed to comply with the requirements of s. 471 of the Code of Criminal Procedure, and had made no preliminary enquiry, nor recorded any proceeding showing that he was of opinion that there was sufficient ground [453] for enquiring into the charge; that the order should have specified the particular acts or statements which constituted the offence charged; that his reasons for disbelieving the evidence were highly conjectural, and that it was beyond the scope and object of the law that such prosecutions should be allowed upon such reasons, and that the order was made without jurisdiction.

Upon this motion the High Court sent for the record and called upon the Judge to show cause why his order should not be set aside.

In his return to the High Court the Judge stated that he had made the order in exercise of the powers vested in the Court by s. 16 of Act XXIII of 1861; that he made no preliminary enquiry as the statement of the witnesses and their demeanour satisfied him that they had given false evidence, and he submitted that "the necessity or the reverse which existed for a magisterial

enquiry was all that the preliminary enquiry of the Civil Court could decide ; " and that " the framing of a technical charge was the duty of the Magistrate, and not of the Court directing the Magistrate to hold an enquiry ; the duty of the Court was limited to a reasonable indication of the nature of the offence to be enquired into. "

Mr. C. Gregory for the Crown showed cause.

Mr. Branson and Mr. Sandel in support of the rule.

The Judgment of the Court was delivered by .

Macpherson, J.—This is an application to quash an order of the Judge of Gya, under s. 471 of the Criminal Procedure Code, sending the plaintiff in a civil suit and two of his witnesses to a Magistrate for enquiry into charges of giving false evidence, &c.

I say the order was made under s. 471 of the Criminal Procedure Code, because although s. 16 of Act XXIII of 1861 * gives Civil Courts powers similar to those conferred on Civil and Criminal Courts alike by s. 471, there can be no doubt that the whole law is now embodied in s. 471, and our [454] jurisdiction to interfere in the matter is not affected by a suggestion that the order in question was, or might have been, made under s. 16 of Act XXIII of 1861 and not under s. 471.

(The learned Judge stated the facts of the case and continued.)

It is contended for Baijoo Lall and Juggernath that the Judge had no power to make that order, inasmuch as he never made any preliminary enquiry and had no sufficient ground on which to base such an order as required by s. 471.

We think the objection is valid, and that the Judge had no jurisdiction to deal with these persons as he did. As regards Juggernath, although the Judge disbelieved his evidence, no witness had been called to contradict him. And as regards Baijoo Lall he was not examined before the Judge at all, and there is absolutely nothing to show that he abetted the offence of giving false evidence excepting the one naked fact that he was the plaintiff in the cause. The Judge says he must presumably have influenced his own witnesses. There is no such legal presumption, and we may add that if there were, it would put an end to litigation in the Civil Courts, for no plaintiff would be safe. The Judge, because he disbelieved the two witnesses called for the plaintiff, considered no " preliminary enquiry " necessary. But that is in contravention of the law : for the law permits the Judge to send the case on to the Magistrate only if, after having made such a preliminary enquiry as may be necessary, he is of opinion that there is sufficient ground (*i.e.*, ground of a nature higher than mere surmise or suspicion) for directing judicial enquiry into the matter of a specific charge.

That the Judge did not make any preliminary enquiry and did not know what specific charges he wanted the Magistrate to enquire into is clear. The Magistrate is directed to enquire generally whether or not the two witnesses

* [Sec. 16 :—When in any case pending before any Court any witness or other person shall appear to the Court to have been guilty of an offence described in sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, or 210 of the Indian Penal Code, the Court may commit such person to take his trial for the offence before the Court of Session, or after making such preliminary enquiry as may be necessary, may send the case for investigation to any Magistrate having jurisdiction to try or commit for trial the accused person for the offence charged, and such Magistrate shall thereupon proceed according to law.]

Procedure when certain offences under Chapter XI of the Penal Code are committed in any case pending before any Court.

have voluntarily given false evidence in a judicial proceeding, and as regards Baijoo Lall, "whether the plaint which he has attested contains an averment which he knew to be false." S. 471 does not warrant the Judge in issuing a general roving commission such as this to a Magistrate to enquire [455] generally into the truth or falsehood of depositions or of averments in a plaint, and the Judge was bound to indicate the particular statements or averments in respect of which he considered that there was ground for a charge into which the Magistrate ought to enquire. The Judge says, "The duty of this Court was limited to a reasonable indication of the nature of the offence to be enquired into" and again, "the necessity or the reverse which existed for a magisterial enquiry was, I submit, all that the preliminary enquiry of the Civil Court could decide." We think that this view of the law is incorrect. Something more than a mere indication that a witness has spoken falsely is needed before a Civil Court is justified in initiating a prosecution for giving false evidence. There must be, it seems to us, evidence of a direct and substantive nature before the Court, evidence going to show that the statement made by the witness is absolutely false. There must be in the words of the law "sufficient ground" for enquiring into the matter of a specific charge.

Altogether, we think that the Judge's order is bad, he having made no preliminary enquiry as was clearly necessary, and the order being too vague and general in its character. In thus deciding we follow the course taken in the case of *Kali Prosunno Bagchee* (23 W. R., Cr. Rul., 39).

The power given by s. 471 should be used with care and after due consideration. And it is by no means in every instance in which a party fails to prove his case, that the Judge who has decided against such party is justified in exercising the powers given him by this section. So long as it is a case as to which there is any possible doubt, or in which it is not perfectly certain that the Judge's decision must be upheld in the event of there being an appeal in the civil suit, the Judge acts indiscreetly and wrongly if the moment he has given his judgment in the civil suit he exercises the power given him by this section. At the same time, if in the course of the civil trial the Judge has before him clear and unmistakable proof of a criminal offence, and if, after the trial is over, he on consideration thinks it necessary to proceed at once, of course it may be right to do so [456] Judges should, however, bear in mind that criminal prosecutions are frequently suggested by successful litigants merely to prevent an appeal in the civil suit; and they should be careful not to lend themselves to such suggestions too readily. They should also recollect that when they proceed under s. 471, the responsibility for the prosecution rests upon the Judge entirely; such a prosecution being a very different thing from a prosecution instituted on the complaint of a private party and merely sanctioned by the Court under s. 468.

Order quashed.

NOTES.

- [1. No stay of criminal proceedings pending appeal from the civil suit :—(1880) 6 Cal. 908.
2. Dismissal of complaint without hearing witnesses and prosecution :—(1881) 7 Cal. 908.
3. No preliminary enquiry necessary :—(1892) 20 Cal. 474.
4. Power to alter or reverse an order of the lower Court :—(1889) 16 Cal. 780.

5. Court should see whether there is reasonable foundation for the charge :—(1909) 10 C. L. J. 865.
6. Distinction between sanction to private individual and complaint by Court :—(1888) 13 Bom. 109 : 388.
7. Requirements as to sanction to prosecute :—(1880) 3 All. 62.]

[1 Cal. 486]

APPELLATE CIVIL.

The 3rd July, 1876.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE McDONELL.

Ram Needhee Koondoo.....Plaintiff

versus

Rajah Rughoo Nath Narain Mullo and another.....Defendants.

[- 25 W. R. 516.]

Declaratory decree—Consequential relief—Act VIII of 1859, s. 15—

Jurisdiction of Civil Courts.

A granted a lease of his entire property to the plaintiff for a term of years, with power to enhance the rents and make settlements. Immediately after A executed a pottah in favour of B, covering a portion of the same estate, whereby B's rent was to remain unchanged for a period coterminous with the plaintiff's lease. In a suit by the plaintiff against B and A's representative to have the pottah set aside, it was objected that, inasmuch as the deed had not been as yet set up against the plaintiff, nor any injury shown to have been occasioned to him thereby, he had no cause of action : *held* that the suit was maintainable.

In laying down the rule that "a declaratory decree cannot be made, unless there be a right to consequential relief," the Privy Council did not intend to deny to the Courts of this country the power to grant decrees in any case in which, independently of the provisions of Act VIII of 1859, s. 15, they had the power to grant a decree. This power is generally the same as that of the Court of Chancery in England.

SUIT to set aside a pottah, dated the 1st Srabun 1280 (15th July 1873), executed by the late Raja Bikramajit Mulla, zamindar, in favour of Surroop Mahto, the first defendant.

[487] The plaintiff was a creditor of the late Rajah, who, in order to pay off his debts from the income of the estate, gave a lease of his entire property to the plaintiff for a term of fourteen years, commencing with the year 1280 (1873). The lease was dated the 22nd February 1872, and the jama fixed in it was Rs. 35,000. This document, among other conditions, contained stipulations to the following effect :—That the Rajah should have the jama fixed in the lease tested by *mukabulla*, or reference to ryots, within six months from the date thereof ; that the lessee should possess the power of enhancing the rents, and the enhanced amount should be appropriated by him as his profit ; and that, during the term of the lease, he should have authority as complete as the Rajah himself to make settlements in the zamindari, the only qualification being that such settlements should not be injurious to the reversionary interest of the zamindar.

* Special Appeal No. 385 of 1876, against a decree of the Judge of Zilla Midnapore, dated the 26th February 1876, reversing a decree of the Officiating Munsiff of that district, dated 3rd September 1875.

Subsequently on the 1st Srabun 1280 (15th July 1873), that is, after the lease had been several months in force, the Rajah granted to the first defendant, Suroop Mahto, the pottah which was sought to be set aside in this suit. The pottah in question recited that the subject-matter of the grant was formerly in the possession of the defendant under what was called a *mondullee* (the position of a *mondul* on this estate was stated to be that he collected the rents from the ryots, and paid the landlord the rate fixed by the pottah, taking all the risk of collection upon himself) settlement; and that, owing to the condition for adjustment of jama contained in the plaintiff's lease, a fresh *mondullee* jote settlement was granted to the defendant on an enhanced malguzari, which should not be liable to further enhancement during the entire term of the pottah extending from 1280 to 1294 (1873 - 1887). The Rajah subsequently granted pottahs of a similar character to other parties covering the entire estate.

The plaintiff instituted the present suit against the second defendant (called the minor defendant in the judgment of the High Court), the grandson and representative of the late Rajah, and Suroop Mahto, to have the pottah set aside, alleging that it was executed collusively in detriment of his interests, and that the Rajah had no power to make any settlement during the [488] continuance of the lease by which the malguzari of the first defendant was made invariable, and not liable to enhancement by the plaintiff during the entire period of the *ijara*.

The first defendant pleaded, *inter alia*, that the plaint disclosed no cause of action; that inasmuch as there was no express allegation in it regarding the nature and extent of the loss incurred by the plaintiff, the suit was not maintainable; and that the pottah was granted in pursuance of the condition for adjustment in the lease.

On behalf of the minor defendant, Mr. Harrison, the Collector, representing the Court of Wards, submitted the matter to the Court, saying in his written statement, that, "if the pottahs granted to the ryot and jote *monduls* be held by the Court as contrary to the conditions of the lease, and be on that account set aside, I have no objection thereto."

The Munsiff found that the pottah was executed after the period within which the jama stated in the lease should have been tested by reference to ryots; that the grant of the pottah was no adjustment as understood by the parties; that the Rajah, finding that the *mo*fussil collections were less than the jama fixed in the lease, entered into a collusive arrangement with his principal ryots, whereby, in consideration of their rents remaining unchanged for fifteen years, they undertook to take pottahs from him at a nominally higher rent; and that the pottah in question, if held valid, would nullify the terms of the lease. The Munsiff accordingly decreed the plaintiff's suit.

The minor defendant appealed to the District Judge, making the first defendant, who did not appeal, a respondent. The lower Appellate Court set aside the Munsiff's decree and dismissed the plaintiff's suit, holding that the pottahs were granted in conformity with the powers reserved to the Rajah by the lease, and that the plaintiff was bound to prove some substantial injury in order to maintain his action.

The plaintiff preferred a special appeal to the High Court, making both the defendants special respondents.

Mr. Woodroffe (Baboos Bhowany Churn Dutt and Rash Behary Ghose with him) for the Appellant.

[459] The Advocate-General, Officiating (Mr *Paul*) and the Legal Remembrancer (Mr. *Bell*), (the Senior Government Pleader, Baboo *Annoda Pershad Banerjee*, with them) for the minor Respondent.

Mr. *Woodroffe*.—The Judge is wrong in holding that the plaintiff has no cause of action. The Rajah, after he had executed the lease, had no power to make any settlement with his ryots. By the lease all such power was made over to the plaintiff. By the new settlements, the rents of the ryots have been made invariable, and not liable to enhancement for a period covering the term of the lease; the effect of which is to nullify the terms of the lease, authorizing him to enhance the rents. The plaintiff is entitled to maintain this suit, to have the pottah set aside and declared null and void as against him without proving special damage: Story's Eq. Jur., § 698. Distinct consequential relief is prayed for, and, therefore, under the Privy Council rulings and the High Court decisions, the suit is maintainable. The following cases were cited:—*Strimathoo Moothoo Vijia Ragoonadah v. Dorasinga Tevar* (15 B. L. R., 83; S.C., L. R., 2 Ind. App., 169), *Thakoor Deen Tewarry v. Nawab Syed Ali Hossain Khan* (13 B. L. R., 427; S.C., L. R., 1 Ind. App., 192), and *Joy Narain Giree v. Gireesh Chunder Mytee* [15 B. L. R., 172 (n)].

The Legal Remembrancer for the respondent.—The present suit is not maintainable; the plaintiff does not allege that any injury has as yet occurred to him, and therefore until the deed is set up against him or any actual damage is suffered by him, he has no cause of action. If the Rajah had no power to grant the pottah, it is a nullity. No person can derive any benefit from it. If it is void *ipso facto*, what is the suit for, and what is the cause of action? But as a matter of fact, the pottah was granted in compliance with the terms for adjustment contained in the lease. The Rajah no doubt had not the power to make new settlements; but this is not a new settlement. It was an arrangement really for the benefit of the lessee, and for the purpose of testing the [460] mofussil collections. The pottah must, therefore, be held good. The plaintiff prays for a simple declaratory decree, and therefore his suit is not maintainable—*Sreenurain Mitter v. Sreenuttu Kishen Soondery Dassee* (11 B. L. R., 171), *Thakoor Deen Tewarry v. Nawab Syed Ali Hossain Khan* (13 B. L. R., 427; S.C., L. R., 1 Ind. App., 192), *Strimathoo Moothoo Vijia Ragoonadah v. Dorasinga Tevar* (15 B. L. R., 83; S.C., L. R., 2 Ind. App., 169), and *Saidat Ali Khan v. Khajeh Abdool Gunny* (11 B. L. R., 203).

Mr. *Woodroffe*, in reply, cited the following cases:—*Howe v. O'Flaherty* (9 Ir. Chan. Rep., 119), *Raja Nilmoney Sing Deo Bahadoor v. Kaler Churn Bhattacharjee* (14 B. L. R., 382; S.C., L. R., 2 Ind. App., 83), *Sheik Jan Ali v. Khonkar Abdur Kharma* (6 B. L. R., 154), *Maharajah Rajinder Kishwur Sing Bahadoor v. Sheopursun Misser* (10 Moore's I. A., 438), and *Kamala Nacker v. Pitchacooty Chetty* (10 Moore's I. A., 386).

The Judgment of the Court was delivered by

Markby, J. (who, after shortly stating the facts, continued):—There can be no doubt whatever that under the ijara the plaintiff from the time the ijara term commenced, and whilst that term lasted, was, and is, the only person capable of granting a valid lease to tenants, or making any valid arrangement as to the collection of rents. The zamindar has granted to the plaintiff for fourteen years his zamindari, "together with the rights." There is nothing to show that the zamindar intended to retain to himself the power of making any settlements with the tenants or the munduls during the term; on the contrary, it is expressly said:—"You have during the term power as

complete as my own to make 'settlements in the said zamindari,' the only qualification added being that these settlements shall not be injurious to the Rajah's reversionary interest. It would require very clear words to qualify this express power, and there are no such words in the document.

[461] [His Lordship then referred to the terms of the pottah, especially to the stipulation, whereby the first defendant's rent was to remain unchanged during the existence of the lease, and continued] :—This is a stipulation which the Rajah had no power whatsoever to make. Indeed, the Legal Remembrancer, who appeared in this Court for the minor defendant, has expressly abandoned the right to interfere between the ijaradar and the tenants; and much unnecessary litigation might have been saved if this abandonment had been made earlier.

It is, however, argued for the minor defendant, that the late Rajah did not, by granting the lease, assume to exercise the power of making settlements with the tenants generally, but that by one of the clauses in the ijara lease, he was allowed six months to adjust the rent-roll, so as to show a mofussil jama of Rs. 35,000, and that, in pursuance of this understanding, the rent of the defendant, Suroop Mahto, was adjusted within the time specified, and that the pottah granted to this defendant merely embodies the terms of the adjustment.

The answer to this is twofold. First, what is here called the "adjustment" did not in fact take place within the time specified. The time specified in the ijara lease was the six months' interval between the execution of the ijara and its taking effect. Secondly, the Munsif has found that what was done was not any adjustment of the old payment but the fixing of a new payment, and this finding remains undisturbed; to which may be added that the clause, which this pottah contains prohibiting future enhancement, cannot possibly be called "adjustment."

It was, however, said that, even if the Rajah had no power to make this settlement, either as zamindar or under the clause of the ijara lease requiring him to show a mofussil jama of Rs. 35,000, still this suit would not lie; that, in this view, the pottah sought to be set aside was a nullity, that it had not yet been set up against the plaintiff, and that he had been in no way injured by it.

With regard to the question of injury, there is no finding in this case that the plaintiff has as yet suffered any actual injury for which he could have claimed compensation in the way of [462] damages. But we entirely dissent from the argument on the part of the minor defendant, that the making of this pottah was beneficial to the plaintiff, or that it was executed with the object that it should be so. It is admitted now that the Rajah could not, at the end of the six months, show a rental of Rs. 35,000. By granting pottahs to the tenants, similar to the one in this case, he tried to raise the rental to the required amount, hoping thereby to escape the penalties which he incurred under the ijara lease. There can be little doubt that he prevailed upon the tenants to accept this advance on the old rents by offering them some kind of advantageous provision in the pottah granted. In the present case, the advantage held out to the tenant was that his rent should not be increased during the term. We think the assertion contained in the pottah that it was granted for the purpose of effecting a *mukabulla* was a mere pretence and rather a shallow one. We think this is what is meant by collusion in the plaint, and that to that extent it is (as found by the Munsif) established by the evidence.

It also seems to be clear that, although the right to make settlements with the tenants after ijara term commenced is not now asserted on behalf of the minor defendant, the plaintiff, upon coming to know that pottahs had been granted after that time, had a right to treat such a proceeding as a violation of his rights under the ijara, which, in my opinion, in fact it was. On the other hand, it was never expressly admitted in this case that this pottah was a nullity, until the close of that argument in this Court. It was in the first instance submitted to the Court to say whether it was or was not a valid document. Subsequently this attitude was departed from, and the validity of the pottah was strenuously asserted and maintained. The grounds upon which its validity was maintained have now been overruled.

Nor, as far as the minor was concerned, was any objection raised in the first Court to the suit being tried. On the contrary, Mr. Harrison said, "if the pottahs granted to the ryot and jote monduls be held by the Court as contrary to the conditions of the ijara pottah, and be on that account set aside, I have no objection thereto. But the ijara pottah, which has been [463] granted to the plaintiff, is not an ordinary ticca ijara pottah, and it is, therefore, difficult to give a reasonable interpretation to it. I, therefore, pray that the Court will be pleased to take into its consideration the undermentioned facts, in ascertaining what interpretation it is necessary to give to the plaintiff's ijara pottah, in order to pass a judgment on the pottahs granted to the ryots and jote monduls." In all probability Mr. Harrison thought it convenient for the minor that the question should be once for all determined.

It is also admitted that a very large number of pottahs have been granted under circumstances similar to the present, the validity of all of which is in dispute and must be determined in some way or other. It is certainly desirable that the power of the Rajah to grant these pottahs should be discussed and determined before the plaintiff takes proceedings against the tenants. There is every probability that, when this point is finally decided in one case, it will not be again litigated.

We advert to these circumstances to show that there are reasons why it is desirable to give in this suit a decree which will declare the rights of the plaintiff and the minor defendant respectively, and why it would be a hardship now to hold that the suit does not lie. We cannot, of course, give a decree, however desirable it may be in this particular case, if the law does not permit us to do so.

It is now the settled law that, in the Courts of this country, "a declaratory decree cannot be made, unless there be a right to consequential relief capable of being had either in the same Court or in certain cases in some other Court"—*Strimathoo Moothoo Vijia Ragoonadah v. Dorasingu Tevar* (15 B. L. R., 106). But in laying down this rule, we do not understand it to have been the intention of the Privy Council to deny to the Courts of this country the power to grant decrees in any case, in which, independently of the provisions contained in s. 15⁴ of Act VIII of 1859, these Courts have power to grant a decree. It is, therefore, necessary to see what that power is. Now, in this Court, the power is generally the same as that of the Court of Chancery in England. That was the power of the Supreme Court, and it is [464] continued to this Court. And I do not think there is any valid ground for holding that the Courts of the mofussil

* [Sec. 15:—No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right, without granting consequential relief.]

have a jurisdiction in this respect different from or less than that of this Court. At any rate, in the absence of all special provision or authority upon the subject, it would be difficult to suggest any other guide than the practice of the Court of Chancery in England, and according to the best information we are able to obtain, the Court of Chancery in England would in such a case as this entertain the suit. The cases in the Privy Council also support this view. In the case of *Thakoor Deen Tewarry v. Nawab Syed Ali Hossain Khan* (13 B. L. R., 427 : S.C., L. R., 1 Ind. App., 192), the plaintiff, alleging himself to be in possession, obtained a decree to set aside a deed executed by a deceased person in favour of the defendant. The plaintiff claimed to be the heir of the deceased ; the defendant, who was in possession, claimed to hold the property under the deed. The Privy Council say, " the plaintiff prayed that the deed might be set aside, which is a prayer for substantive relief." In another recent case, the Privy Council said, speaking of the claim of the plaintiff in that suit, " his requisition of a declaration of a mal title, by setting aside the false *brahmotra* title alleged by the defendants, is really no more than this, that he should have his title, whatever it was, as a zamindar, free from the allegation of the defendants that they had some other title. If he had applied to set aside a deed set up by the defendants impugning his ordinary title as zamindar, then relief might be granted to him by cancelling that deed ; but he cannot obtain relief in the shape of merely setting aside an assertion, which for all that appears may have been merely by word of mouth " (*Rajah Nilmoney Singh Deo v. Kallee Churn Bhutta-charjee* (14 B. L. R., 382).

In *Maharajah Rajuntur Kishur Sing Bahadoor v. Sheopursun Misser* (10 Moore's I. A., 438), the Privy Council dealt with the case of a tenant of a portion of a zamindari who set up against the zamindar a holding different from that which was his true holding, and it seems to be considered that this was an interference with the zamindar's possession for which a suit would lie. Their [468] Lordships say, " if this tenure be not interposed between the zamindar and the cultivators, the ordinary relation between him and them exists ; but if it be interposed, the zamindar's general proprietary title to the collections is gone, and in lieu of it he is simply entitled to some jama from the mesne proprietors. It is obvious, then, that the assertion of such a title is a serious prejudice to a zamindar, and may materially interfere with the successful management of his zamindari. Such an intermediate tenure cuts off the possession, that is the zamindar's title to the rents and profits immediately derived from the cultivators " (10 Moore's I. A., 449). In the earlier case of *Kamaku Naicken v. Pitchacooty Chetty* (10 Moore's I. A., 386), the facts were somewhat similar to the present. A zamindar, after granting to the plaintiff a lease of his zamindari, issued notices to the tenants not to pay the rents to the lessee. No other interference with the rights of the lessee appears to have taken place, and no actual refusal to pay rent appears to have been alleged. The High Court gave a decree, declaring that the plaintiff was entitled to specific performance of the lease and to the possession and enjoyment of the zamindari under the terms of the lease. The Privy Council did not approve of the declaration as to the specific performance, but affirmed the rest of the decree.

These cases appear to us to justify this Court in making a decree in this case.

The plaintiff has not asked for any injunction, though probably he might have done so, and only asks that the pottah should be set aside as against him. We think a decree substantially to that effect may be made. The decree of the lower Appellate Court dismissing the suit will therefore be set aside, and, instead

thereof, there will be a decree in the following form :—that the pottah of 29th Srabun 1280 granted by the Rajah to the defendant No. 1 be as between the plaintiff and the defendants in this suit set aside, and the plaintiff declared entitled to the possession and enjoyment of the zamindari under the terms of the ijara lease of the 12th Falgoon 1279 the aforesaid pottah notwithstanding.

Appeal dismissed.

[466] ORIGINAL CIVIL.

The 6th September, 1876.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MACPHERSON.

The Coringa Oil Company, Limited.....Defendants

versus

Koegler and others.....Plaintiffs.

Contract Act (IX of 1872), s. 28—Agreement to refer to Arbitration—Suit for Damages for Breach of Contract—Suit for Specific Performance of Contract to refer.

A contract entered into between the plaintiffs and the defendants contained a clause, that "in case of any dispute the same to be decided by two competent London brokers—one to be appointed by the buyers' and the other by the sellers' agents; such brokers' decision to be final," but did not provide that no action should be brought till such decision was pronounced. Matter of dispute arising, the defendants refused to appoint an arbitrator. In a suit for damages for breach of the contract, *held* that the contract was not one of the nature referred to in s. 28, Act IX of 1872. That section only refers to contracts which wholly or partially prohibit the parties absolutely from having recourse to a Court of law. The first exception in that section applies only to a class of contracts where the parties have agreed that no action shall be brought, until some question of amount has first been decided by the arbitrators.

Semle :—A suit will not lie to enforce an agreement to refer to arbitration, even in the case referred to in the first exception to s. 28 of Act IX of 1872.

APPEAL from a decision of PHEAR, J., dated 31st of May 1875, and a decision of PONTIFEX, J., dated the 22nd of May 1876.

The suit was one for damages for breach of contract. The facts are fully set forth in the report of the case before PHEAR, J., in the Court below (I. L. R., 1 Cal., 42). The case first came on for settlement of issues, and an issue was raised as to whether the plaint disclosed any cause of action, which was decided in favour of the plaintiff. The case was then heard before PONTIFEX, J., on the merits, and a decree given for the plaintiffs. The defendants appealed from both decisions, but the appeal from the latter decision was confined exclusively to the facts of the case, [467] and is therefore omitted from this report. The ground of appeal from the decision of PHEAR, J., was "that such a contract, as is mentioned in Act IX of 1872, s. 28, Exception I, was proved to exist between the plaintiffs and the defendant company in respect of the subject of this suit, and that the existence of such a contract was and is by the said Act a bar to this suit."

Mr. Evans and Mr. Macrae for the Appellants.

Mr. Branson and Mr. Jackson for the Respondents.

Mr. Evans contended that the contract was one which clearly came within s. 28 of Act IX of 1872, * and fulfilled all the requirements of Exception 1 of that section, and therefore inasmuch as the present suit was not one for specific performance of the contract to refer, or for the recovery of the amount awarded, the only suits which by the express words of the section could be brought in such a case, the suit was barred. By the express words of the Contract Act, the plaintiffs' proper course was a suit for specific performance of the agreement to refer. The learned Judge in the Court below holds that to bring an agreement within Exception 1 of s. 28, the agreement must exclude the Courts in all respects except the matter which is the subject of the award, but it is submitted this is not so; it amounts to saying that a case cannot come under the saving of Exception 1, unless it would but for the exception have come under the rule laid down in the original section; i. e., this contract cannot come under the exception though within it, because it does not contain a clause excluding the jurisdiction of the Courts on matters other than the subject referred to arbitration. It is submitted that this contract is not only not illegal but is a bar to the present suit.

Mr. Branson, for the respondent, relied on the judgment of the Court below, beginning at p. 50 of the report in I. L. R., 1 Cal. The contract does not come within s. 28, because it does not contain a clause that the Courts shall be excluded in all matters except what is decided by the arbitrators. The contract must come within the class of contracts mentioned in the rule before the benefit of the exception can be taken; [468] and, unless it comes strictly within the section, it should be held not to be within it at all, because it would leave the plaintiffs without any remedy, as pointed out by PHEAR, J. If they had sued for specific performance it is difficult to see, even if the action were maintainable, how they could have obtained any practical relief.

Mr. Macrae in reply.—A decree for specific performance of a contract to refer can be enforced (see ss. 200, 326, Act VIII of 1859) † by proceeding

* [Sec. 28.—Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

•Exception 1.—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

When such a contract has been made, a suit may be brought for its specific performance; and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Saving of contract to refer questions that have already arisen.

Exception 2.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.]

† [Sec. 200.—If the decree be for any specific movable, or for the specific performance of any contract, or for the performance of any other particular act, it shall be enforced by the seizure, if practicable, of the specific movable, and the delivery thereof to the party to whom it shall have been adjudged, or by imprisonment of the party against whom the decree is made or by attaching his property and keeping

against the defendants for contempt of the order of the Court. The plaintiffs too might have sued for breach of the contract to refer. But they have brought a suit which the Legislature has expressly prohibited.

The following **Judgments** were delivered :—

Garth, C.J.—The first point which we have to decide is that which was argued before PHEAR, J., in the Court below, and his judgment upon which is reported in the January number of the Indian Law Reports (I. L. R., 1 Cal., page 47).

The defendant contends that the contract upon which this suit is founded is one of the class described in the 1st exception of s. 28 of the Contract Act, and, consequently, that as the dispute which has arisen between him and the plaintiffs remains undecided by arbitration, no suit can be brought upon it, except for a specific performance of the agreement to refer. Certainly, as PHEAR, J., very truly observes, the plaintiffs, if this were so, would be in an unfortunate position, because the defendant has distinctly refused to refer the dispute to arbitration; and, as according to the present law, no suit will lie to compel him to refer, the defendant, if he is right in his contention, may, by his own breach of the contract, deprive the plaintiffs of any remedy whatever. Happily for the interests of justice in the present case, we think it quite clear that PHEAR, J., is right, and that the contract is not one of those described in the 28th section of the Contract Act.

That section does not apply to contracts which merely contain a provision for referring disputes to arbitration, but to those which wholly or partially prohibit the parties from having recourse to a [469] Court of law. If, for instance, a contract were to contain a stipulation, that no action should be brought upon it, that stipulation would, under the first part of s. 28, be void, because it would restrict both parties from enforcing their rights under the contract in the ordinary legal tribunals; and so, if a contract were to contain a double stipulation, that any dispute between the parties should be settled by arbitration, and that neither party should enforce their rights under it in a Court of law, that would be a valid stipulation, so far as regards its first branch: viz., that all disputes between the parties should be referred to arbitration, because that of itself would not have the effect of

the same under attachment until further order of the Court, or by both imprisonment and attachment, if necessary; or if alternative damages be awarded, by levying such damages in the mode hereinafter provided for the execution of a decree for money.

Sec. 326:—When any person or persons shall by instrument in writing agree that any differences between them or any of them shall be referred to arbitration or to the arbitration of any person or persons named in the agreement or to refer to arbitration may be filed in the Court.

Agreement of parties to refer to arbitration may be filed in the Court. which it relates, application may be made by the parties thereto or any of them that the agreement be filed in such Court. On such application being made, the Court shall direct such notice to be given to any of the parties to the agreement, other than the applicants, as it may think necessary, requiring such parties to show cause, within a time to be specified, why the agreement should not be filed. The application shall be written on a stamp paper of one-fourth of the value prescribed for plaints in suits, and shall be numbered and registered as a suit between some or one of the parties interested or claiming to be interested as plaintiffs or plaintiff, and the others or other of them as defendants or defendant, if the application have been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants. If no sufficient cause be shown against the agreement, the agreement shall be filed and an order of reference to arbitration shall be made thereon. The several provisions of this chapter, so far as they are not inconsistent with the terms of any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court and to the award of arbitration and to the enforcement of such award.]

Provisions of this chapter applicable.

ousting the jurisdiction of the Court, but the latter branch of the stipulation would be void, because by that the jurisdiction of the Court would be necessarily excluded.

Then the 1st exception in the 28th section applies only to a class of contracts where [as in the cases of *Scott v. Avery* (5 H. L. C., 811) and *Tredwen v. Holman* (8 Jur., N. S., 1080; s.c. 1 H. & C., 72), cited by PHEAR, J.] the parties have agreed that no action shall be brought until some question of amount has first been decided by a reference; as, for instance, the amount of damage which the assured has sustained in a marine or fire policy. Such an agreement does not exclude the jurisdiction of the Courts; it only stays the plaintiff's hand till some particular amount of money has been first ascertained by reference.

Now it is clear that in this case the contract does not exclude the jurisdiction of the Courts at all; it merely provides, as hundreds of commercial contracts provide, for a reference of disputes to arbitration, and it is perfectly clear law that such a clause does not oust the jurisdiction of the Courts.

This appeal will, therefore, be dismissed with costs on scale No. 2.

Macpherson, J.—I see no reason to differ from PHEAR, J., in the conclusions he arrived at on the point of law, and I agree in thinking the appeal should be dismissed with costs.

Appeal dismissed.

Attorney for the Appellants : Mr. *Hechle*.

Attorney for the Respondents : Mr. *Pittar*.

NOTES.

[ENFORCEMENT OF AGREEMENT TO REFER TO ARBITRATION—

The second clause of the exception to the Indian Contract Act, 1872, sec. 28, was repealed by the Specific Relief Act I of 1877, sec. 21, which contains this proviso :—

“ Save as provided by the Code of Civil Procedure no contract to refer a controversy to arbitration shall be specifically enforced, but if any person who has made such a contract and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit. ”

By section 21 of the Indian Arbitration Act IX of 1899 it is enacted :—

“ In section 21 of the Specific Relief Act, 1877, after the words ‘ Code of Civil Procedure ’ the words and figures ‘ and the Indian Arbitration Act, 1899 ’ shall be inserted, and for the words ‘ a controversy ’ the words ‘ present or future differences ’ shall be substituted. ”

See also sec. 3 thereof as regards cases where that Act applies.

See also (1883) 6 Mad., 368, where the Court interfered on the ground of misconduct of the arbitrator.]

[470] ORIGINAL CIVIL.

The 19th June, 1876

PRESENT:

MR. JUSTICE PONTIFEX.

Johurra Bibee

versus

Sreegopal Misser and others.

Hindu law—Mitakshara—Widow—Maintenance—Joint ancestral business—Debts incurred by Manager of joint family in trading.

A joint family property acquired and maintained by the profits of trade is subject to all the liabilities of that trade.

Ramlal Thakursidas v. Lakmichand (1 Bom. H. C., App., 51, at p. 71) followed.

THIS was a suit for a declaration, that the plaintiff as widow of one Monohur Lall was entitled to maintenance out of the rents and profits of a house, No. 13, Roopchand Roy's Street, in Calcutta. For the purposes of this report it may be assumed that the said Monohur Lall, together with his father Luchmeenarain and his uncle Hurrynarain, formed a Hindu joint family subject to the Mitakshara law.

The house in question was acquired by Luchmeenarain, partly out of funds received by him from the estate of his father Chotai Lall, and partly out of the profits of a business for the sale of shawls, silks, and Benares piece-goods, which he carried on with money, portions of which were given him by his father, and portions received by him from his estate. Some time after the acquisition of the said house, Monohur Lall died, leaving the plaintiff, his father Luchmeenarain and his uncle Hurrynarain surviving him; and the plaintiff resided in the house until the year 1866 when Luchmeenarain died and Hurrynarain took possession of the whole family estate including the house and the business. Disputes then arose between the plaintiff and Hurrynarain, and litigation ensued, but after some negotiation, it was agreed that she should continue to reside in the house, and that Hurrynarain should provide her with maintenance and money for the performance of her religious ceremonies, which he continued to do until April 1875. On 17th April 1875, Hurrynarain, having failed in the business, filed his petition in the Insolvent Court, and the whole of his estate and effects [471] became vested in the Official Assignee. From that time the plaintiff received no maintenance, nor money for religious ceremonies. On 5th August 1875, the Official Assignee sold the house to Sreegopal Misser, who called on the plaintiff to remove from the house.

In the present suit, which was brought against the Official Assignee and Sreegopal, the plaintiff submitted that, as the widow of Monohur Lall, she was by Hindu law entitled to be maintained and supplied with money for religious ceremonies out of the property which belonged to the family; that the defendant Sreegopal Misser, purchased the house with full notice of the plaintiff's right to maintenance from the rents and profits thereof; and alleged that there was property in the hands of the Official Assignee forming part of the estate. She prayed that she might be declared entitled to maintenance out of the rents and profits of the house; or that it might be declared that she was, as the widow of Monohur Lall, entitled to be maintained and supplied with money for her religious ceremonies out of the estate in the hands of the Official Assignee; that the amount of such maintenance might be fixed; and that she might be declared entitled to have a suitable residence provided for her.

The Official Assignee, in his written statement, stated that Hurrynarain described himself in his petition of insolvency as carrying on business in the name of Luchmeenarain and Hurrynarain as merchants, and that the sale and conveyance to Sreegopal Misser was of the right, title, and interest of Hurrynarain as vested in him. He submitted his right and interest in the suit to the decision of the Court.

The defendant, Sreegopal Misser, stated that he had purchased the said house and premises, but that he had never obtained possession thereof, and had instituted a suit with the object of obtaining such possession.

The case came on for settlement of issues.

Mr. Branson and Mr. Bonnerjee for the plaintiff.

Mr. Kennedy and Mr. Ingram for the Official Assignee.

Mr. Evans and Mr. Macgregor for the other defendant.

[472] Mr. Branson.—Under the Mitakshara law, a Hindu widow's charge for maintenance is a charge on the estate of her deceased husband and on every part of it—see *Ramchandra Dikshit v. Savitribai* (1 Bom. H. C., A. C., 73). This is not so however by the Bengal law, by which she only has such charge against one who takes the estate with notice of her claim.—*S. M. Bhagabati Dasi v. Kanailal Mitter* (8 B. L. R., 225), *Mussamut Golab Koonwur v. Collector of Benares* (1 Moore's I. A., 246), and *Khettraman Dasi v. Kashnuth Das* (2 B. L. R., A. C., 15). The last case was one where a widow sued her father-in-law for maintenance, and it was held under the law in Bengal that she was not entitled to it; but it is submitted it would be different by Mitakshara law, where the son is from his birth a co-sharer with his father. [PONTIFEX, J., referred to *Girdhar Lal v. Kanto Lal* (L. R., 1 Ind. App., 321; S. C., 14 B. L. R., 187) as to the power of alienation of a father as against his sons by Mitakshara law. Why should the widow have a greater right to complain of alienation than her husband: he would be bound by it.] In this case, the plaintiff alleges it was alienated and purchased with notice of her claim.

As to her right to residence, the case of *Mangala Debi v. Dinanath Bose* (4 B. L. R., O. C., 72), decides that in her favour. [PONTIFEX, J.—That would not be to the exclusion of Hurrynarain; if there were only room for him and his family, she would have no right of residence in the family dwelling-house.] In that case, she would probably be entitled to maintenance to enable her to reside elsewhere. It is submitted the plaintiff here is at least entitled to an inquiry as to her maintenance and residence.

Mr. Kennedy for the Official Assignee.—In a joint family governed by Mitakshara law, no one has any right to a definite share: it is a kind of corporation. Right to maintenance is subject to the ordinary obligations of the joint family. In this case, the insolvent was carrying on an ancestral family business on behalf of the joint family, and if it became indebted, he had a right to pledge the credit of the family to pay the debts.—*Ramlal* [473] *Thakursidas v. Lakmichand* (1 Bom. H. C., App., 51, at p. 71). • A widow cannot have a greater right than her husband would have had, or be in a better position than one who on a partition would be entitled to a share of the property. Even admitting her right to reasonable maintenance, there is, by the justifiable conduct of the manager of the family, no property out of which she can be maintained. Her credit to the amount of her claim was pledged to carry on the business. If she has such a right, she can come in as a creditor and prove her claim in the usual way.

Mr. *Evans* for the defendant Sreegopal Misser.—There is no cause of action against the purchaser. The plaintiff, as a member of the joint family, would be liable for the losses, just as she would be entitled to benefit by its gains; her maintenance would increase with any increase of the business. If the trading debts of the business increase, so that the business fails, she will have no claim to maintenance, not at any rate in priority to the debts; she admits that but for this business she would have no maintenance. If the debts are improperly incurred, the Court might say the alienation should not be valid, or the debts should not be paid, but not in such a case as this. As to residence, the case of *Mangala Devi v. Dinanath Bose* (4 D. L. R., O. C., 72) does not lay down that the widow is absolutely, and in all circumstances, entitled to reside in the family dwelling-house.

Mr. *Branson* in reply.—The maintenance of a Hindu widow by Mitakshara law would not be liable to variation with the increase or decrease of the family business. She is not part of the joint family so as to entitle her to any increase. She is only entitled to that share which her husband would have had a right to on partition: she is to that amount a creditor of the estate. Under Mitakshara law, the widow cannot obtain a partition when she sees her rights endangered as she can by the Bengal law. She is entitled to maintenance notwithstanding alienation.—*Heera Lall v. Mussanul Kousallah* (2 Agra H. C., 42).

[474] **Pontifex, J.**—The plaintiff in this case is the widow of Monohur Lall, who died in the lifetime of his father Luchmeenarain Kuppoor Khettry. Luchmeenarain left a brother joint in estate, Hurrynarain Kuppoor Khettry, who subsequently became insolvent. The parties were, and are, governed by the Mitakshara law.

The plaintiff claims that, as the widow of Monohur Lall, she has a right to be maintained and supplied with money for the performance of her religious ceremonies out of the rents and profits of the house, No. 13, Roopchand Roy's Street, in Calcutta, as property which belonged to the joint family, and that any interest which passed to the Official Assignee as representing Hurrynarain, the surviving member of the joint family, passed subject to such rights. A great many cases have been cited in support of the proposition, that a widow has what is called a lien for maintenance on the joint estate and particularly in a Mitakshara family. It is not necessary for me to give any opinion on the ordinary case, where the surviving members of a joint family contract to convey without reserving the widow's rights, for in my opinion the present is a special case which does not fall within the ordinary rule. The plaintiff, in her plaint, admits that the property, out of which she claims maintenance, was acquired by her father-in-law, partly by money supplied to him by his father, and partly out of the profits of a business for the sale of shawls, silks, and Benares piece-goods which he carried on with moneys, portions of which were given to him by his father, and portions received by him from his estate. In my opinion, the business established and carried on with moneys so derived must be treated as a joint family business, and in fact the insolvent was carrying on such business at the date of his insolvency, as appears by the written statement of the Official Assignee.

It was in respect of his debts incurred in such business that Hurrynarain was adjudicated insolvent. And it was not alleged that any of the debts were incurred improperly, or otherwise than in the due course of business. The debts of the family business became greater than could be provided for by

the insolvent or the joint family property, and the insolvent accord-[473] ingly filed his petition. It seems to me that the law is correctly laid down in the case of *Ramlal Thakursidas v. Lakmichand* (1 Bom. H. C., App., 51, at p. 71), that persons carrying on a family business in the profits of which all the members of the family would participate must have authority to pledge the joint family property and credit for the ordinary purposes of the business. And, therefore, that debts honestly incurred in carrying on such business must override the rights of all members of the joint family in property acquired with funds derived from the joint business. In other words, it seems to me that those who claim to participate in the benefits must also be subject to the liabilities of the joint business, and by the plaintiff's own admission, the joint family title to the house, in respect of which she claims, would not have existed, except for the profits of the business. I had some difficulty at first in seeing how the house could vest in the Official Assignee without being subject to the claim of the plaintiff; but the debts being joint business debts and as such, debts for which business creditors could have attached the property, the whole interest in the property vested in my opinion in the Official Assignee; for the proceedings in insolvency are in fact substituted for separate suits by creditors. In this case, the property was put up for sale by the Official Assignee, subject to the plaintiff's right (if any) to maintenance, and was so conveyed. The effect of such conveyance is, that the purchaser took only such estate as the Official Assignee could give, but if the plaintiff had no right the purchaser would take an absolute estate. In my opinion, the plaintiff, under the circumstances of this case, has no right as against joint creditors to maintenance or residence, out of or in the house in question, and as the plaint is confined to this particular house, there is no case made for any further enquiry. At all events, the enquiry can't be made in this suit against the present defendants, though there may be a right to an enquiry against the Official Assignee separately. I am, however, of opinion that the plaintiff has no claim which can be enforced against any part of the joint estate, until after payment of the [476] joint trade debts. The Official Assignee must have his costs out of the estate of the insolvent, and Mr. Evans' client must have his costs from the plaintiff.

Suit dismissed.

Attorney for the Plaintiff: *Bahoo Joykissen Ganooly.*

* Attorneys for the Official Assignee: *Messrs. Dignam and Robinson.*

Attorney for the other defendant: *Mr. Carapet.*

NOTES.

[HINDU FAMILY BUSINESS—

1. Minor's interest in family business will be bound, but not those properties which he separately acquires:—(1908) 29 All., 476; 4 A. L. J. 94; (1907) A. W. N., 13.
2. Minor not personally bound, but his interest will be:—(1878) 3 Cal., 738.
3. How far member is personally liable:—(1898) 22 Mad., 166; (1901) 25 Mad., 149 (1901) 3 Bom. L. R., 144; (1902) 27 Bom., 157; (1907) 9 Bom. L. R., 1289.
4. Where not an ancestral business:—(1877) 3 Cal., 508, at 510.
5. Power to pledge the family properties for a joint debt in the course of the business:—(1892) 20 Cal., 458.

6. Liability of the firm on a pro-note when its éredit is pledged whether in the course of the firm's business or not :—(1908) 10 Bom. L. R. 668 affirmed, in (1909) 11 Bom. L. R. 255.

7. The rule of liability holds even in respect of Dayabhaga families running a family business :—(1880) 5 Cal. 792.

8. As regards limitation in respect of the joint liability :—See (1885) 12 Cal. 389.

9. Effect of insolvency on the family business :—See (1895) 21 Bom. 205.

10. Reversioners are bound by debts incurred by the widow in the course of business descending from the husband :—(1901) 26 Bom. 206; F B.]

[1 Cal. 476]

APPELLATE CIVIL.

The 31st August, 1876.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MACPHERSON.

Sib Chunder Mullick

versus

Kissen Dyal Opadhya and another.

Small Cause Court Act (IX of 1850), s. 42—Power to restore case struck off for default in appearance.

A Court of Small Causes, constituted under Act IX of 1850, can, during the same day, and at the same sitting of the Court, *ex parte* restore a cause once struck out under s. 42, though the order for striking off may have been duly recorded. In such a case, it would be open to the defendant to apply to set aside such *ex parte* order, and the sufficiency of the grounds of the application would be a question for the discretion of the Judge.

THE following case was referred to the High Court, under s. 7, Act XXVI of 1864, by the first Judge of the Small Cause Court, Calcutta :—

“ On the 8th of February 1876, the plaintiff instituted a suit against the defendants in this Court, to recover Rs. 1,000 due on a balance of account for goods sold and delivered, the plaintiff abandoning all excess. The summons was returnable on the 15th of February 1876. On the 15th of February 1876, the cause was called on in due course and adjourned by me—there being no time to hear it on that day—to the 6th of March 1876. On the 6th of March 1876, the cause was again called on in due course, but as neither the plaintiff nor any one on his behalf appeared, I ordered the case to be struck [477] out, acting under s. 42* of Act IX of 1850. A few minutes after I had so ordered the cause to be struck out, Mr. C. F. Pittar, who had appeared as the plaintiff's

*[Sec. 42 :—If upon the day of the return of any summons, or at any continuation or adjournment of the said Court, or of the cause for which the said summons shall have been issued, the plaintiff shall not appear, the cause shall be struck out ; and if he shall appear, but shall not make proof of his demand to the satisfaction of the Court, the Judges may non-suit the plaintiff or give judgment for the defendant ; and, in either case, where the defendant shall appear and shall not admit the demand, may award to the defendant, by way of costs and satisfaction for his trouble and attendance, such sum as they, in their discretion, shall think fit ; and such sum shall be recoverable from the plaintiff by such ways and means as any debt or damage ordered to be paid by the same Court can be recovered : provided always, that if the plaintiff shall not appear when called upon, and the defendant, or some one duly authorized on his behalf, shall appear, and admit the cause of action to the full amount claimed, and pay the fees payable in the first instance by the plaintiff, the Court, if it shall think fit, may proceed to give judgment, as if the plaintiff had appeared.]

attorney on the first day the cause was called on, made an application to me to restore the cause; and having satisfied me that the absence both of the plaintiff and of himself had arisen from a reasonable mistake, I ordered the cause to be restored, and also ordered a fresh summons to issue, on payment of full costs, returnable on the 20th of March 1876. At the time Mr. Pittar made his application, the pleader of the defendants was not present, and the order for striking out had been entered on the record as follows:—'Plaintiff absent; second defendant with pleader present; struck off.' This order had been initialled by the clerk, but not signed by me, though, it would, in due course, have been duly authenticated by me under s. 81* of Act IX of 1850. On the 20th of March 1876, on the cause being called on, and before the plaintiff had gone into any evidence, Mr. *Arrikial*, who appeared as the pleader of one of the defendants, objected to my right to hear the cause, on the ground that, when once a cause has been struck out, the Court has no power to restore it.

"I am of opinion that the objection is fatal to the plaintiff, for though it seems that some Judges of this Court have, on several occasions, restored causes previously struck out, other Judges again have refused, on the ground that they have no power so to do.

"Section 37† of Act IX of 1850 gives this Court power to try in a summary way, and give judgment in cases where the plaintiff appears and the defendant also appears and answers; and s. 42 of the same Act, which is a repetition of 9 & 10 Viet., c. 95, s. 79 (County Courts Act, 1846) gives the Court power to strike out the cause where the plaintiff shall not appear, and also to non-suit the plaintiff if he shall fail to prove his demand, and give judgment for the defendant; but no express power is given to this Court to restore a cause when struck out.

"But it has been argued that s. 41‡ of Act IX of 1850, which gives the Judges of this Court power to make rules for regulat[478]ing the practice and proceedings of the Court, also gives this Court power in any case not expressly provided for by the Act, or by the said rules, to adopt and apply the general principles of practice in the Supreme Court, that is to say, the High Court,

* [Sec. 81:—The Clerk of every Court holden under this Act shall cause a record of all summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the Court, to be fairly entered, from time to time, in a book or books belonging to the Court, which shall be kept at the Office of the Court; and shall be duly authenticated by one or more of the Judges; and such entries in the said book or books or a copy thereof bearing the seal of the Court, and purporting to be signed and certified as a true copy by the Clerk of the Court, shall be admitted in all Courts and places as evidence of such entries, and of the proceedings referred to by such entry or entries, and of the regularity of such proceedings, without any further proof.]

† [Sec. 37:—The Judges of the Court shall be empowered to determine all questions as well of fact as of law or equity, as administered in the Supreme Court, in all cases which they have authority to try.]

‡ [Sec. 41:—The Judges of each Court, holden under this Act, subject to the approval of the Judges of the Supreme Court, shall have power to make and issue all the general rules for regulating the practice and proceedings of the Court, and also to frame forms for every proceeding in the Court for which they shall think it necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the Clerk of the Court, and, from time to time, to alter any such rule or form; and the rules so made and the forms so framed, shall be observed and used in the Court of that Presidency, and shall be sent to the Supreme Court for approval, but shall be of force until disapproved; and in any case, not expressly provided for herein, or by the said rules, the general principles of practice in the Supreme Court may be adopted and applied at the discretion of the Judges, to actions and proceedings in their Court.]

to actions and proceedings in this Court. Further, that by s. 110* of the Code of Civil Procedure, the High Court has power under that section, even after it has dismissed a suit, to issue a fresh summons on the plaint already filed—in other words, to restore the case. The Code of Civil Procedure, however, with the exception of four sections (which do not include s. 110), especially extended under the provisions of s. 15† of Act XXVI of 1864, is not applicable to this Court, so that, if I were to act under that section, I should in effect be extending to the Court a section of a Code which is clearly not applicable to it. Under any circumstances, I think it a question more of procedure than practice, and holding such an opinion it is clear that s. 41 of Act IX of 1850 would not be applicable to the present question.

“ There is a case, however, of *Jones v. Jones* (5 D. & L., 628 ; s.c., 1 Cox & Macrae's C. C. Cases, 92), in which COLERIDGE, J., says :—‘ I do not mean to say but that a Judge might alter his judgment on the same day during the sitting of the Court, but he can have no authority to alter it in his chambers and behind the back of the parties, after the Court has been broken up.’ But this is a mere *dictum*, and, indeed, would hardly apply to this case, where one of the parties was absent. I think, therefore, that when once an order of such a nature has been made and correctly recorded, this Court has no power to alter such order *ex parte*, unless authorized by the Act so to do.

“ I have been requested by the plaintiff's attorney, under s. 7 ‡ of Act XXVI of 1864, to reserve the following question for the opinion of the High Court :—

“ ‘ Whether a Court of Small Causes, constituted under Act IX of 1850, can, during the same day, at the same sitting of the Court, *ex parte* restore a cause once struck out under s. 42 of the same Act, when the order of striking out has been made and correctly recorded.’

* [Sec. 110 :—If, on the day fixed for the defendant to appear and answer, or any other day subsequent thereto to which the hearing of the suit may be adjourned, neither party shall appear either in person or by a pleader when duly called upon by the Court, the suit shall be dismissed. Whenever a suit is dismissed under the provisions of this section, the plaintiff shall be at liberty to bring a fresh suit unless precluded by the rules for the limitation of actions, or if he shall within the period of thirty days satisfy the Court that there was a sufficient excuse for his non-appearance, the Court may issue a fresh summons upon the plaint already filed.]

If neither party appear, suit to be dismissed with liberty to the plaintiff to bring a fresh suit.

Or if sufficient excuse for non-appearance, a fresh summons may be issued.

† [Sec. 15 :—The Local Government may, with the sanction of the Governor-General of India in Council, declare that the whole or any part or parts of the Code of Civil Procedure shall be applicable to any Court held under Act IX of 1850, or under this Act ; and the procedure prescribed in the said Code, or the part or parts thereof so declared to be applicable shall thereupon be the procedure followed in such Court. Provided that no right of appeal or review shall in any case be given by any declaration made under this section.]

‡ [Sec. 7 :—In any cause of an amount exceeding five hundred rupees, the Judges of the said Courts of Small Causes shall reserve any question of law or equity or any question as to the admission or rejection of any evidence as to which they shall entertain any doubts, or which they shall be requested by either party to the suit to reserve, for the opinion of the High Court, and shall give judgment contingent upon the opinion of the said High Court, on a case which they shall thereupon be entitled to state to the said Court. If only two Judges sit together and shall differ in opinion, the question on which they differ shall be so reserved.]

[479] "My judgment, therefore, contingent on the opinion of the High Court on the above question, will be for the defendants."

Mr. *Macrae*, for the Plaintiff, contended that even if the Judge could not, under s. 41, have adopted the portion of the Civil Procedure Code, s. 119,* under which a case of this kind might have been restored in the High Court, the Judge might have restored the case under s. 53† of Act IX of 1850, by "ordering a new trial;" there would perhaps be some doubt as to whether this section would apply to a case which had been dismissed for default, as it might be said no actual trial had taken place. There is no express power in the Small Cause Court Act to restore cases. In a case under the corresponding section of the County Courts Act (9 & 10 Vict., c. 95, s. 89), it was held that the County Court Judge had a discretionary power to grant a new trial, and that a rule of practice passed by the Judges, as to the exercise of that power, did not interfere with such discretion: *In re Carter v. Smith* (24 L. J., Q. B., 141). [GARTH, C.J.—There is no doubt that cases are frequently restored in the County Courts. MACPHERSON, J.—Was there any default under s. 42 by the plaintiff? It seems he did appear on the day the case was struck off.] That appears to be so, and, therefore, on a strict construction of the section, he might be held to have made no default in appearing. The Judge says the case was a proper one to restore, if he had the power. [GARTH, C.J.—Would there not be an inherent power in the Court to correct a manifest injustice in a case like this by restoring the case? (See *Deen Dyal Paramanick v. Ram Coommar Chowdry*, 9 W. R., 284.) Refers to s. 41, Act IX of 1850. The

No appeal from judgment passed *ex parte* or by default.

When and how judgment *ex-parte* against a defendant may be set aside.

When and how judgment by default against a plaintiff may be set aside.

No judgment to be set aside without notice to opposite party.

Order for setting aside judgment shall be final.

In appealable cases an appeal from order of rejection.

Proviso.

which the final decision in the suit would be appealable, provided that the appeal be preferred within the time allowed for an appeal from such final decision, and be written upon stamp paper of the value prescribed for petitions to the Court where a stamp is required for petitions.]

† [Sec. 58 :—Every order and judgment of any Court holden under this Act, except as herein provided, shall be final and conclusive between the parties; but the Judges shall have power to non-suit the plaintiff, in every case in which satisfactory proof shall not be given to them, entitling either the plaintiff or defendant to the judgment of the Court; and shall also in every case whatever, have the power, if they shall think fit, to order a new trial to be had, upon such terms as they shall think reasonable, and in the meantime to stay the proceedings.]

* [Sec. 119 :—No appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared or from a judgment against a plaintiff by default for non-appearance. But in all cases in which judgment may be passed *ex parte* against a defendant, he may apply within a reasonable time not exceeding thirty days after any process for enforcing the judgment has been executed, to the Court by which the judgment was passed, for an order to set it aside; and if it shall be proved to the satisfaction of the Court that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the judgment, and shall appoint a day for proceeding with the suit. In all cases of judgment against a plaintiff by default, he may apply, within thirty days from the date of the judgment, for an order to set it aside; and if it shall be proved to the satisfaction of the Court that the plaintiff was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the judgment by default, and shall appoint a day for proceeding with the suit. But no judgment shall be set aside on any such application as aforesaid, unless notice thereof has been served on the opposite party. In all cases in which the Court shall pass an order under this section for setting aside a judgment, the order shall be final; but in all appealable cases in which the Court shall reject the application, an appeal shall lie from the order of rejection to the tribunal to

Small Cause Court, like all Courts, would have an inherent power to correct mistakes, but it is submitted that s. 53 would, on the widest construction that can be given to it, apply to any order made by the Judge, and therefore he was not debarred from restoring this case.

No one appeared for the defendant.

[480] The Opinion of the High Court was delivered by

Garth, C. J.—We are of opinion that a Court of Small Causes, constituted under Act IX of 1850, can, during the same day, and at the same sitting of the Court, *ex parte* restore a cause once struck out under s. 42, though the order for striking off may have been duly recorded.

It is always, of course, open to the defendant in such a case to apply to the Court upon sufficient grounds to set aside the *ex parte* order; and the sufficiency of such grounds would in each case be a question for the discretion of the Judge.

The sum of Rs. 230, which has been brought into Court by the plaintiff in this case, will be refunded to him.

Attorney for the Plaintiff : Mr. *Pattar*.

THE INDIAN LAW REPORTS, CALCUTTA SERIES,
CONTAINING CASES DETERMINED BY THE
HIGH COURT AT CALCUTTA AND BY THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT AND FROM
ALL OTHER COURTS IN BRITISH INDIA NOT
SUBJECT TO ANY HIGH COURT.

CALCUTTA—VOL. II—1877.

APPELLATE CIVIL.

The 10th June, 1876.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE MITTER.

Ramdoyal Khan and others.....Plaintiffs

versus

Ajoodhia Ram Khan and others.....Defendants.*

[— 25 W. R. 425]

*Civil Procedure Code (Act VIII of 1859), s. 26, cls. 4 and 5, ss. 135, 139,
and 141—Amendment of plaint—Allegations of facts—Limitation—
Act IX of 1871, s. 19—Personal equity.*

In 1817 the ancestor of the plaintiffs had obtained from the zamindar a maurasi istemrari lease of a certain portion of his property. In 1837 the entire zamindari was put up to sale for arrears of Government revenue, and was purchased by Government as the highest bidder, who thereupon granted a lease for a term of twenty years to W. This revenue sale was never set aside; but in 1842 the Government restored the estate to the Rajah zamindar with all the prior incumbrances, but subject to his confirming the lease to W. In 1844 the father of the plaintiffs brought a suit to recover possession of their tenure, but the suit was dismissed by the Principal Sudder Ameen, on the ground that the right to sue had not accrued, and could only arise on the expiration of the lease to W. This judgment was reversed by the Sudder Dewanny Adawlut, but was restored and affirmed on appeal by the Judicial Committee. In the meantime, and before the expiry of the lease to W, owing to certain fraudulent transactions on the part of A, who had got into possession of the estate as the purchaser of the interests of certain mortgages of the Rajah, the property was again put up to sale for arrears of Government revenue, and was purchased by M, a party to the transactions above mentioned. The Rajah, however, succeeded in getting this sale reversed in 1866, and obtained possession of his estate in 1871. In a [2] suit instituted on the 23rd October 1873 against the Rajah and certain other parties to whom he had granted a patni lease, the plaintiffs alleged that the sale of 1837 was set aside by Government as illegal, and that consequently their tenure had revived; that the effect of the Principal Sudder Ameen's decision, confirmed by the Privy Council, was to postpone their right to obtain possession of their tenure, until after the expiration of the lease to W; that when that lease expired, the property was in the possession of M, of the fraudulent character of whose title they had no knowledge; and that their right to sue in the present case consequently arose only in 1871. The defence was that the plaint disclosed no

* Regular Appeal, No. 308 of 1874, against a decree of the Judge of Zilla Midnapore, dated the 25th of August 1874.

cause of action; that the cause of action, if any, was barred by the law of limitation; and that the tenure was destroyed by the proceedings connected with the sale in 1837, which was never set aside. The Judge held that the plaint disclosed a cause of action which arose in 1837, and that the suit was consequently barred. He accordingly dismissed the suit without taking any evidence.

On appeal to the High Court, it was admitted on the part of the plaintiffs that the sale of 1837 was never set aside; but it was contended that the restoration of the zamindari to the zamindar, "with all the former incumbrances," gave rise to an equity of a personal character against the Rajah and those taking under him with notice of the plaintiffs' title, to restore the plaintiffs' tenure, which equity fastened upon him on his obtaining actual possession of the estate; and that therefore the cause of action accrued only in 1871. On the part of the defendants, it was objected that the plaintiffs had no right to make a new case in appeal, and inasmuch as the equity which was now sought to be fastened on the zamindar was never raised in the pleadings, it could not now be set up. *Held* that, under ss. 139* and 141† of the Civil Procedure Code, the plaintiffs might be allowed to amend their case in any stage before a final decision; and inasmuch as, if the plaintiffs' case as so amended were proved, the suit would not be barred, it was necessary for the determination of the question of limitation that the case should be remanded to the lower Court for trial.

Semble.—Section 19 ‡ of Act IX of 1871 is applicable only to those cases where the fraud is committed by the party against whom a right is sought to be enforced.

From cls. 4 and 5 of s. 26 § of act VIII of 1859, it would appear that, where whole estate bearing a name is sued for, the boundaries need not be given.

* [Sec. 139 :—At the first hearing of the suit the Court shall enquire and ascertain upon what questions of law or fact the parties are at issue, and shall thereupon proceed to frame and record the issues of law and fact on which the right decision of the case may depend. The Court may frame the issues from the allegations of fact which it collects from the oral examination of the parties or their pleaders, notwithstanding any difference between such allegations of fact and the allegations of fact contained in the written statements, if any, tendered by the parties or their pleaders.]

† [Sec. 141 :—At any time before the decision of the case, the Court may amend the issues or frame additional issues on such terms as to it shall seem fit, and all such amendments as may be necessary for the purpose of determining the real question or controversy between the parties shall be so made.]

Amendment of issues.
Additional issues.

‡ [Sec. 19 :—When any person having a right to sue has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded; and where any document necessary to establish such right has been fraudulently concealed, the time limited for commencing a suit

• (a) against the person guilty of the fraud or accessory thereto, or
(b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or in the case of a concealed document, when he first had the means of producing it or compelling its production.]

§ [Sec. 26, Cl. 4 :—When the claim is for any property other than money, its estimated value.

The following is an instance :—

If the suit be for an estate or for a share in an estate paying revenue to Government—
Possession of the estate or of share in the estate, called _____, situate in the Zillah
of _____ the sudder jumma of which is _____ and estimated value _____
which the plaintiff was dispossessed (or forcibly or fraudulently dispossessed, if the case be so) _____
on the _____ day of _____; or to which the plaintiff became entitled by
inheritance from _____ (or by gift, _____ purchase, or otherwise, as
the case may be) on or about the _____ day of _____

Cl. 5 :—When the claim is for land or for any interest in land, the nature of the tenure or interest must be specified; and if the claim be for land forming part of a village or other known division, or for a house, garden, or the like, its situation shall be described by the setting forth of boundaries, or in such other manner as may suffice for its identification.]

Per MITTER, J. Quere.—Whether, if the plaintiffs' case were established, their claim would not be saved from the operation of the Law of Limitation by s. 29,* Act I of 1845.

SUIT for possession in istemrari maurasi right.

The material allegations of fact contained in the plaint were as follows :—Chuni Lall Khan, the grandfather of the first four plaintiffs (called in the judgment of the High Court the [3] Khan plaintiffs), obtained in the year 1817, from the zamindar whom the first defendant represented, a maurasi istemrari pottah of the lands to which the present suit related at a fixed rent of Rs. 2,250 per annum, under which lease he was in possession in 1837. In that year the zamindari was put up to sale for arrears of Government revenue, and was purchased by Government as the highest bidder for one rupee. The Government then granted an ijara pottah of the entire zamindari for twenty years to certain persons called in the judgment of the High Court the Watsons. The plaintiffs then proceeded to allege that, whilst their father was attempting to institute a suit for setting aside the aforesaid illegal auction sale, "the Government, knowing that the auction sale was illegal and invalid, set it aside, relinquished its title under the purchase, and made over the zamindari to the zamindar with its previous incumbrances and settlements," subject to an arrangement between the Government and the zamindar, that the latter should confirm the ijara granted by the Government to the Watsons of that portion of the property which was covered by the istemrari pottah, and was called the jungle mehals. This happened in the year 1842. In conformity with this arrangement, the Rajah (the first defendant in this suit) granted to the Watsons, on the 7th June 1842, an ijara pottah for a term of twenty years, in confirmation of the ijara granted to them by the Government. In the year 1844, Sreemunto Lall Khan, the father of the Khan plaintiffs, instituted a suit in the Midnapore Principal Sudder Ameen's Court, for recovery of possession of his maurasi tenure. The Principal Sudder Ameen, by his decision of the 17th November 1846, dismissed the plaintiffs' suit, holding that "it appears from the records of the case, and the Rajah defendant's ikrar, i.e., answer, that the claim was established, but the plaintiff was entitled to recover possession during the term of the ijara to the Watsons. The plaintiff should have instituted his suit for recovery of possession with damages on the expiry of the term of the ijara, and after the Rajah defendant had come to possession." On appeal by Sreemunto Lall Khan, the Sudder Dewanny Adawlut reversed the decision of the Principal Sudder Ameen, and, on the 13th July [4] 1848, gave him a decree, under which he took possession (7 Sel. Rep., 516). The Watsons thereupon preferred an appeal to the Privy Council, who reversed the decree of the Sudder Dewanny Adawlut, and restored that of the Principal Sudder Ameen, in consequence of which the Watsons re-entered into possession ousting Sreemunto Lall Khan. The decree of the Privy Council was made on the 3rd February 1854 (5 Moore's I. A., 447). Sreemunto Lall Khan died in 1858. But as the effect of the Principal Sudder Ameen's decision was to keep in abeyance the right of the Khan plaintiffs as the heirs and representatives of

* [Sec. 29 :—And it is hereby enacted, that excepting co-partners of estates under Butwarrah who may have saved their shares from sale under sections 33 and 34, Regulation XIX, 1814, any recorded and unrecorded proprietor or co-partner who may purchase in his own name or in the name of another the estate of which he is proprietor or co-partner, or who by re-purchase or otherwise, may recover possession of the said estate after it has been sold for arrears under this Act : and likewise any purchaser of an estate sold for other arrears or demands than those accruing upon itself, shall by such purchase acquire the estate subject to all its incumbrances existing at the time of sale and shall not acquire any rights in respect to ryots and under-tenants which were not possessed by the previous proprietor at the time of the sale of the said estate.]

their father until the expiration of the Watson's lease, they would have instituted their suit on its expiry on the 22nd July 1860, but were prevented by certain proceedings which arose out of a mortgage made in favour of certain parties called in the judgment of the High Court the Debs. The mortgagees had sold their right and title to one Mr. Abbott who took possession of the zamindari before the Khan plaintiffs' right to institute the suit on the expiry of the Watson's lease had opened. The plaintiffs alleged that Abbott, having privately arranged to sell the zamindari to one McArthur, and to secure to the latter such a title as would enable him to avoid all the incumbrances and settlements which had been made by the former zamindar, concluded with the latter with a view to deprive the plaintiffs and the Rajah defendant of their rights by means of fraud and artifice, and defaulted to pay the Government revenue, and fraudulently and illegally brought the zamindari to sale on the 29th April 1848, when McArthur purchased it and took possession of the whole zamindari. As, however, Sreemunto Lall Khan and the Khan plaintiffs were ignorant of the above acts of collusion and fraud, by which the revenue sale in 1848 was brought about, they were unable to bring a suit for annulment of the above fraudulent auction sale; and, as the zamindari was not in the khas possession of the Rajah defendant, they could not bring a suit for recovery of possession on the determination of the Watson's lease. On the 23rd April 1861, the Khan plaintiffs sold to Srinarain Bysack a moiety of their interest in the tenure, and let the other half in ijara to him. Srinarain Bysack [5] brought a suit against Sidhi Nazir Ally Khan, who had got into possession of the property after McArthur, for ejectment in the Supreme Court. This suit was, however, withdrawn. Subsequently, on the 29th July 1871, Srinarain Bysack reconveyed his entire interest to the Khan plaintiffs, who afterwards conveyed portions of their interest to the other plaintiffs. When the Rajah defendant became aware of the fraudulent character of the auction sale of the 29th of April 1848, he instituted a suit in the District Court of Midnapore against Sidhi Nazir Ally Khan and others, the parties then in possession, for recovery of the zamindari, and ultimately obtained a decree for possession, and mesne profits on the 29th September 1866 by reversal of the sale. This decree was upheld by the High Court on the 4th September 1867. An appeal was preferred to the Privy Council, but it was not prosecuted. In execution of the decree obtained by the Rajah defendant, he finally got into possession of the zamindari on the 11th of July 1871. The plaintiffs submitted that as the fraudulent revenue sale, in consequence of which they had been kept out of possession, and had been also unable to sue for recovery of possession, had been set aside, their right and title had become valid as before; and that, inasmuch as they were not aware of the fraud practised by Abbott and McArthur until the decree obtained by the Rajah, their cause of action accrued only when he obtained possession on the 11th July 1871.

The plaintiffs joined the other defendants in the suit, on the ground of their having taken a patni lease from the Rajah defendant with knowledge of the plaintiffs' title.

The Rajah and the lessee defendants filed separate written statements, setting out at great length the facts of their case. But the chief objections raised by way of defence, and with reference to which the case was argued in the Court below, as well as the High Court, were as follows:—(1) that the plaint disclosed no cause of action; (2) that the suit was barred by limitation; (3) that the revenue sale of 1837, and the consequent proceedings before the Collector by which it was confirmed, had the effect of destroying the plaintiff's

tenure; (4) and that [6] the question in the suit was *res judicata*, having been finally decided by the Privy Council in 1854.

The following were the material issues framed by the Judge:—

3. Were the plaintiffs entitled to obtain possession under their lease in consequence of the Rajah's restoration to possession? 9. Did the plaintiff disclose any cause of action, and if so, when did it arise? 10. Was the suit barred by limitation? 11. Whether or not the plaintiffs' tenure was extinguished by the revenue sale of 1837 and the proceedings consequent thereto, and whether it could be revived otherwise than by a reversal of the sale by competent authority? 12. Was not the question finally decided by the decision of the Privy Council on the 3rd February 1854?

The Judge held that the plaint disclosed a sufficient cause of action, but that it arose in 1837, and consequently the suit was barred by limitation. He accordingly dismissed the suit without taking evidence.

The plaintiffs appealed to the High Court.

Mr. Kennedy (Baboo Ambica Churn Bose and Bhoyrhub Chunder Bunerjee) for the Appellants.

Mr. Woodroffe and Mr. Bunnerjee for the Rajah Respondent.

The Advocate-General, Offg. (Mr. Paul) and Mr. Evans (Mr. Allen and Baboo Bhownany Churn Dutt with them) for the Lessee Respondents.

Mr. Kennedy.—The plaintiffs' cause of action clearly arose in 1871, when the Rajah obtained possession of his zamindari. The suit, therefore, is not barred by the law of limitation. The Principal Sudder Ameen expressly held that the plaintiffs' right to sue could only arise on the expiry of the Watson's lease and when the Rajah should obtain possession of his estate, and this decision was upheld by the Judicial Committee (5 Moore's L. A. 447). The plaintiffs' right was therefore held in abeyance until 1871. The moment the estate came back into the hands of the Rajah, an equity fastened upon him to replace the plaintiffs in the possession which their ancestor occupied previous to the revenue sale of 1837. This sale was not set aside in the sense of a reversal, as stated in the plaint; and the proceedings [7] before the Collector by which the sale was confirmed had, no doubt, the effect of destroying the tenure. But the Government had returned the estate to the Rajah with all its former incumbrances. The plaintiffs have, upon the basis of the very arrangement by which the Rajah got back his zamindari, a personal equity against him. [Mr. Woodroffe. No such question is raised in the pleadings; and it cannot be now raised for the first time.] The facts upon which our equity arises are sufficiently stated in the plaint. (The learned Counsel then stated the facts of the plaintiffs' case substantially as in the plaint, with this variation that, whilst in the plaint it was alleged that the sale of 1837 was set aside as illegal, he admitted that there was no reversal.) These facts show sufficiently what our equity is. The Principal Sudder Ameen reserved leave to the plaintiffs to institute their suit after the expiration of the Watson's lease. [Mr. Woodroffe.—Any provision of the law of limitation notwithstanding?] Limitation does not run until the right arises; the plaintiffs' right to regain possession of their tenure was dependent upon the Rajah's actual possession of the estate. The zamindari was restored to him by Government with all its prior incumbrances. It will be seen from this condition that he did not get it back simply for his own benefit, and therefore there is an implied trust on the part of the Rajah to replace the plaintiffs in their former tenure—*Keech v. Sandford* (1 White & Tudor's L. C., 44). The

Irish Equity cases on the analogous question of a redemption by the tenant serve to illustrate the equity contended for in this case—*Kent v. Roberts* (3 Ir. Eq. Rep., 279), *Jones v. Kearney* (1 Drury & Warren, 134) and *Nesbitt v. Tredinnick* (1 Ball & B., 29). What was decided by the Privy Council in effect was this, that, immediately on the termination of the lease, the plaintiffs should be put back into possession of their tenure by the Rajah, but when the lease expired (i. e., in 1860), there was nobody to give them that possession. [Mr. Woodroffe.—In the plaint it is stated that Abbott was in possession, and that therefore the plaintiffs did not bring the suit.] What the plaintiffs say is this, that the circumstances connected with Abbott's purchase and the auction sale to McArthur prevented them bringing a suit [8] against the Rajah on the expiry of the term of Watson's lease. As against the Dohs the mortgagees, or purchasers from them, the plaintiffs could not have asserted any title; those persons were purchasers for valuable consideration without notice. But as soon as the Rajah succeeded in obtaining a reversal of that particular sale, their right revived as against him and all those claiming under him. The equity which is sought to be established was recognized in express terms by the Principal Sudder Ameen, and was affirmed by the Privy Council. With reference to the right of suing, the Principal Sudder Ameen made a reservation, and that reservation, it is submitted, was also affirmed; for otherwise the affirmance would be absolutely futile. [MARKBY, J.—In *Watson v. The Collector of Rajshahuc* (13 Moore's L. A., 160), the Privy Council strongly objected to give effect to such a reservation.] In this case there is something more than a reservation, for it proceeds upon an express admission by the Rajah of the plaintiffs' title. The plaintiffs were not aware of McArthur's fraud until the Rajah's decree in 1806. Limitation, therefore, cannot run from 1860, even if it be supposed that the right to sue arose immediately on the expiry of the Watson's lease—*Dwarkanath Bhooya v. Rajah Ajoodhayram Khan*. [MITTER, J.—That case was under Act XIV of 1859. Act IX of 1871 is different.] S. 19 of Act IX of 1871 is for the purposes of my argument identical with s. 9 of Act XIV of 1859. During the pendency of the proceeding to set aside the fraudulent sale, in which McArthur became purchaser, limitation did not commence to run. It was only when Rajah Ajoodhayram Khan obtained possession of his property, and, instead of replacing the plaintiffs in their original tenure, began to deal [9] inconsistently with their rights, that his possession became hostile and adverse to them.

Mr. Woodroffe for the Rajah Respondent.—The Principal Sudder Ameen had no power to make the reservation contended for—*Watson v. The Collector*

* Regular Appeal 257 of 1872, decided on the 22nd of December 1873. In this case, which also proceeded upon the fraudulent sale to McArthur, it was held by MARKBY and BIRCH, JJ., that where the allegations in a plaint sufficiently stated that the plaintiffs being entitled to property and being in enjoyment thereof were ousted therefrom under colour of a fictitious revenue sale in pursuance of a fraudulent contract, the fraud being so contrived as to make plaintiffs believe that they had no right of action at all, and the allegations were proved, the fraud would entitle the plaintiffs to claim the benefit of s. 9 of Act XIV of 1859:—[See (1907) 34 Cal 241 : 5 C. L. J. 385.]

† [g. v. *supra*, 2 Cal. 2.]

‡ [Sec. 9:—If any person entitled to a right of action shall by means of fraud have been kept

Computation of period of limitation in case of concealed fraud.

from the knowledge of his having such right or of the title upon which it is founded, or if any document necessary for establishing such right shall have been fraudulently concealed, the time limited for commencing the action against the person guilty of the fraud or accessory thereto, or against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be reckoned from the time when the fraud first became known to the person injuriously affected by it, or when he first had the means of producing or compelling the production of the concealed document.]

of *Rajshahye* (13 Moore's I. A., 1). The Privy Council simply affirmed the decree dismissing the suit of the plaintiff's father. They say nothing about the suit not being maintainable until the expiration of the lease to the Watsons; for, if the sale were illegal, as the plaintiffs allege in their plaint, Sreemunto Lall Khan was entitled to bring his suit at once. But, as a matter of fact, the sale of 1837 was not illegal, and, as has now been admitted, was never set aside; the title acquired by the Government was valid, and the Government simply transferred the rights it had acquired to the Rajah as an act of grace. The Irish cases cited by Mr. *Kennedy* have no application; they are founded on special statutes. In the present case, there was a total forfeiture of the rights of the plaintiffs in consequence of the revenue sale, and that sale having never been set aside, the forfeiture was not relievable either at law or equity. The sale acted as a complete annulment of the tenure; and the tenure could never be revived or restored into being except by a fresh grant. [MARKBY, J.—Supposing the Government restored the zamindari, subject expressly to the right of the Watsons and the prior incumbrances, would not the tenure revive?] The tenure would not revive, but the plaintiffs would get a right to demand possession and a right to sue on refusal. [MITTER, J.—The evidence has not been taken yet, and it is difficult to say what the plaintiffs can prove, and what they cannot: but supposing they fail to prove that the sale was illegal, but they succeed in proving that the zamindari was made over on condition of restoring the prior incumbrances, would not they be entitled to recover their tenure?] It is submitted they would not; they would only get a right of action. Besides, the compromise was only between the Rajah, the Government, and the Watsons. The plaintiffs were no parties to it, and that was [10] the reason why the Judicial Committee held that in no way affected their rights. The Sudder Dewanny Adawlut wanted to fix an equity, but their decision was reversed. But supposing the plaintiffs are entitled to the benefit of that arrangement, why did they not sue in 1860? It is no answer to say that it was owing to the Rajah not being in possession. His right was existing. [MARKBY, J.—The contention of the plaintiffs is that their right was not against the world, but a personal equity against the Rajah, Mr. *Kennedy*—and those who took under him with notice.] As soon as those words are added, they dispose of the contention: for if that was so, the plaintiffs would be entitled to recover against the Rajah's mortgagees as well as the Rajah himself. If they take under the arrangement, it is a legal right and not an equity. An equity would only arise if the arrangement had been made behind their backs. The suit ought to have been brought within twelve years from the date of the restoration of the zamindari to the Rajah, or at all events from the expiry of the Watson's lease under cl. 141, sched. II. Act IX of 1871. [Mr. *Kennedy*—cl. 145.] The plaintiffs cannot take advantage of s. 19 of Act IX of 1871: they were perfectly aware of their title, and were therefore bound to sue when their right to sue arose. It has been contended for the plaintiffs that the fraud kept out of possession the party against whom the plaintiffs had a personal right. But they were not kept out of the knowledge of their right; in fact, nothing done by Abbott and McArthur could affect their right. They cannot, therefore, escape from the operation of the law of limitation. In conclusion, it is submitted that the plaintiffs should not be allowed to start a new case in this Court. The equity which they now seek to fasten upon the Rajah was never raised in the pleadings—*Eshen Chunder Sing v. Shama Churn Bhutto* (11 Moore's I. A., 7).

The *Advocate-General* for the *Lessees*.—The Irish cases cited do not apply, as they are founded on particular statutes; and *Keech v. Sandford* (1 White

and Tudor's L. C., 44) proceeded on the grounds of public policy. In this case, Sreemunto Lall Khan, a person who [11] was *sui juris*, does not take action when his right accrues; he remains quiescent until long after the period of limitation has elapsed. Should his representatives be now allowed to come into Court and disturb the titles of those persons whom he allowed by his quiescence to deal with the Rajah under the belief that he had no more subsisting title? Even if the fraud committed by Abbott was a fraud against the plaintiffs, they were bound to come into Court with reasonable diligence—*Chetham v. Hoare* (L. R., 9 Eq., 571). S. 19 of Act IX of 1871 cannot save the plaintiffs' suit from being barred, for that section does not apply. In order to make it applicable, it must be assumed that the fraud of Abbott was tantamount to the fraud of the Rajah. How could that be? The fraud was committed against the Rajah, and it is rather difficult to see how the fraud of another person to his injury can be said to be his fraud.

Mr. *Kennedy* in reply.—Art. 141, sched. II of Act XI of 1871, would only apply, if the right of the plaintiffs were in its nature reversionary. But it is not so. What they claim is a personal equity against the Rajah and those claiming under with notice of the plaintiffs' title.

The following **Judgments** were delivered :—

Markby, J.—In this case the plaintiffs sue to recover, in istemrari maurasi right, possession of an extensive tract of country in Zilla Midnapore. The property is of very large value, and the appeal has been very fully and ably argued.

It is necessary to state in what shape the appeal comes before us. The plaint is not at all in the form prescribed in Act VIII of 1859, but, as customary in the mofussil, is a plaint and written statement combined. The plaint was admitted, and the defendants having filed their written statements, the case then came on before the District Judge for settlement of issues. Upon that hearing the District Judge, without taking any evidence, dismissed the suit. Against this decision the plaintiffs appeal.

One of the questions which was argued before the District [12] Judge, and which he decided, was whether the plaint disclosed a cause of action. The District Judge held that it did disclose a cause of action. Against this there is no appeal. The District Judge further held that the cause of action arose in 1837, and that the suit was barred by limitation, and against this the plaintiffs appeal.

I am not quite sure from the judgment of the District Judge what he considered the plaintiffs' cause of action to be. There can be no doubt that the plaint does disclose one cause of action, namely, that the person through whom the plaintiffs claim was in the year 1837 or thereabouts dispossessed by the auction-purchaser, under an illegal sale for arrears of Government revenue, which was afterwards set aside. But that this was not the sole view put forward in the Court below is clear from the 3rd and the 11th issues.

It therefore becomes necessary to consider what the plaintiffs' cause of action is, and Mr. *Kennedy*, on behalf of the plaintiffs, now states his case as follows :—It is necessary to set it out in full, as the terms of it will, no doubt, form the subject of much discussion hereafter.

[After stating the facts as above, his Lordship continued] :—This is the case of the plaintiffs. Besides stating the above facts, the plaintiffs expressly admit that by the proceedings which took place before the Collector, consequent

upon the sale for arrears of revenue of 1837, the maurasi tenure, which was then vested in Sreemunto Lall Khan, was put an end to. But they contend that, in consequence of the arrangement between the Rajah, the Government, and the Watsons, Sreemunto Lall Khan had a right as against the Rajah and all persons claiming under him, other than the purchasers for valuable consideration without notice, to be restored to his tenure.

This right they contend, the Principal Sudder Ameen, by the decision of July 1848, declared to be suspended, until the expiration of the twenty years' ijara granted to the Watsons. They further say that this right was a personal equity against the Rajah, which could not be enforced when the ijara expired against the mortgagees of the Rajah, because they had no notice of it. They say, moreover, that this equity was destroyed [13] by the sale for arrears of revenue in 1848, but that it arose again when Ajoodhia Ram recovered possession of the estate under the decree of the District Judge of Midnapore, affirmed by the High Court as above mentioned.

It was very strenuously argued on the part of the respondents, especially by the learned Counsel who appeared for the Rajah, that the plaintiffs could not be allowed to put their case in this way; and as it was alleged that to allow them to do this would not only be contrary to law, but also would be a great hardship to the defendants, I think it right to state how in my opinion the matter actually stands.

The suit, it must be remembered, was (as already stated) disposed of by the Court below at the first hearing upon the settlement of issues - not a tittle of evidence has yet been taken, and I neither affirm nor deny the truth or otherwise of any single one of the facts above stated. Some of them I believe are not disputed, but many are so. I only state the case as it has been placed before us by the Counsel for the appellants. Moreover, it must be remembered that, by express provision of the Code of Procedure (s. 139), the Court may frame the issues from the allegation of facts which it collects from the oral expression of the parties or their pleaders, notwithstanding any difference between any allegation of fact and the allegation of fact contained in the written statement (if any) tendered by the parties or their pleaders. The allegations of fact, set out by us above, as relied on by Mr. Kennedy, do not, however, materially differ from the allegations of fact set out in the plaint, except in this that, whereas in the plaint there were allegations that both the revenue sales were set aside, those allegations are now withdrawn, and it is admitted that they were neither of them set aside (the sale of McArthur was set aside). As before pointed out, it is clear from the 3rd and 11th issues that something was said upon this point in the Court below, and it is very doubtful whether these allegations were not then withdrawn, for it is to be observed that, whilst in the District Judge's statement of the facts of the case in his judgment, no reference is made to either of the sales being set aside, and, whilst the 11th issue raises the question whether the [14] tenure could be revived *without* the sale of 1837 being set aside, the plaintiffs did not ask for any issue upon the question whether or no that had been done. But if there were any doubt about this, and as to the application of s. 139 when the case is in the Court of Appeal, there are still the provisions of s. 141 under which "at any time before the decision of the case, the Court may amend the issues or frame additional issues on such terms as to it may seem fit, and all such amendments, as may be necessary for the purpose of determining the real question or controversy between the parties, shall be so made." The mode in which the case is now put on the part of the plaintiffs may render necessary the amending of the

issues or the framing of additional issues, and this can be done at the request of either party, either by this Court or the Court below, should the case eventually go down for trial.

There is moreover, in my opinion, ample authority in the decisions of this Court and of the Privy Council to justify the course which we have taken. In *Joseph v. Solano* (9 B. L. R., 44, at p. 453), Sir RICHARD COUCH thus states what he considered the Privy Council to have done in the case of *Mohammed Zahoor Ali Khan v. Mussamut Thakooranee Rutla Koer* (11 Moore's I. A., 468): "The Judicial Committee, having held that on the face of the plaint, no relevant case was made against the defendants, but that in a suit, properly framed, if he proved his case, he would be entitled to a decree against one, and considering that a new suit would probably be met by a plea of the act of limitations, allowed the appellant to amend his plaint, so as to make it a plaint against that defendant alone for the recovery of money due on a bond. They considered that the liability on the bond might be tried on the issues already settled, but they would not intimate any opinion upon them and the evidence, and remanded the suit for retrial."

In the case of *Joseph v. Solano* (9 B. L. R., 441, at p. 453) itself, the plaintiff sued upon a promissory note; the Court of first instance held that one or two small items in the account, forming the consideration for this note, were illegal, and on that ground dismissed the suit. [15] Sir RICHARD COUCH agreed in this opinion, and considered that, with regard to this note, the plaintiffs' suit had failed and ought to be dismissed; but he allowed the plaint to be amended and an issue to be framed, in order to enquire what amount was due to the plaintiff in respect of the consideration of the note. That is going far beyond what we propose to do here.

It is said that the decision of *Eshen Chunder Singh v. Shamu Churn Bhutto* (11 Moore's I. A., 7) shows that we ought not to allow the plaintiffs to set up the case upon which they now seek to rely. In my opinion that case has no application whatever to the present. The observations of the Privy Council in that case were based upon the position of this Court when hearing a special appeal, at which stage all consideration of the facts is excluded; and they point out that the learned Judges, whose judgment was under appeal, after all the evidence had been taken and the facts conclusively found, had decided the case upon an assumed state of facts contrary to those stated in the plaint, and devoid not only of allegation, but also of evidence in support of it. That is not what is going to be done here. It is true that the Privy Council say they "desire to take advantage of it" (the particular case before them) "for the purpose of pointing out the absolute necessity that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or a consistent with the case they thereby made" (11 Moore's I. A., 20); and this has been supposed to prohibit all departure whatsoever from the written allegations of the parties. But we must read this decision of the Privy Council with the other decision already referred to, and which was decided only a few months afterwards. The Privy Council must also have been aware that there were no regular pleadings in this country, and they must also have been aware of the provisions of the Code of Procedure to which I have referred, and I have no doubt, therefore, that by the word "pleadings" in this passage was meant such allegations as the parties put forward at the proper time and in the proper manner; and that the practice that the Privy Council wish to enforce is not an absolutely rigid adherence to the plaint and written statements (which the Code declares not to be necessary), but that care [16] should be taken to raise

properly on the issues and at the proper time the questions to be tried, so as to give the parties an opportunity of producing their evidence and being heard upon the points upon which the decision of the case ultimately turns. I think, therefore, that there is no objection to the plaintiffs putting their case as they now seek to put it.

It was further objected that no such right to be restored to the tenure as the plaintiffs now put forward could be claimed; in other words, that the case of the plaintiffs as now put did not disclose any cause of action. I do not, however, think that we could dismiss the suit on this ground. Whether any such right, as the plaintiffs now claim, can be established by law, will be determined hereafter when the facts are fully ascertained.

Another objection raised by the respondents to the mode in which the plaintiffs' case is now put was that, if the plaintiffs ever had any such right as that which they now claim, it had been abandoned by the conduct of Sreemunto Lall Khan, particularly by his conduct with reference to the litigation of 1844 in which he was plaintiff. But this, I think, cannot be determined now. If the suit be tried, this may form one of the issues.

Then we come to the question whether the claim of the plaintiffs is on the face of it barred by limitation, and of course in determining this point at this stage of the proceedings, we must take the case as the plaintiffs choose to put it, provided that they keep within the allegations made.

Now, from the mode in which the arrangement between the Rajah, the Government, and the Watsons is stated in the first part of the plaint, I should certainly have thought that any right Sreemunto Khan obtained thereby might have been asserted at once. He could apparently have required the Rajah to recognize his tenure at once. This the Rajah might have done by allowing Sreemunto Khan to stand between himself and the Watsons in respect of the lands covered by his tenure, which would in no way have interfered with their *ijara*, and would have put him at once in possession of a large income. To this income, if there be anything in his present case at all, it would appear to me that he was then entitled. Instead, [17] however, of asserting this right, Sreemunto Khan chose to join with the Rajah in trying to get rid of the Watsons altogether by asserting that he held his tenure *under* the Watsons instead of *over* them—a right which he failed to establish. That, however, is not the view which the plaintiffs now put forward as to the effect of the transactions between the Rajah, the Watsons, and the Government. They contend that, during the *ijara* of the Watsons, Sreemunto Khan's rights as *mukarridar* were entirely suspended, and they go so far as to assert that this point has been finally determined by the decision of the Principal Sudder Ameen. I do not assent to this latter contention. I do not think that this view, which certainly seems to have been in the mind of the Principal Sudder Ameen, was affirmed by the Privy Council. Nor can I help considering it as something extraordinary that the Government should have done this apparent injustice to Sreemunto Khan. I do not see why an arrangement should have been made which benefited the Rajah at his expense when the general desire was to protect the claimants on the *zanindari*. But I must admit that we are not now in a condition to decide this question, because the documents which show the exact nature of the transaction are not before us. They were apparently filed with the plaint, but were removed from the record by order of the District Judge, and have not been restored, and I cannot therefore undertake to say that the effect of the transaction cannot have been such as the plaintiffs allege and as the Principal Sudder Ameen appears to

have thought. I cannot, therefore, say that the right now set up was capable of being asserted as soon as the Rajah was restored to his zamindari, and that, on this ground, it is barred by limitation.

Again, it is contended for the defendants that, if Sreemunto Khan's interest was suspended during the ijara of the Watsons, it was then in the nature of a remainder or reversion, which fell into possession in 1860, and that the suit was therefore barred within twelve years of that date under the provisions of cl. 141 of sch. 2 of Act IX of 1871. But Mr. Kennedy meets this by the assertion that the right of Sreemunto Khan or his representatives was merely a personal equity as [18] against the Rajah, and not anything in the shape of a remainder or a reversionary right to the land itself.

Here, again, without the documents before us, it is impossible to say what was the nature of the plaintiffs' right, and, if the plaintiffs choose to put their case in this way, I do not think we can then apply this provision of the statute. As far as I can see, if the plaintiffs succeed in establishing their case in the way in which they now put it, no question upon the statute of limitation really arises at all. They base their present right upon the last recovery of the estate by the Rajah Ajoodhna Ram by the decree of the District Court of Midnapore, affirmed by this Court, and say their cause of action arose when he recovered actual possession of the estate. It is really, therefore, at the present stage of the inquiry rather a question whether the plaintiffs disclose a cause of action than whether the suit is barred by the statute of limitation. I have already said that I am not prepared to say that the case of the plaintiffs as now put discloses no cause of action. I think sufficient is stated to render it necessary that the suit should be tried.

In this view, it is, of course, unnecessary to express any opinion upon the contention of the plaintiffs that, even if they could have brought their suit whilst the Rajah was out of possession, they would be protected by the provisions of s. 19 of Act IX of 1871. But as that point has been argued and may possibly arise again, I may say that, in my opinion, s. 19 does not apply to this case, because I do not think the plaintiffs allege that they claim through either Abbott or McArthur, by whose fraud they allege that they were kept in ignorance of their rights.

The lower Court seems also to have proposed to deal with the 11th and 12th issues, and what I understand to be the opinion of the lower Court on these issues is that the Privy Council had finally decided, on the 3rd February 1854, that the maurasi tenure was destroyed by the revenue sale of 1837 and could not be regained until that sale was set aside by a suit. The Privy Council do undoubtedly say in one passage—"all the right of that party (i. e., Sreemunto Khan), was merely to institute a suit for the purpose of setting aside the sale which had [19] been made to Government, and the lease which had been granted under that sale." But the view of the case now put forward was certainly not then suggested to the Privy Council and was not adjudicated on. The objection, if it is worth anything, falls rather under s. 7* of the Procedure Code than under s. 2,† but I do not think it falls under either: for

* [Sec. 7.—Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained.]

† [Sec. 2.—The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.]

if the view of the transaction between the Government, the Watsons, and the Rajah, which the plaintiffs now contend for, be correct, their present cause of action was not in existence at all at that time.

Lastly, the lower Court held that the plaint ought to be returned upon the ground that it is deficient in the particulars required by s. 26 of Act VIII of 1859. That section requires that "when the claim is for land or for any interest in land, the nature of the tenure or interest must be specified; and if the claim be for land forming part of a village or other known division, or for a house, garden, or the like, its situation shall be described by the setting forth of boundaries, or in such other manner as may suffice for its identification" (cl. 5). Taking this with the form given in cl. 4, it is clear that, when a whole estate bearing a name is sued for, the boundaries need not be given. The plaintiffs here seek to recover two estates, "Mouzah Barooah," formerly included in Hudah Tomapara and now included in the map of Hudah Satpatti Jungle Mahal, and "Jungle Mehal, Hudah Satpatti, &c., composed of the turrufs therein comprised, viz., Turruf Roygurrh, Turruf Gurwah, Turruf Sabboni, and Turruf Nij Satpatti, and the mouzahs situated within them." This is the correct translation of the plaint given to us.

My learned colleague suggests that the plaintiffs should make their plaint more precise by filing their survey maps of the mouzahs which they claim, and I concur in that view. The plaintiffs, therefore, will be ordered to do this.

In my opinion, the decree of the lower Court, dismissing the suit, should be set aside, and the suit remanded to the District Judge of Midnapore for trial.

The costs hitherto incurred will abide the result.

Mitter, J.—I am also of the opinion that the judgment of [20] the lower Court cannot stand. But I desire to record the grounds upon which I think that, at this stage of the case, the lower Court was not right in dismissing the suit as barred by limitation. Upon the other objections raised before us on behalf of the respondents, I entirely concur in the reasons given by my learned colleague in overruling them.

The plaintiff puts his cause of action as having arisen when the defendants' possession was restored. This is admittedly within the time allowed by the law of limitation for bringing a suit of this nature. At this stage we cannot say that, according to the case which has been put before us, the ground upon which the plaintiff's case has been made to rest does not constitute a valid cause of action. The contention of the learned Counsel for the plaintiff has been that, according to the arrangement under which the zamindari was restored to the defendant, the plaintiff acquired an equitable right which would entitle him to demand possession of his mokurree property from the Rajah, whenever he happened to be in a position to make good that right. It has been further said that this being a personal equity against the Rajah, enforceable against him or persons deriving their title through him with notice of the existence of this equity, it could not be enforced against the Rajah's mortgagees, because they had no notice of this equity, and the time for enforcing it against the Rajah arrived only when his possession over the zamindari was established. Without allowing the plaintiff to adduce his evidence, we cannot say that this case, as put before us, cannot succeed, and must be therefore dismissed at this stage. Again, if the facts upon which the plaintiffs' case as put before us is based be established, it would be a question requiring serious attention whether the

plaintiffs' claim would not be saved from the operation of the law of limitation under the provisions of s. 29 of Act I of 1845.* But it is not necessary to consider this question now, because, upon the other contention raised by the learned Counsel for the plaintiff, I am not prepared to say at this stage that the cause of action disclosed is not such a valid cause of action that the plaintiffs can successfully maintain this suit upon it.

But it has been said that, upon the statements of the plaintiffs' [21] case, it is evident that the cause of action for the establishment of the plaintiffs' title accrued at a much earlier date, and counting from it, the present suit has not been brought within the time allowed by the law of limitation. The contention of the learned Counsel for the respondent upon this point is two-fold. First, that immediately on the restoration of the zamindari to the defendant in the year 1842, the plaintiffs' cause of action arose and secondly, if it did not arise then, at any rate it arose in the year 1860, when the time of the ijara to Messrs. Watson & Co. expired.

In the year 1842 when the zamindari was restored, it has now been conclusively established that the plaintiffs were not entitled to possession. In a suit instituted by the father of the plaintiffs, against Messrs. Watson & Co., which went up to the Judicial Committee of the Privy Council, it was held that the zamindari was restored to the defendant, preserving intact the rights which Messrs. Watson & Co. acquired under the then existing revenue sale law. But it has been said that the father of the plaintiffs could assert his right immediately by asking the Rajah to recognize his tenure by allowing him to stand between him (the Rajah) and the ijaradars, Messrs. Watson & Co. This he could not do, because the ijara lease extended over the whole of the jungle mehal, while the plaintiffs' tenure comprises only a portion of it. He could only ask the Rajah to account to him for his share of the profits derivable from the ijaradari proportionate to the interest he had in the jungle mehal. But if the Rajah failed to account to him in any particular year for his share of the profits, that gave rise to a cause of action for suing the Rajah to recover his share of the profits, a cause of action very different from the one upon which the present suit has been brought. I do not mean to say that under no circumstances non-payment by the Rajah to the plaintiff's father of his share of the profits could give rise to a cause of action upon which he would be bound to sue within the time allowed by law to enforce the right alleged to have been secured to him by the compromise between Government and the defendant. Facts might be established which would go to show that such a cause [22] of action did accrue. But there is nothing in the statement of the plaintiffs' case as it was put before the lower Court or before us, from which we can say that this was the case. Furthermore, it appears to me that it has not been admitted by the plaintiffs that the defendant did not account to them for their share of the profits during the continuance of Watson's ijara lease.

Then as regards the other contention. The learned Counsel for the plaintiffs answers it by asserting that their right is of such a nature that it could not be enforced against the Rajah's mortgagees who had no notice of it. Without an enquiry into the nature of this right, and without an enquiry into the question, whether the mortgagees had or had not such notice, we cannot say that this is not a sufficient answer. Further, as I have already observed before, it is a question which would require serious consideration in this case, whether the provisions of s. 29 of Act I of 1845 would not enure to the benefit of the plaintiffs. Although it has been declared by a competent Court that the revenue sale of the zamindari in 1848 is to be treated as a mere private sale between

* [q. v. *supra*, 2 Cal. 2.]

the defendants on the one hand, and the auction-purchaser and the subsequent transferees on the other hand, it by no means follows that, after the zamindari came back to the defaulting proprietor, the under-tenants would not be entitled to rely upon s. 29 of the sale law of 1845 for being restored to their tenures.

For these reasons, I do not think that, at this stage of the case without a trial of it, the plaintiffs' case should be dismissed as barred by limitation.

Appeal allowed.

NOTES.

[As to amendment of pleadings, the Civil Procedure Code, 1908, contains the following provisions:—Order I, rule 10 (in respect of parties), Order VI, rule 16 and 17.

See (1895) 22 Cal., 692, where this case was referred to.]

[23] APPELLATE CRIMINAL.

The 15th June, 1876.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE MORRIS.

The Queen

versus

Bholanath Sen.

[25 W. R. Cr. 57]

*Criminal proceedings—Irregularities—Effect of waiver by prisoner—
Disqualifying interest of Judge—Judge giving evidence.*

The jailor of a district jail being accused by one of the jail clerks of falsifying his accounts and defrauding the Government, the matter was enquired into by the District Magistrate, and the jailor was, by the Magistrate's order, placed on trial before a Bench of Magistrates, consisting of the District Magistrate himself, *L*, the Officiating Superintendent of the Jail, and three other Honorary Magistrates. The prisoner and his pleaders were alleged to have stated before the commencement of the trial, on being questioned, that they had no objection to the composition of the Bench, but after the charges had been framed, the prisoner's Counsel objected to the Bench as formed. The District Magistrate directed the Government Pleader to prosecute, and both the District Magistrate and *L* gave evidence for the prosecution. After the case for the prosecution was closed, two formal charges were drawn up, namely, that the prisoner had debited Government with the price of more oil-seed than he actually purchased, and that he had received payment for certain oil at a higher rate than he credited to Government. The moneys, the receipt of which was the subject of the first charge, were obtained by the prisoner on the strength of certain vouchers which he had induced *L* to sign as correct, and *L* had sanctioned the sale at the rates credited to Government. Upon the prisoner's giving the names of the witnesses he intended to call in his defence, *L* was deputed by his brother Magistrates to examine some of them who were connected with the jail, in order "to guard against deviation," and the depositions so taken were placed on the record, "to be used by either party, though not themselves as evidence." The prisoner was convicted. On a motion to quash the conviction—

Held, that *L* had a distinct and substantial interest which disqualified him from acting as Judge.

* Criminal Motion, No. 800 of 1876, against the order of the Sessions Judge of Midnapore, dated the 11th February 1876.

Held, further, that, although a Magistrate is not disqualified from dealing with a case judicially merely because in his character of Magistrate it may have been his duty to initiate the proceedings, yet a Magistrate ought not to act judicially in a case where there is no necessity for his doing so, and where [24] he himself discovered the offence and initiated the prosecution, and where he is one of the principal witnesses for the prosecution.

Held, further, that the recording the statements of the prisoner's witnesses was irregular.

Criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner.

The prisoner Bholanath Sen, while occupying the post of jailor of the District Jail at Midnapore, was accused by one of the jail clerks of falsifying his books and defrauding the Government. The matter was enquired into by the District Magistrate, Mr. Harrison, by whose order the prisoner was placed on trial for criminal breach of trust as a public servant before a Bench of Magistrates consisting of Mr. Harrison himself and four Honorary Magistrates. One of the latter was a Mr. Larymore, who, at the time of the commission of the alleged offences, and at the time of the trial, was the Officiating Superintendent of the Jail and the prisoner's immediate superior. In his judgment in the case Mr. Harrison stated that the prisoner and his pleaders were asked, before the commencement of the trial, whether they had any objection to the composition of the Bench, and that they distinctly said they had none whatever. The prisoner's consent, however, was not formally recorded, and after the charges were drawn up the prisoner's Counsel objected to the Bench as formed. Under instructions from Mr. Harrison, the Government Pleader appeared to prosecute, and both Mr. Harrison and Mr. Larymore gave evidence for the prosecution. After the case for the prosecution was closed, two distinct charges against the accused were framed, the first of debiting Government with the price of more oil-seed than he actually purchased, and the second of receiving payment for certain oil at a higher rate than he credited to Government. As regards the first charge the prisoner was alleged to have received money for the oil-seed on the strength of certain vouchers which he had induced Mr. Larymore to countersign as correct, and with respect to the second charge the prisoner's defence was that Mr. Larymore had himself sanctioned the sale at the rate credited to Government. Upon the accused giving the names of the witnesses he intended to [25] call in his defence, Mr. Larymore was deputed by his brother Magistrates to examine some of them who were connected with the jail and to take down their statements at once in the presence of the agents of both parties in order to prevent any suggestion that the witnesses had been tampered with and "to guard against subsequent deviation." The depositions so taken were placed on the record "for the use of either party, though not themselves as evidence." Separate judgments were written by the various members of the Bench, but all five joined in signing the finding and sentence of the Court convicting the accused on the two charges of criminal breach of trust under s. 409 of the Penal Code, and sentencing him to two periods of rigorous imprisonment, amounting in all to two years, and to a fine of Rs. 1,000, and in default of payment of the fine to six months' additional imprisonment.

An appeal by the prisoner to the Sessions Court was dismissed and he now moved the High Court to quash the conviction.

Mr. M. Ghose (Bahoo Bordonath Sen with him) for the prisoner.—The conviction is bad not merely on the ground of the serious irregularities which marked the whole course of the proceedings, but because the Bench of Magistrates, as constituted, was incompetent to try the case. The District

Magistrate who presided at the trial was 'virtually the prosecutor, and Mr. Larymore was materially, in fact pecuniarily, interested in the result of the trial, and therefore disqualified from acting as Judge : *Queen v. Meyer* (1 Q. B. D., 173), *Queen v. Hiralal Das* (8 B. L. R., 422) ; and the presumed consent of the prisoner would not cure the disqualification---*Queen v. Bertrand* (L. R., 1 P. C., 520). Further it was illegal, or at least highly improper, for these gentlemen to be both witnesses for the prosecution and judges of the prisoner's guilt or innocence. Taylor on Evidence, 5th ed., 1197. The Bench of Magistrates, in deputing Mr. Larymore to take the depositions of the witnesses for the defence, committed a grave irregularity, and one which has materially prejudiced the prisoner in his defence.

[26] The Judgment of the Court was delivered by

Macpherson, J.—This is an application to the High Court under s. 297 of the Criminal Procedure Code.

The petitioner, Bholanath Sen, has been convicted by a Bench of Magistrates at Midnapore on two charges of breach of trust, under s. 409 of the Indian Penal Code. He was sentenced to two periods of imprisonment, amounting, in all, to two years' rigorous imprisonment, with a fine of Rs. 1,000 and in default of payment of the fine six months' additional imprisonment.

We are asked to quash the conviction on the ground of various substantial illegalities and irregularities, most of which are set forth in the petition presented to this Court.

The seventh of the grounds stated in the petition is, that it was illegal and improper that a certain Mr. Larymore should have been one of the Bench of Magistrates who tried this case. It appears to us that this is a good ground of objection, and that, under the circumstances, the presence of Mr. Larymore, who had a substantial interest in the prosecution vitiated the proceedings, and makes it necessary that the conviction should be quashed.

The prisoner Bholanath Sen was the jailor of the District Jail at Midnapore, of which Mr. Larymore was the Superintendent at the time of the trial and at the time of the commission of the offences for which Bholanath Sen was tried. Bholanath Sen was Mr. Larymore's immediate subordinate in the management of this jail, and the moneys, the receipt of which was the subject of the first charge, were drawn by him from Government on the strength of certain bills or vouchers which (although in fact incorrect) Mr. Larymore had been induced by the accused to countersign as correct ; while as regards the second charge, which was for receiving payment for certain oil at a higher rate than he credited to Government, the defence was (and Mr. Larymore proved it to be true) that Mr. Larymore had himself sanctioned the sale at the rate with which the prisoner credited the Government.

The whole case was, that the prisoner, by deceiving and **[27]** imposing upon Mr. Larymore, had fraudulently got the sums of money, the receipt and appropriation of which was charged against him as criminal breach of trust. Mr. Larymore being the Superintendent in charge of this Jail, and being connected in this manner with the sums which the prisoner was alleged to have misappropriated, it is evident that he was most substantially interested in the matter, and that he was by no means free from the possibility of pecuniary responsibility in respect of it. That being so, it was most unfortunate that the District Magistrate should have thought fit to select Mr. Larymore to sit as one of the Judges in the case.

The Magistrate says that Mr. Larymore was friendly to the prisoner, and that it was with a desire to assist the prisoner that he put Mr. Larymore on the Bench. But the Magistrate really erred if he selected Mr. Larymore because he was supposed to be specially friendly to the prisoner, almost as much as he would have erred had he selected him for the opposite reason. A criminal prosecution is not in the nature of a friendly arbitration. It is a penal proceeding of a very grave and serious kind, in which it is impossible to proceed too strictly according to the rules prescribed by law. Connected as Mr. Larymore was with the prisoner in the very matters which were the subject of the trial, it is impossible that his sitting as one of the Judges could be right. It is one of the oldest and plainest rules of justice and of common sense that no man shall sit as judge in a case in which he has a substantial interest. That is the law of this country as much as it is the law of England. [See the decision of a Full Bench of this Court in the case of *The Queen v. Hirral Das* (8 B. L. R., 422) and the cases there referred to. See also a very recent case in England—*The Queen v. Meyer* (1 Q. B. D., 173).]

The District Magistrate says, that Mr. Larymore's interest in the matter was very indirect. In this we cannot agree with him: for it is quite clear, even from the evidence given by Mr. Larymore himself, that he had a most distinct and substantial interest. Under certain circumstances it might have proved a direct pecuniary interest. The District Magistrate [28] himself says as to the second head of charge,—“there is this to be said in palliation of it, that Mr. Larymore's consent was obtained to the price, while the quantity sold was probably fixed in the accounts with a view to square the monthly statements.”

We think that, were it on this ground alone, the conviction ought to be quashed.

But, in addition to this, there are several other very serious irregularities to which our attention has been called.

The Bench of Magistrates consisted of the District Magistrate, Mr. Harrison, Mr. Larymore, the Officiating Superintendent of the Jail, Dr. Bachelor and two native gentlemen, being a Bench of five. In the course of the trial, both Mr. Harrison and Mr. Larymore were examined as witnesses for the prosecution. Without saying that it is illegal for a Magistrate to give evidence in the witness-box in a case with which he is dealing judicially, it clearly is, on general principles, most undesirable that a Judge should be examined as a witness in a case which he himself is trying, if such a contingency can possibly be avoided. [See the Full Bench case—*The Queen v. Hirral Das* (8 B. L. R., 422) —already referred to.] The mere fact that Mr. Harrison and Mr. Larymore were necessary witnesses for the prosecution was a most cogent reason why neither of them should have been members of the Bench by which the prisoner was to be tried. Mr. Harrison was almost as much out of place on the Bench as was Mr. Larymore. For the whole alleged fraud was discovered by Mr. Harrison himself: the prosecution was initiated, and the Government pleader was instructed by him: and he was one of the most important witnesses for the prosecution. That being the District Magistrate's position, we cannot conceive why he did not place the case (which is really a very important one) before some Magistrate in no way connected with it, who might have disposed of it himself, or might have committed the accused for trial to the Sessions, instead of going out of his way to have the case tried by a Special Bench composed of Magistrates, of whom two were manifestly objectionable.

[29] In making these remarks, we do not say that a Magistrate is incapacitated from dealing with a case judicially, merely because in his character of Magistrate it may have been his duty to initiate the proceedings. We only say that it was wrong that the District Magistrate should deal with a case judicially when there was no sort of necessity for his doing so, when he had himself discovered the alleged fraud and initiated the prosecution, and when he was one of the principal witnesses against the prisoner.

Then, again, we find that after the case for the prosecution was closed and formal charges were drawn up, and the accused had given the names of the witnesses whom he intended to call, Mr. Larymore was deputed by his brother Magistrates to go and take the depositions of some of these witnesses. Mr. Harrison in his judgment says:—"When the witnesses for the defence were named, most of them were connected with the jail. As it would certainly be said by whatever party they gave evidence against, that they had been tampered with, the Court suggested, and both sides agreed, that these statements had better be taken down at once in the presence of the agents of both parties and of one of the Honorary Magistrates, to guard against 'subsequent deviation'. Accordingly, they were questioned, and their answers recorded in this way on the 12th and 13th November, and the statements are placed with the record for the use of either party, though not themselves as evidence." We are unable to understand what such a proceeding is supposed to mean. Here is a man being tried on a very serious charge, who names the witnesses whom he means to call. Thereupon "the Court" suggests that "to guard against subsequent deviation," the statements of these witnesses should be taken down at once in the presence of one of the Honorary Magistrates and of the prisoner's agent. Accordingly, the statements are taken down by Mr. Larymore, and the depositions so recorded "are placed with the record for the use of either party, though not themselves as evidence." This was a most irregular and unfair proceeding. The Court had no possible right to receive from Mr. Larymore or from anybody else statements recorded after such a fashion, or to place [30] these statements with the record, if they were not themselves evidence. As a matter of fact, these statements were taken down and were placed with the record, for the sole purpose of being used against the prisoner. And they are practically so used by the Magistrate, Mr. Harrison, who, in his judgment, says:--"Now, Uma Churn Chatterjee's evidence I have already said I consider quite unworthy of credit, and it will be observed that when his statement was taken before Mr. Larymore on November 13th, he was never questioned about these purchases or said anything about them."

In our opinion, the deputing Mr. Larymore to take in an irregular way the statements of the witnesses whom the prisoner meant afterwards to call in support of his defence, was most unfortunate. It was quite illegal and unjustifiable. The District Magistrate, Mr. Harrison, in his judgment, says, that when the Court suggested, "that these persons should be examined at once in the presence of one of the Honorary Magistrates," both sides agreed "that this had better be done. And doubtless he relies on that agreement," as justifying and sanctioning what was done. So, as regards the objection taken to Mr. Larymore's being on the Bench and to Mr. Harrison's own presence there, he relies on the consent given by the prisoner in the first instance.

The District Magistrate has throughout these proceedings treated them very much as if they had been proceedings pending in a civil suit and has lost sight of the wide difference which exists between a civil suit and a criminal

prosecution. Criminal proceedings are bad, unless they are conducted in the manner prescribed by law; and if they are substantially bad in themselves, the defect will not be cured by any waiver or consent of the prisoner. When the irregularities are all unfavourable to the prisoner, as in our opinion they clearly were in the present case, it is impossible for any Court to consider a waiver consent as binding on him. It is the duty of Magistrates and all Criminal Courts to follow the procedure prescribed by law, and there is no law which sanctions their intentional departure from that procedure; and then attempting to protect themselves against the consequences of such departure [31] by getting the accused person to say he consents to it. In the mofussil, most prisoners, not properly defended, would probably assent to any irregularity which the Judge or Magistrate trying him chose to suggest. There would be an end to all procedure if such an assent were held to warrant material and important irregularities.

But after all what really was the nature of the consent given by the prisoner as to the composition of the Bench? After the witnesses for the prosecution had been examined, formal charges were, on the 10th of November, drawn up, and the plea of 'not guilty' was recorded. The accused gave the names of his witnesses, and the further hearing was adjourned to the 4th of December. In his judgment, Mr. Harrison says:—"After the charge was drawn up, and the case resumed after the long adjournment for the defence, the accused's Counsel objected to the composition of the Bench, both to Mr. Larymore's presence on it and to mine. Except under the special circumstances of the case Mr. Larymore's presence on the Bench might obviously be questionable, and hence before commencing the trial the accused and his pleaders were expressly asked, if they had any objection to the composition of the Bench, when they distinctly stated that they had none whatever, &c."

It is to be noted that the objection was raised and pressed, before the case had proceeded further than the point of drawing up formal charges and recording the plea of "not guilty"; also that before that time both Mr. Harrison and Mr. Larymore had given evidence as witnesses on behalf of the prosecution. But it is not stated, and there is nothing to lead us to suppose, that when the prisoner was asked whether he objected to the composition of the Bench, he was warned that Mr. Harrison and Mr. Larymore were both very important witnesses for the prosecution. The record of the case does not show that, when the prisoner was first brought before this Bench, he was asked whether he objected to its composition; except that Mr. Larymore deposes to the fact which is confirmed by Mr. Harrison in his judgment. It is a matter of comparatively little consequence whether it is recorded or not. But if the Magistrates really intended to rely [32] on the prisoner's consent, that consent ought to have been formally and accurately recorded at the time it was given.

On these grounds, and without entering into the other objections which the prisoner's Counsel take to the conviction, we think it clear that there have been most serious and material errors in the proceeding in this case, which have been greatly to the prejudice of the prisoner. We, therefore, set aside the conviction and sentence, and order that the prisoner be discharged and that the fines, if paid, be refunded to him.

The Magistrate of the District, no doubt, had authority to direct that this case should be tried by a Bench of Magistrates. But a complicated and somewhat difficult case like this is by no means one which it is desirable to place before such a Court. And the result shows that this is so. The case is one in which the strictest accuracy is necessary: whereas the proceedings have

been diffuse and loose in the highest degree. Moreover, there is not one "judgment" by the Court, but a series of judgments, which to say the least of it is most inconvenient. Mr. Harrison writes the judgment (a most voluminous one) on the first charge, and says that he concurs with Mr. Larymore's judgment on the second charge. Mr. Larymore writes a judgment on the second charge, and says he concurs in Mr. Harrison's judgment on the first charge. Dr. Bachelor writes that he concurs in the judgment of Mr. Harrison and Mr. Larymore. And the two native Magistrates write a long judgment of their own. All the five Magistrates, however, so join in signing in a regular way the final "finding and sentence" of the Court. The case comes before us under somewhat peculiar circumstances; for the prisoner availed himself (as to a portion of his case at least) of his right of appeal to the Sessions Judge. The appeal was unsuccessful, although he, in his petition, repeated his objections to the constitution of the Court which tried him. Notwithstanding that the appeal was dismissed, it appears to us that the irregularities on which we have dwelt are so serious and so important as to render it imperative on us even now to quash the whole proceedings.

Conviction quashed.

NOTES.

[PRISONER'S CONSENT TO DEPARTURE FROM PROCEDURE—

It is the duty of Magistrates and all Criminal Courts to follow the procedure prescribed by law, and there is no law which sanctions their intentional departure from that procedure; and then attempting to protect themselves against the consequences of such departure by getting the accused person to say he consents to it :—(2 Cal. 23 at 30).

This principle has been applied to the following :—

- i. Special procedure for European British subject :—(1880) 6 Cal. 83.
- ii. Simultaneous trial :—(1880) 6 Cal. 96.
- iii. Irregular service of notice in disputes as to possession (Cr. P. C., 1898), s. 145 (3) :—(1905) 33 Cal. 68 F.B. : 9 C. W. N., 1046 : 2 C. L. J., 241.
- iv. Joint trial of different accused in respect of receiving stolen property :—(1906) 29 Bom., 449.
- v. No examination-in-chief in the presence of the accused :—(1887) 9 All., 609.

See the Privy Council decision of *Subrahmanya Ayyer v. King-Emperor* (1901) 28 Mad. 61.]

[33] ORIGINAL CIVIL.

The 5th, 6th and 14th September, 1876.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE MACPHERSON.

MacGillivray

versus

The Jokai Assam Tea Company.

*Master and Servant--Suit for damages for wrongful dismissal--Incompetence--
Rendering true and just accounts--Warranty.*

The plaintiff, having obtained recommendations as a tea assistant in the defendant company's garden in Assam, came out to Calcutta, and, after some interviews with the defendants' agents there, entered into an agreement with the defendants to enter into their service as assistant in their tea gardens for a period of three years. The agreement stipulated that the plaintiff should, "when required to do so, render just and true accounts, and give every other particular and information of all moneys, &c., entrusted to him, or that may come into his possession, power, or custody or under his control;" and it was also agreed that the defendants should "be at liberty to annul this agreement at any time for wilful misconduct of the plaintiff in not fulfilling the terms and conditions to be observed by him, or if he shall be prevented by reason of continued illness from attending to, or be hindered thereby in the performance of, his duties, or by reason of the bankruptcy, insolvency, or dissolution of the defendant company," and in those cases the salary was to cease, and the plaintiff be discharged from the defendant company's service. The plaintiff proceeded to Assam, worked for a short period in the defendants' garden, and was then dismissed from the company's service, on the ground of his incompetence. In an action brought for damages for wrongful dismissal, the Judge of the Small Cause Court was of opinion that, under the circumstances, there was no implied warranty on the part of the plaintiff of his competence, and the grounds for dismissal having been expressly stated in the agreement, the defendants were not justified in dismissing him on another ground, and therefore should not be allowed to give evidence of his incompetence. *Held*, on reference to the High Court, that the plaintiff, having expressly undertaken to render true and just accounts, his incompetence to do so would, if proved, be an answer to the action, and therefore the defendants ought to have been allowed to give evidence that he was incompetent. "True and just accounts" meant such accounts as an inexperienced assistant in a tea garden might reasonably be asked to render, and were not to be interpreted merely as an undertaking that the plaintiff would act honestly by his employers. *Held*, also, that the agreement expressly stating the grounds of dismissal did not preclude the defendants from dismissing the plaintiff for incompetence.

CASE referred for the opinion of the High Court under s. 7 of Act XXVI of 1864 by H. Millett, First Judge of the Calcutta Court of Small Causes.

[34] "This suit is brought by the plaintiff, to recover Rs. 1,000, after abandoning all excess, as damages for wrongful dismissal and breach of contract. The defendant company pleaded that they had dismissed the plaintiff for incompetence, and, when the case was called on on the 24th June 1876, Mr. Macrae, the Counsel for the defendants, applied for a commission to examine Dr. O'Brien, the manager of the garden in Assam, and also Dr. White, one of the largest shareholders in the company, who resides near the garden, in order to prove the incompetence. This application was opposed by the other side, on the ground that

such evidence would not be material, as the plea of incompetence could be no defence to the suit, and this in fact is the real question to be decided.

"All the facts, except as regards the incompetence, are practically admitted and are as follows: Messrs. Balmer, Lawrie & Co., who are the agents of the defendant company (and who for the purposes of this reference may be considered as the defendants), received a letter from Mooltan, dated 26th July 1875, from a Mr. MacBean, who seems to be in some way connected with the Punjab Bank, as follows:

GENTLEMEN,

I am anxious to get a young relative of mine on to a tea estate, and it has just occurred to me that, from your connections with tea gardens, you may sometimes have enquires from the gardens for assistants. The lad I speak of is about 21 years of age, and from the life he has been brought up to is just the sort of person who would make a first-class assistant. His father is a farmer in a place called Strathmairn in the Highlands of Scotland, and he has been brought up to assist on the farm. He is a strong, able young man, and steadiness itself. He is quite ignorant of town life, which should be all in his favour, and another point which should recommend him to you, viz., that he is of a very amiable disposition and well suited to manage the natives. If I can get a promise of a berth as assistant in a tea garden for the lad, I would send for him at once.

"The young man alluded to in this letter was the plaintiff, and he accordingly came to Calcutta, and, on the 12th January 1876, the parties executed the following agreement."

The case referred then set out the agreement by which the [33] plaintiff was engaged as an assistant in the defendants' tea gardens for a period of three years. The following are the only clauses material to this report:

"And further that, during the time of such service as aforesaid, he will, whenever required to do so, render just and true accounts, and give every other particular and information of all moneys, goods, and chattels, merchandise, and other products and things entrusted to him, or that may come into his possession, power, or custody, or under his control..... And, lastly, it is agreed that the said company, or the directors and agents thereof, shall be at liberty to annul this agreement at any time for wilful misconduct of the said Duncan MacGillivray in not fulfilling the terms and conditions on his part to be observed, or if the said Duncan MacGillivray shall, by reason of continued illness, be prevented from attending to, or be hindered thereby in the performance of, his duties, or by reason of the bankruptcy, insolvency, or dissolution of the said Jokai Tea Company, Limited. And thereupon the salary specified herein shall completely cease, and the said Duncan MacGillivray be discharged from the company's service."

The reference then continued:

"The plaintiff subsequently went up to Assam, worked for a short period, and was dismissed finally by a letter from Messrs. Orr and Harris, the defendants' attorneys, dated the 5th April 1876.

"It was alleged that the plaintiff was clearly incompetent, in so far as he was unable to write an ordinary business letter, and so far a letter of the plaintiff's shows, that he is unable to write any better English than an ordinary outdoor servant in England would be able to write; but, at the time of making the application, no suggestion was made that he was unable to render accounts.

"It was contended, therefore, on the authority of *Harmer v. Cornelius* (5 C. B., N. S., 236), that there is always an implied representation on the part of

the person taking service, that he is capable of performing the service required of him, and that the failure to afford the requisite skill so impliedly promised is a breach of legal duty, and therefore misconduct and even wilful misconduct. There is no doubt on that authority that when a skilled labourer, artisan, or artist is employed, there is an implied warranty on [36] his part that he is of skill reasonably competent to the task he undertakes; but in the judgment, WILLES, J., says: — 'It may be that, if there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. If a gentleman, for example, should employ a man who is known to have never done anything but sweep a crossing, to clean or mend his watch, the employer would probably be held to have incurred all risks himself'. The case of the crossing-sweeper is, no doubt, an extreme case, but it means to say that there may be cases of service where there is no implied warranty on the part of the servant that he is competent to perform the duties he undertakes.

"Here the defendants employ a young man from the Highlands of Scotland, whose recommendations seem to be that he is strong, able and steady, quite ignorant of town life, and amiable in his disposition, and they employ him for duties concerning which he could have had only vague ideas, and in a country entirely strange to him. It may fairly be said that, if they employ a simple country youth with no better recommendations than the above, they do so at their peril, for it is not alleged as against him that there was any express representation of competency.

"But apart from this, the parties have gone out of their way to insert in their agreement the ground on which the defendants are at liberty to annul it, and those are wilful misconduct, continued illness preventing him from attending to his duties and the insolvency of the company. Looking at the position of the parties, there seems every reason that such a clause should be inserted; — nothing could be more inconvenient than for a man who had come thousands of miles to obtain a particular employment to be discharged from such employment when obtained for any reason beyond those stated in the agreement. Looking at the fact that the defendants might, with ordinary ease, have decided the question of his incompetency before they signed the agreement, *Dickson v. Zizinia* (10 C. B., 602) seems to apply here — MAULE, J., saying: — 'We should not by inference insert in a [37] contract implied provisions with respect to a subject which the contract has expressly provided for. If a man sell a horse and warrant it to be sound, the vendor knowing at the time that the purchaser wants it for the purpose of carrying a lady, and the horse, though sound, proves to be unfit for that particular purpose, that would be no breach of warranty. So, with respect to any other kind of warranty, the maxim *expressum facit cessare tacitum* applies to such cases. If this were not so, it would be necessary for the parties to every agreement to provide in terms, that they are to be understood not to be bound by anything which is not expressly set down which would be manifestly inconvenient.'

"For the above reasons I was of opinion that the commission was unnecessary, and as it was stated on the part of the defendants that there was no other defence, and that the damages asked for could not be considered excessive, the case was practically undefended, and, after examining the plaintiff, judgment was given for him for the full amount sued for.

"But at the request of the Counsel for the defendants, I refer the following question for the opinion of the High Court: — 'Whether the plea that the plaintiff was dismissed for incompetence is a good defence to this suit.'

"Contingent on the opinion of the High Court, my judgment is for the plaintiff for the full amount sued for."

Mr. *Macrae* for the Defendants, at whose request the reference had been made, commenced, and contended that the defendants ought to have been allowed to go into evidence of the plaintiff's incompetence, which would be an answer to the suit. Under the express terms of the agreement, he was bound to be competent to render just and true accounts, meaning thereby that he should be able to give to his employers in Calcutta such ordinary accounts as would be necessary for an assistant in a tea garden to keep and send in a written form to his employers. We don't contend he must be a skilled book-keeper. This the defendants have evidence to show he was incompetent to perform, and they were entitled therefore to dismiss him. The learned Counsel referred to the case of *Harmer v. Cornelius* (5 C. B., N. S., 236) to show [38] that there is in such an agreement an implied representation of competency.

Mr. *Shell* for the Plaintiff, contended, that the grounds of dismissal stated in the agreement were the only grounds which would justify the plaintiff's being dismissed. If it had been intended that he should be liable to dismissal on other grounds, they would have been stated: not having been stated, they could not, on the principle of the maxims *expressio unius exclusio alterius* and *expressum facit cessare tacitum*, be now implied; see Broom's Legal Maxims, 651, 5th ed., and *Aspden v. Austin* (5 Q. B., 671).

The clause relating to the "true and just accounts" did not mean that the plaintiff was to be able to keep written accounts, or understand accounts at all, but refers to his honesty in everything that should be entrusted to him. [MACPHERSON, J.—We must treat this as if it were an argument on demurrer and assume he was incompetent, as no evidence was allowed to be called.] Even if he were unable to satisfy that clause of the agreement in the strict sense contended for by the defendants, that would not go to the root of the agreement so as to avoid it: he would not thereby become liable to be dismissed. The clause as to rendering accounts is restricted by that stating the grounds of dismissal in which the parties have specified what should be good cause, and which cannot be extended by implication: see *per* DENMAN, C.J., in *Aspden v. Austin* (5 Q. B., 671, at p. 684). It is said competence must be implied in a case of this kind, but wilful misconduct would of itself have been a ground for dismissal, yet that is specified in the agreement, as would incompetence have been expressed if it had been intended to be a ground of dismissal. In *Harmer v. Cornelius* (5 C. B., N. S., 236) there were no specified grounds of dismissal. The services contracted for in that case, moreover, were skilled services, and in case of skilled persons competence for the work in which they profess to be skilled is implied. Here there was nothing [39] of that kind; the defendants knew the plaintiff could know nothing about a tea garden, and they did not engage him until they had seen him and had an opportunity of judging of his capabilities—thus they took the risk on themselves as put by WILLES, J., in *Harmer v. Cornelius* (5 C. B., N. S., 236, see p. 246). [MACPHERSON, J.—WILLES, J., says that failure to perform what has been promised is misconduct, which would justify a servant's dismissal.] The principles which govern cases in which skilled services are guaranteed do not apply to the present case. It is submitted that the principle of *caveat emptor*, which applies in ordinary cases of sale of goods, has some bearing on this case. [GARTH, C.J.—Here there is an express warranty as to fitness to render accounts.] Where parties have purchased with their eyes open they take the risk. There is no implied warranty on the part of the vendor. From that

view fitness would not be implied at all; it is a case similar to the defendants having purchased goods after inspection.

Mr. *Macrae* in reply.—We take rendering accounts in the common and ordinary meaning of that term. If we are driven to a strict interpretation of the contract, *Harmer v. Cornelius* (5 C. B. N. S., 236, see p. 246) is an authority for saying that if a servant is unable to perform work he has undertaken to do, it is misconduct, and would justify his dismissal; it does not matter whether he cannot, or will not, do it. If this is taken as an argument on demurrer, and the plaintiff treated as incompetent, as must be done, how would he allege his readiness and willingness?

Cur. adv. vult.

The **Opinion** of the High Court was as follows:—

Garth, C.J.—We are of opinion that, with reference to the express terms of the written agreement entered into on the 12th of January 1876, the plaintiff distinctly undertook that he would, "whenever required to do so, render just and true accounts, and give every other particular and information of all moneys, goods, and chattels, merchandise, and other products and things entrusted to him, or that might come into his possession, power, or custody, or under his control;" and we think [40] that the defendant company ought to have been allowed to go into evidence to show that the plaintiff was not reasonably competent to the task which he undertook. In deciding thus, we act in accordance with the principle laid down in the case of *Harmer v. Cornelius* (5 C. B., N. S., 236; s.c., 28 L. J. C. P., 85). The passage as to the crossing-sweeper, quoted by the Judge of the Small Cause Court from the judgment of *WILLIAMS, J.*, has no application to the present case. The crossing-sweeper is stated to have been known to his employers as a person who had never done anything but sweep a crossing, and, under such circumstances, must necessarily have been known to be incompetent for the task which he undertook, and, moreover, he is not supposed to have made any express contract with his employers; whereas, in the present instance, there would appear to have been no knowledge by the defendants of the plaintiff's lack of competency, and there was an express undertaking on his part that he would render just and true accounts, &c.

• It has been contended by Mr. *Shrell* that this undertaking does not refer to any rendering of accounts in the sense of keeping what are technically called "books;" or, in other words, that it was merely an undertaking that the plaintiff would act honestly by his employers; but we do not think that this is the true meaning of the agreement. We consider that the plaintiff undertook that, in the event of moneys, &c., coming under his control, he would duly account for them, and furnish all such reasonable information and particulars as might be expected from a person in his position. We by no means construe it as an undertaking that the plaintiff was a skilled accountant in the wider sense of the expression, but we think that he undertook to keep and render such accounts as an inexperienced assistant in a tea garden might reasonably be asked to keep and render. •

We further think that the learned Judge of the Small Cause Court is wrong in holding that the last clause of the agreement means that the plaintiff shall in no case be dismissed, except for such wilful misconduct as is there described, or by reason of continued illness, or the dissolution of the defendant company, &c. The agreement does not say that the defendant company shall

[41] not have the right to dismiss the plaintiff for any other cause than those specified. It merely reminds the plaintiff that he may be dismissed for the misconduct which is there specified; but it in no way affects or alters the right which the defendant company had to dismiss the plaintiff for absolute inability to perform what he had undertaken.

The Judge of the Small Cause Court must, therefore, proceed to deal with the case on the merits. Each party will pay his own costs of this reference.

Attorneys for the Plaintiff: Messrs. *Chauntrell, Knowles, and Roberts*.

Attorneys for the Defendants: Messrs. *Orr and Harris*.

[2 Cal. 41]

APPELLATE CIVIL.

The 20th March, 1876.

PRESENT:

MR. JUSTICE KEMP AND MR. JUSTICE BIRCH.

Deen Doyal Lall.....Plaintiff

versus

Het Narain Sing and others.....Defendants.*

Mortgage bond—Interest after due date, Rate of.

In a suit brought to recover the principal and interest due upon a written security given for the payment of the principal money on a day specified, with interest at a stipulated rate up to such day, the Court may, in its discretion, award interest on the principal sum from due date at such rate as it thinks fit, and is not bound to award such interest at the stipulated rate.

The principle laid down in *Cook v. Fowler* (L. R., 7 H. L., 27) followed.

SUIT on a mortgage bond dated the 28th of Assin 1269 (Fuslee), corresponding with the 17th October 1861, for payment of the principal sum of Rs. 2,600 and Rs. 5,488-8-6 interest, computed, at the rate of 18 per cent. per annum, as specified in the bond, from date of the execution of the bond to the 28th Bysack 1281, corresponding to the 29th April 1874.

The original mortgagors were called as witnesses for the plaintiff, and admitted the execution of the bond and the non-[42] payment of principal and interest due thereon. It was, however, objected on behalf of the subsequent purchasers of part of the mortgaged property, parties to the suit, that the claim as to interest payable after due date was barred on the ground that such interest was not a charge upon the hypothecated property, but partook more of the nature of damages, and should therefore have been sued for within six years of the date when the bond fell due.

The Court below gave the plaintiff a decree for Rs. 2,875-9-6, refusing to award any interest from the date on which the bond fell due.

The plaintiff appealed to the High Court.

Mr. C. Gregory and Baboo Nil Madhub Sen for the Appellant.

* Regular Appeal, No. 88 of 1875, against a decree of the Subordinate Judge of Zilla (Tya, dated the 19th of September 1874.

Baboo Mohesh Chunder Chowdhry and Jogesh Chunder Dey for Respondents.

The Judgment of the Court was delivered by

Kemp, J.—The plaintiff is the appellant in this case. He sued three sets of defendants to recover a sum of Rs. 8,088-8-6, due under a bond dated the 28th of Assin 1269 Fuslee, corresponding with the 17th of October 1861. The principal amount borrowed was Rs. 2,600, and interest is claimed from the 28th Assin 1269, the date of the bond, to the 28th Bysack 1281, date of suit, being twelve years and seven months, at the rate of Re. 1-8 per mensem, the total amount of interest claimed being Rs. 5,488-8-6. The bond was admitted by the principal defendants, the judgment-debtors. They were examined, and they also stated that, after the bond fell due, they were unable to pay it, and that they agreed to go on paying interest. The first defendants are the purchasers of a portion of the property which was mortgaged to the plaintiff as security for the sum advanced by him to the principal defendants. The Subordinate Judge has given the plaintiff a modified decree for a sum of Rs. 2,875-9-6 [43] out of Rs. 8,088-8-6 claimed. He has also made the plaintiff pay the costs of the defendants, and the result of the suit is that although the bond is admitted, and the defendants depose that they were unable to pay, and asked for time, and promised to pay interest, they have to pay only about one-third of the amount claimed, and that the plaintiff has only to receive Rs. 2-5 in the shape of costs from the defendants. No wonder that, under these circumstances, the respondents did not appeal to this Court.

The Subordinate Judge has found that, as there is no stipulation in the bond regarding payment of interest after the appointed period for the discharge of the debt, the plaintiff is not entitled to interest after the lapse of that period.

The first objection taken before us by the appellant is, that the Court was wrong in not using its discretion, in overlooking the evidence of the debtor-defendants, and in not awarding interest from the date upon which the bond fell due up to the date of suit. The purchaser-defendants raised the following objection, that interest after the due date is not a charge upon the property hypothecated, inasmuch as any interest after that date is in the nature of damages, and more than six years having elapsed from the date on which the principal fell due, namely, in May 1862, the suit is barred.

We think that the Subordinate Judge is clearly wrong in not awarding interest at all from the date on which the bond fell due. The execution of the bond is admitted, and the bond-debtors admit in their evidence that they were unable to pay the debt on the date it fell due, and that they promised to pay interest from time to time. There is a case before the House of Lords, of *Cook v. Fowler* (L. R., 7 H. L., 27), in which it has been held that there is no rule of law that upon a contract for the payment of money on a day certain with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest is to be implied. . . . Lord SELBORNE, in his judgment, which is to be found at page 37, says:—"Although in cases of this class, interest for the delay of payment *post diem* [44] ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted, in an ordinary case of this kind, by a Court or jury, as the proper measure of damages for the subsequent delay; but that is because ordinarily a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, has been agreed to. But in the case before your Lordships, the agreed rate of interest is excessive and extraordinary; and although no question is raised between the

present parties as to its fairness and reasonableness so far as it was matter of express contract, it by no means follows that it would have been fair and reasonable, or would have been so regarded by the borrower, if it had been indefinitely extended to every possible delay of payment after the stipulated time."

Now, applying the principle thus laid down to the present case, we do not think we should be justified in giving the plaintiff interest from the date on which the bond fell due at the rate of 18 per cent. per annum, the rate mentioned in the bond; but we think that, acting upon the discretion vested in us, we ought to allow the plaintiff interest at the rate of 6 per cent. per annum, which is the rate usually allowed by this Court, from the date on which the bond fell due. The plaintiff will therefore be entitled to recover Rs. 2,600 principal with interest at the rate of 18 per cent. per annum up to the date on which the bond fell due, and from that date at the rate of 6 per cent. per annum up to date of payment.

We also think that the decision of the Court below with reference to costs must be modified. We therefore modify the decree of the Court below with reference to our remarks made above as to the interest payable to the plaintiff and the period for which that interest is to be paid, and as regards costs, we think that the plaintiff is entitled to his costs in this Court and in the Court below upon the sum now decreed as against both sets of defendants.

Decree modified.

NOTES.

[INTEREST—AFTER DUE DATE—

The leading case of *Cook v. Fowler*, L. R. 7 H. L., 27, was thus distinguished in *Dixon, In re Heynes v. Dixon* (1900) 2 Ch. 561 by Lord Justice COLLINS :—

There is a "distinction between a *simplex obligatio*—that is to say, a simple bond without a penalty—and a bond with a penalty. In the first case you have simply an absolute contract to pay upon a particular day, and for all practical purposes that is on the same footing as a deed secured by a warrant of attorney, which was the actual case before the Court in *Cook v. Fowler*. In those two cases of a simple absolute contract to pay money on a given day there was no implication in law of any obligation to pay interest as a part of the contract after the given day. Interest, if recoverable, could only be recovered as damages, and can of course, now, by the statute of William, be recovered as damages. Now, what was it that differentiated the case of a bond with a penalty from the case of a bond without a penalty? You could not recover interest as interest upon a simple bond without a penalty; but you could unquestionably always in a Court of equity, and afterwards, by the statute of Anne, in a Court of law, recover on a bond with a penalty, not damages but interest. The explanation is that in the view of both Courts the penalty really was for the purpose of securing that which was the real contract, namely, the principal with the interest. There was, it is true, a difficulty in suing for the interest as interest in a Court of law; but, when the statute of Anne was passed the Courts of law, as has been pointed out by my brother RIGBY, were in a position to give effect to that which had always been the doctrine of equity :"

The principle of *Cook v. Fowler* has been extended in England also to debts secured by mortgage :—*Goldstorm v. Tallerman*, (1886) 18 Q. B. D., 4.

See also (1879) 3 Bom. 131; (1878) 1 All. 603.]

[45] ORIGINAL CIVIL.

The 13th June, and 7th July, 1876

PRESENT:

MR. JUSTICE PONTIFEX.

Treepoorasoonndery Dossee

versus

Debendronath Tagore.

*Limitation Act (IX of 1871), cls. 122 & 145—Will—Residuary Estate of
Moveable and Immoveable property --Express Trustee Account--
Multifariousness—Jurisdiction—Certificate under Act XX of
1841 --Act XXVII of 1860, s. 2—Suit by Hindu Widow
without Certificate-- Claims to Immoveable Property
against Executors and Trustees.*

Held, that cl. 122 of Act IX of 1871 applies to a suit for a share of the residue of a testator's moveable property disposed of by his will.

Prior v. Hornblor (2 Y. & C. Ex., 200) followed.

Held, also, that if a testator appoints persons to be his executors and trustees, and directs them to do certain acts which can only be done by the owners of his residuary estate, the trustees will take that estate, though there be no express devise to them.

THE facts and arguments in this case are fully stated in the **Judgment** of the Court.

Mr. *Evans* and Mr. *Bonnerjee* for the Plaintiff.

Mr. *Kennedy* and Mr. *Engram* for the Defendant Gunendronath Tagore.

The Advocate-General, Offg. (Mr. *Paul*), and Mr. *Woodroffe* for the Defendant Debendronath Tagore.

Mr. *Macrae* for the executors of the defendant Gunendronath Tagore.

Mr. *Branson* and Mr. *Palit* for the sons of Debendronath, except Suttendronath.

• Mr. *Stokoe* for the Trustee Defendants.

The following authorities and cases were referred to: As to the [46] suit being a supplementary suit: *Seton on Decrees*, 1175, 1176, 3rd edition. As to the raising of issues, amending the plaint, and the nature and form of relief: *Arbuthnot v. Betts* (6 B. L. R., 273), *Joseph v. Solano* (9 B. L. R., 441), and *Hiralal Mullick v. Matilal Mullick* (5 B. L. R., 682). As to jurisdiction: *Delhi and London Bank v. Wordie* (I. L. R., 1 Cal., 249), *Juggodumba Dossee v. Puddomoney Dossee* (15 B. L. R., 318), *Diagram v. Moses* (1 Hyde, 284), *Whittaker v. Forbes* (1 C. P. D., 51) and the cases of construction of wills in *Tagore v. Tagore* (4 B. L. R., O. C., 103), *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* (2 B. L. R., O. C., 11), and *Krishnamamani Dasi v. Ananda Krishna Bose* (4 B. L. R., O. C., 231). As to multifariousness: *Pointon v. Pointon* (L. R., 12 Eq., 547) and *Coates v. Legard* (L. R. 19 Eq., 56). As to limitation: *Dantell's Ch. Pr.*, 554, and cases there cited—*Berrington v. Evans* (1 Y. & C. Ex., 434) and *O'Kelly v. Bodkin* (2 Ir. Eq., Rep., 361), Act IX of 1871, Sch. II, cls. 122 and 145, *Cholmondley v. Clinton* (2 Jac. & Wal. 1 at p. 139), *Story's Equity Jurisprudence*, Vol. II, s. 1520, *Clegg v. Edmondson* (3 Jur., N. S., 299, at p. 303). As to the position and powers of an executor: *Sharo Bibee v. Buldeo*

Doss (1 B. L. R., O. C., 24), *S. M. Joykali Debi v. Shibnath Chatterjee* (2 B. L. R., O. C., 1), *Anund Chunder Ghosh v. Soorjee Money Dossee* (Morton's Rep., 77), *S. M. Dossee v. Tarachurn Coondoo Chowdry* (Bourke, Pt. VII, 48), *Nilkant Chatterjee v. Peari Mohan Das* (3 B. L. R., O. C., 7), *Dhunraj v. Broughton* (15 B. L. R., 296) and *In the goods of Tarachand Coondoo Chowdry* (Bourke, Pt. V, 1). As to adoption: *Dabee Dyal v. Hur Hor Singh* (4 Sel. Rep., 320), *Shamachurn's Vyavastha Darpana*, 779, *Rattigan on Adoption*, 25, *Mussamul Taramunce Dibia v. Deo Narayan Rai* (3 Sel. Rep. 387), *Norton's L. C.*, Vol. 1, p. 88, *Cowell's Hindu Law*, 303, and *Tarim Charan Chowdhry v. Ananda Chandra Chowdry* (3 B. L. R. A. C., 145).

[47] **Pontifex, J.**—This case, which has been argued in the settlement of issues, raises many troublesome and difficult questions.

Dwarkanath Tagore, who died about the year 1846, left three sons—Debendronath, who is still living and is the principal defendant in this suit; Greendronath, who died in 1854, leaving two sons, Ganendronath, who died in 1869, and Gunendronath, who is a defendant in this suit; and Nogendronath, who died in 1858, without issue, leaving a widow, who is the plaintiff in this suit. Dwarkanath Tagore, by his will made in 1843, appointed a Mr. Gordon and his three sons his executors (all of whom, except Nogendro, proved the will), and, after thereby confirming a certain deed of settlement of the 20th of August 1840, making certain devises and bequests (including a devise of a piece of land and a bequest of Rs. 20,000, for the purposes of building a house thereon, to his son Nogendronath), the testator Dwarkanath gave the beneficial interest in the residue of his real and personal estate in effect, and according, as I am informed, to the construction placed on such residuary devise by the Supreme Court in 1847, to his three sons absolutely, as tenants in common. I shall state later on my reasons for considering that the executors of Dwarkanath's will took thereunder the whole of his residuary estate as trustees.

By the settlement of the 20th of August 1840, referred to in his will, Dwarkanath conveyed very valuable immoveable estate, the whole of it outside the jurisdiction of this Court, to trustees, who, under a subsequent appointment, are now represented by the defendants Sarodaprosad Gangooly, Nilcomul Mookerjee, and Nobin Chandra Mookerjee, whom I shall call the settlement trustees. The trusts of the settlement were that the trustees should, after the decease of the testator Dwarkanath, pay the rents of the lands between his three sons, in equal shares, during their lives, and immediately after the decease of any of them, upon trust, to pay the share of the son so dying to his children, being a son or sons, in equal shares; and the deed provided that if the sons of Dwarkanath, or any of them, or any of their respective sons, should die without having male issue, and without having duly adopted a son but leaving a [48] widow, then the trustees should pay, out of the rents of the settled property, a sufficient sum for the suitable support of such widow during her life and for providing her with a suitable residence.

The three sons of Dwarkanath, after his decease, and during their joint lives, received the income of the settled property in equal shares, and after Greendronath's decease, in 1854, it seems to have been assumed by all parties that his two sons, Ganendronath and Gunendronath, were entitled to Greendronath's one-third share, under the deed of settlement.

Nogendro, who died in 1858 without issue, left a will; and a certificate under Act XX of 1841 to collect debts was granted by the Court at Alipore to his nephew Ganendro. The will has been admitted in this suit, by the plaintiff,

to be a valid will. The scheme of it is as follows :—The testator, Nogendro, gave authority to his widow, the plaintiff, to adopt a son of Ganendro, or a son of Gunendro, and, in default of a fit son of either, then such child as Ganendro should approve. It is clear from the will that Nogendro believed that a son so adopted would succeed to his own one-third share under the settlement, and that he considered that such share would be a provision for himself and Nogendro's widow. The only devise made by the will is to Ganendro, of the testator's one-third share of certain other property, which he refers to as described "in the schedule written under the former will."

A document purporting to be a former will has been produced by the plaintiff in this suit under somewhat peculiar circumstances. She does not admit it to be the former will referred to in her husband's last will, but the defendants rely upon it. I think, under the circumstances, and at this stage of the case, I am bound to assume that the document so produced is the former will referred to by Nogendro.

(After finding that the devise in this will to Ganendro gave him no interest in Nogendro's residuary property, or in anything but the specific items enumerated in the schedule thereto, His Lordship continued.)

It is to be particularly noticed that the appointment in the admitted will of Debendro and Ganendro as executors is of a [49] very restricted character ; whatever may be the exact nature of the interest or power of a Hindu executor appointed by will—whether, as argued on behalf of the plaintiff, he takes no estate, or whether, as argued on behalf of Debendro, he sufficiently represents the entire estate of a testator—it seems to me that, in this particular will, Debendro and Ganendro, though called executors, were appointed only for a special purpose, and for a limited period,—that is to say, only to look after, and take care of, the natural or adopted son of the testator during his minority, and only so far as concerned the property in settlement. They were, in my opinion, only constituted guardians and manager for the son (if any), and took, under the will, no further interest or powers as executors.

(His Lordship, after referring to certain transactions with reference to the adoption of a son by the plaintiff under an alleged verbal permission from her husband—to the actual adoption of Gunendro under that permission—to a suit brought by him to establish his adoption, which was dismissed in January 1860—to a bill filed by Debendro to set aside the adoption, and to ascertain the rights of the parties in the settled property, to which the plaintiff was a defendant—to a suit brought, pending Debendro's suit, by a creditor, Bazlur Bahim, for administration of Nogendro's estate, in which suit Debendro and Ganendro were made defendants, but to which the plaintiff in this suit was not a party—to a decree made in Debendro's suit in September 1860, whereby it was declared that the adopted son took no benefit under the settlement, that the plaintiff was entitled to Rs. 400 monthly as maintenance, which the settlement trustees from that time continued to pay to her, and that subject to debts and legacies Debendro was entitled to one-third of the surplus of Nogendro's share, Ganendro and Gunendro to another one-third, and as to the third share all parties were to be at liberty to apply—to a consent decree made in Bazlur Bahim's suit in April 1864, which directed that the real estate of Nogendro should be sold, and the Receiver of the Court be appointed Receiver to collect the outstandings of his estate and also the share of Nogendro in the residuary estate of Dwarknath, continued :—

[50] In my opinion, the present plaintiff is not bound by the decree, or proceedings, in the creditor's suit, and the only property of Nogendro which

could be affected thereby is the property devised by Nogendro to Ganendro, and any debts of Nogendro which Ganendro was authorised to collect and get in under the certificate granted to him by the Alipore Court. Such certificate applied only to debts and moveable estate, and did not give Ganendro any interest in, or any authority to receive, or represent, immoveable estate; as was decided by Sir BARNES PEACOCK in the two judgments in *Atkinson v. Mee Nay* (8 W. R., 1) and *Sivinthia Pellai v. Mootooswamy* (8 W. R., 2) with respect to a similar certificate under the Act of 1860: and if Debendro and Ganendro have no right to recover and no interest in Nogendro's immoveable estate, any decree made in a suit in which they were the only defendants could not affect the immoveable estate or the person really interested in such immoveable estate. The plaintiff, it is true, has asked that this suit may be taken, so far as it relates to the same subject-matter, as supplemental to Bazlur Rahim's suit. But even if it could be so taken, I think, under the circumstances, she is not absolutely bound by that portion of the prayer.

Ganendronath died in 1869 without issue, having by his will appointed Gunendronath, Jogesh Prokash Gangooly and Nilcomul Mookerjee executors, and leaving a widow, Samasondery, who has been made a defendant, but who has not appeared, to this suit.

The present plaintiff, on the 12th July 1875, filed her plaint in this suit against Debendronath and his seven sons, Gunendronath and his three sons, Ganendro's widow, Ganendro's executors; and the three trustees of the deed of settlement. In her plaint she charges that her adoption of Gunendro was without her husband's authority, and therefore void, and that Gunendro has never acted upon it; that Debendro is in possession of the whole of Dwarkanath's estate, and has filed no accounts since 1848; that Debendro has bought up the rights of Nogendro's creditors at reduced prices; that Debendro and Gunendro are in possession of the piece of land specifically devised by Dwarkanath [51] to Nogendro, and of certain silk factories, either belonging to Nogendro's estate, or purchased therefrom, which last appear to be a part of the property mentioned in the schedule to Nogendro's first will; that she is not bound by the decree of the 24th of September 1860; that she, as widow of Nogendro, is entitled, subject to the life-interests created by the said settlement, to one-third of the property therein comprised. She accordingly prays for a declaration that she is not bound by the decree of the 24th September 1860, and that the settlement deed may be now construed, and that it may be declared that she is entitled to one-third part of Dwarkanath's residuary estate and of the settled property; that accounts of the settled property and of Dwarkanath's estate may be taken, and if necessary, that his estate should be administered by the Court; that, so far as Nogendro's estate is unadministered, it may be administered by the Court; that, in respect of any purchases by Debendro of debts due by such estate, he should only rank as a creditor for the amounts expended by him in such purchase; and that the present suit, so far as it relates to the same subject-matter, may be taken as supplemental to Bazlur Rahim's suit. All the defendants, except the widow of Ganendro and one of the sons of Debendro, have appeared. With those exceptions, written statements have been put in by all the defendants. The plaintiff at this hearing has asked that her suit may be dismissed as against the two defendants who have not appeared, and may be dismissed with costs, as against the sons of Debendro and Ganendro; and I made an order accordingly.

The suit came on to be heard before me in settlement of issues, and Debendro and Ganendro set up three principal grounds why the suit should be

dismissed :—1st, that it is multifarious ; 2nd, that the plaintiff has no right to sue in respect of any of the matters complained of by her ; and 3rd, that the plaintiff is barred by limitation and acquiescence.

I propose to take these objections in their order.

The plaintiff asks relief in respect of three different matters : the administration of the estate of Dwarkanath ; the construction [52] of the deed of settlement ; and an administration of Nogendro's estate, which might also involve an administration of Ganendro's estate. Considerable stress has been placed on the fact that, if the plaintiff can combine in one suit these several subjects, she will be able to get a decree with respect to the settled property, which she could not get if she sued separately for an administration of that property, inasmuch as the whole of it is without the local limits of this Court's jurisdiction. This objection would, no doubt, have great force if the plaintiff was attempting to deal only prospectively with the property outside Calcutta. But in fact her case is that, since 1860, the trustees of the settlement have paid a particular share of the rents of the settled property to Debendro, as executor of Dwarkanath's will : and her principal object is to get a construction of the settlement with respect to the rents so paid, which construction, no doubt, would incidentally affect future rents, and would be a binding decision on title.

Supposing the plaintiff had, in fact, any right or interest under the deed of settlement, and having regard to the wider and more liberal view latterly taken with respect to objection for multifariousness, as shown in the cases of *Pointon v. Pointon* (L. R., 12 Eq., 537) and *Coates v. Legard* (L. R., 19 Eq., 56), I should not have been disposed to dismiss the plaintiff's suit on that ground. But in fact the plaintiff has, in my opinion, no right or interest under the settlement deed, beyond what she has already received, and is now in receipt of, under the decree of the 24th of September 1860. And I think she has neither the right, nor that it would be any material advantage to her, to go behind that decree. She has not the right, because, in my view of the proper construction to be placed on that deed, she was only entitled to maintenance and a residence thereunder ; and, with that exception, the sole person who could sue the trustees, or be affected by any decree made against them, was Debendro—1st, in his character of surviving tenant for life ; and, 2nd, as executor and trustee of his father Dwarkanath's will, to whom alone the settlement trustees were liable to account : and the only substantial injury which, as a claimant upon [53] Dwarkanath's estate, she may have received, is that a third share was given directly to Ganendro's sons, which probably would not have been given if the Court had had the advantage of considering more recent decisions, the gift in remainder being to a class, some of the members of which might not be, and, in fact, were not, in existence at the time of the settlor's death. But this construction, if erroneous, may probably be, to a great extent, cured when Debendro's one-third comes to be dealt with, on his death.

I think, therefore, that the plaintiff has no cause of action against the settlement trustees, and that her suit must be dismissed against them with costs.

The second main objection is that the plaintiff has no right to sue in respect of any of the matters complained of by her,—1st, because the whole of Nogendro's estate was devised by him to Ganendro ; 2nd, because Ganendro having been adopted by her in fact, is alone entitled to Nogendro's estate, although his adoption may not have constituted him a *cestui que trust* under the settlement deed ; and 3rd, because the plaintiff has not been constituted the

legal personal representative of Nogendro by certificate, or letters of administration, and is therefore under s. 2* of Act XXVII of 1860 incompetent to sue.

On the first of these objections, I have already held that the devise to Ganendro in Nogendro's will was specific, and not residuary.

With respect to the second objection, the parties would be entitled to an issue if Gunendro claimed to be such adopted son. But this objection is only raised by Debendro, for Gunendro absolutely disclaims the status of adopted son; and as he is a party to this suit, and Debendro would consequently be protected by any order made in the suit, I do not think Debendro alone can claim to raise the issue. And, upon the facts stated, it seems to me that it would be impossible to prove or establish such adoption; for a suit in which Gunendro attempted to establish such status has been already dismissed as against the present plaintiff. And, again, if such adoption had been relied on in Debendro's suit on the settlement, the decree [84] of 1860, directing payment to the executor of Dwarkanath, would in all probability have noticed it, inasmuch as it did notice the right of Debendro and the rights of Ganendro and Gunendro representing their father, as beneficially interested in Dwarkanath's residuary estate. It certainly would require the clearest possible evidence to make me believe that after Nogendro had so carefully by his will limited the selection of an adopted son, he would have given verbal permission to his minor wife to adopt a son of her own exclusive choice; for that is the allegation in the petition put in for her in the Alipore Court, and to my mind it is quite impossible to read the agreement of March 1859 between Ganendro and his mother, and the two petitions filed at Alipore on behalf of the plaintiff, and to believe that the alleged verbal permission to adopt was ever in fact given by Nogendro to the plaintiff. I am, therefore, of opinion, at all events at the present stage of the case, that this objection cannot prevail.

With respect to the next objection, that the plaintiff is incompetent to sue, inasmuch as she has neither obtained a certificate nor letters of administration to Nogendro's estate, it appears to me that s. 2 of Act XXVII of 1860 applies to debts and not to claims against executors or trustees. At all events, it does not apply to claims for immoveable property, and therefore, so far as may relate to the residuary immoveable property of Dwarkanath, the plaintiff is not thereby disabled from suing.

I now come to the most serious objection of all, namely, that the plaintiff, and, indeed, that any representative of Nogendro, is barred under the Limitation Act. For the objection as to acquiescence as I take it only relates to the decree of 1860, by which I have already held that the plaintiff is bound.

Apart from authority, I should have had considerable doubt as to whether the word "legacy," even in cl. 122 of the Indian Limitation Act, applied to a share of residue, the words "distributive share" in that clause applying presumably to undisposed of estate only. But in *Prior v. Horniblow* (2 Y. & C. Ex. Rep., 200), Mr. Baron ALDERSON decided unhesitatingly that the word "legacy," in 3 & 4 Wm. IV., c. 27, [85] s. 40, included a share of residue. This seems to have been rather a forced construction for two reasons—first,

*[Sec. 2 :—No debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any

No debt recoverable without a certificate. deceased person or any part thereof, except on the production of a certificate, to be obtained in manner hereinafter mentioned or of a probate, or letters of administration, unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled.]

because a share of residue is not, like a legacy, a liquidated amount, but may depend upon long and complicated accounts; and secondly, because the English statute clearly does not provide for the analogous case of a demand by next-of-kin for a distributive share against an administrator. And it is to be observed that V. C. Knight BRUCE in *Adams v. Barry* (2 Collyer, 285, see p. 293), said:—"With regard to the case of *Prior v. Horniblow* (2 Y. & C. Ex. Rep., 200) I am not entirely free from doubt, but I am not aware of any decision contradicting it, and I ought not to decide inconsistently with it, unless having a clear opinion that it is not right, which clear opinion I cannot say that I have." But *Prior v. Horniblow* (2 Y. & C. Ex. Rep., 200) has never been overruled, and in fact it may be said to have obtained legislative sanction, inasmuch as by s. 13 of 23 & 24 Vict., c. 38, claims of next-of-kin against administrators are barred in the same way as legatees under the former statute. I am therefore bound to hold that cl. 122 of the Indian Limitation Act, which applies not only to a legacy, but also to a distributive share of the moveable property of a testator or intestate, includes a share of the residue of a testator's moveable property; and therefore that the plaintiff is not entitled to an account of Dwarkanath's moveable property. It must be observed, however, that cl. 122 applies only to moveable property and the resulting trust under the settlement is undisposed of immoveable estate, which would continue immoveable estate in the hands of Dwarkanath's trustee.

The question then arises whether Debendronath, as to immoveable estate, is to be treated as an express trustee under the Act; or whether the plaintiff's claim for immoveable estate is regulated by cl. 145, which gives a period of twelve years from the time that possession became adverse. In either case, it seems to me she would be entitled to an account against Debendro for even in the latter case, his possession can hardly be said to have been adverse while any debts of Dwarkanath remained unpaid, and there was no other estate wherewith to pay them. And it will be remembered that, by the decree of the 15th May [56] 1860, Debendro specially took his one-third share under the decree, subject to the payment of Dwarkanath's debts and legacies.

But I think that upon the true construction of Dwarkanath's will, Debendro must be considered to be an express trustee. For Debendro, Ganendro, and Nogendro were nominated "executors and trustees"; and by his will, Dwarkanath made a number of provisions for strangers, which were to be satisfied at the choice of his executors, either by the appropriation of parts of the testator's own immoveable estate, or by purchases out of his moveable estate. To make these appropriations, the trustees must necessarily be trustees of the testator's immoveable estate, and until these provisions were completed, the claims of the residuary devisees could not be satisfied. The case appears to me to fall within the rule of construction to be found, with the authorities for it, at pages 281 and 282 of the second volume of Jarman on Wills (3rd edition) and at pages 191 and 192 of Lewin on Trusts (6th edition) that if a testator appoints persons to be his executors and trustees and directs them to do certain acts which can only be done by the owners of his residuary estate, the trustees will take such estate, although there be no express devise to them. And this seems to be supported by the decree of the Supreme Court in September 1860, which directed the payment of the surplus rents to Debendro as executor of Dwarkanath; and indeed, in the present case, it was one of the arguments of the defendants, that the plaintiff was not entitled to sue the settlement trustees at first hand, and that they could only be approached through Dwarkanath's trustee.

But even if Debendro was not an express trustee, and if cl. 145 did not apply, the plaintiff would still, in my opinion, and as I suggested to Mr. *Evans* during his reply, be entitled, to an account for twelve years of the surplus income paid to Debendro by the settlement trustees under the decree of September 1860. In *Adams v. Barry* (2 Collyer, 285, see p. 293), V. C. Knight BRUCE says, in continuation of his judgment already quoted :— " It is however, I suppose, not inconsistent with *Prior v. Hornblow* (2 Y. & C. Ex. Rep., 200) to say, that if after April' 1822 " [57] (being twenty years before the filing of the plaintiff's bill, the corresponding date in this case being the 12th of July 1863), " Thomas Wilson possessed himself of any part of the assets of Samuel Wilson, which ought to have been paid or delivered by Thomas to Sophia Wilson—her claim against Thomas' estate in that respect was not barred when the bill was filed. "

So, in this case, Debendro is, under any circumstances, liable to account to the plaintiff for so much of the income of the settled property as has, since the 12th of July 1863, been paid by the settlement trustees, under the decree of September 1860, to Debendro " as executor of the will of Dwarkanath. "

But, upon the whole case, I am of opinion that the plaintiff is entitled to a general account of Dwarkanath's residuary immoveable estate ; and that she is barred by limitation from claiming an account of a share in his residuary moveable estate, and from claiming any pecuniary legacy, or specific devise, by Dwarkanath to her husband.

I am also of opinion that she is not bound by the decree in *Bazlur Rahim's* suit ; and that, therefore, at this stage of the case at all events, to deal with Debendro's purchases of the debts proved in that suit.

And whether the plaintiff is entitled to an unlimited account against Debendro as an express trustee, or to a limited account under cl. 145 of the Limitation Act, or only in respect of payments made to Debendro under the decree of September 1860, and within twelve years from the time of instituting this suit, in any of these three cases, if Debendro claims that any part of the property so to be accounted for has been needed for payment of Dwarkanath's debts or legacies, general accounts of both the moveable and immoveable estate of Dwarkanath must be taken by the Court, to prove whether, and to what extent, Debendro is liable to the plaintiff for the residuary immoveable property so to be accounted for.

Attorney for the Plaintiff : Baboo *Kedarnath Mitter*.

Attorneys for the Defendants : Messrs. *Trotman and Watkins*, and Messrs. *Berners, Sanderson and Upton*.

NOTES.

[STATUTORY CHANGE—

Consequent upon this decision, the law was amended by Art. 123 of XV of 1877 (Limitation Act) which has been re-enacted as follows in the Limitation Act 1908, Art. 123 :—

Art. 123 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.	Twelve years.	When the legacy or share becomes payable or deliverable.]

[58] APPELLATE CIVIL.

The 16th, 17th and 21st August, and 15th September, 1876.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE
MACPHERSON.

Moran and others.....Plaintiffs
versus
Mittu Bibee and others.....Defendants.

Stamp Act (XVIII of 1869), s. 3, cls. 18 & 26, and sch. i, cl. 10—Mortgage—Pledge of Property not in esse—Evidence Act (I of 1872), s. 92—Oral Agreement contradictory to Written Contract—Act VIII of 1859, s. 243, Powers of Manager appointed by Court under—Manager pending Sui or Administration appointed by Court of Chancery or High Court—Lien of Manager or Consignee of West India Estate—Salvage lien—Estoppel, Knowledge and Acquiescence.

M, the manager of an Indigo Concern under s. 243, Act VIII of 1859* by a deed dated the 1st February 1873, in which the owners of the concern joined, which was duly registered, and which was made with the Court's sanction, mortgaged the concern, and pledged and assigned the season's crop to A and B, who were pardanishins, to secure repayment of a large sum of money, consisting partly of the balance of previous loans from the husband of A and B, and partly of a new loan to the extent of what was described in the deed as the estimated outlay of the season. The deed provided that A and B should have a first charge upon the indigo to be manufactured in the season in respect of the money secured thereby; that the indigo should be sold subject to A's and B's direction; that until the debt was paid M should have no power to transfer, sell, or mortgage the properties thereby mortgaged, pledged and assigned, or in any way to deal with the sale proceeds of the manufactured indigo; and that A and B should have full power to arrange for the appointment and dismissal of the servants of the concern, and for its better management. Previously to this, namely, in October 1872, M had, in pursuance of his letter of appointment, filed an estimate for the season's outlay largely exceeding the sum mentioned in the deed as the estimated outlay, and had alleged that, at the time of executing the mortgage deed, he had informed one C, who was the general manager of A and B, and as such was the only medium of communication between M and A

* [Sec. 243 :—When the property attached shall consist of debts due to the party who may be answerable for the amount of the decree, or of any lands,

When the property attached consists of debts or immoveable property, a manager may be appointed.

for the purpose, and to pay and apply such rents, profits, or receipts, towards the payment of the amount of the decree and costs; or when the property attached shall consist of land if

Court may postpone sale of land if satisfied that amount of judgment may be raised by mortgage, &c.

to postpone the sale for such period as it may think proper to enable the judgment-debtor to raise the amount.

Manager to render accounts.

houses or other immoveable property, it shall be competent to the Court to appoint a manager of the said property, with power to sue for the debts, and to collect the rents or other receipts and profits of the land or other immoveable property, and to execute such deeds or instruments in writing as may be necessary for the purpose, and to pay and apply such rents, profits, or receipts, towards the payment of the amount of the decree and costs; or when the property attached shall consist of land if the judgment-debtor can satisfy the Court that there is reasonable ground to believe that the amount of the judgment may be raised by the mortgage of the land, or by letting it on lease, or by disposing by private sale of a portion of the land or of any other property belonging to the judgment-debtor, it shall be competent to the Court, on the application of judgment-debtor, to postpone the sale for such period as it may think proper to enable the judgment-debtor to raise the amount.

In any case in which a manager shall be appointed under this section, such manager shall be bound to render due and proper accounts of his receipts and disbursements from time to time as the Court may direct.

(Extended to rent suits by Act XIV, 1863, s. 6).]

and *B*, that further advances would be necessary. According to *M*'s account *C* told him that *A* and *B* were unable to make further advances, and that he could, if they were needed, obtain them on the usual terms from the plaintiffs, who were indigo brokers. In previous years, during the lifetime of the husband of *A* and *B*, who had held similar mortgages of the concern and of the crop in those years to secure advances made by him, such advances, had, with the mortgagee's knowledge, been supplemented by loans obtained from the plaintiffs on the security of a first charge upon the crop to the extent of such loans. And it was alleged by *M* that it was upon the understanding that the same [59] course was to be followed in the present instance, that the mortgage deed to *A* and *B* was executed.

The moneys advanced by the latter were wholly expended by April, when *M*, without communicating with *A* and *B*, and with only the verbal sanction of the Court, applied to the plaintiffs for money, and on the 26th April, the plaintiffs wrote to *M*, that they would make advances to the extent of Rs. 50,000, upon his assigning to them and giving them a first charge on the first 250 maunds of indigo to be manufactured in the season, and they enclosed a form of assignment for *M*'s signature which he duly signed, and returned to the plaintiffs on the 3rd May. This document bore a Rs. 2 stamp. In September and October, *M* obtained further advances from the plaintiffs in respect of other indigo, giving them similar letters of assignment, which also bore Rs. 2 Stamps. Of the moneys thus advanced by the plaintiffs, Rs. 5,000 was paid to *C* for *A* and *B*, by a bill drawn upon the plaintiffs. About Rs. 17,000 was applied towards the expenditure of the following season, and the remainder was applied in the production of the then season's indigo, and *M* stated that without it he could not have manufactured any indigo whatever that season. The indigo, when manufactured was claimed by *A* and *B* under their mortgage, and their claim being resisted by *M*, who set up against them the plaintiffs' rights under the letters of assignment, *A* and *B* brought a suit to enforce the provisions of their mortgage deed. In this suit the indigo was attached before judgment and sent to Calcutta for sale. The plaintiffs now sued *A*, *B*, *M*, and the holders for sale to establish their first charge in respect of their advances to *M* upon 360 maunds of the indigo on the strength of their letters of assignment.

Held per GARTH, C.J., and MACPHERSON, J., that the letters of assignment to the plaintiffs were not mortgages within the definition of the Stamp Act XVIII of 1859, and that the proper stamp to be affixed to such documents is a stamp of 8 annas.

Held per GARTH, C.J., PHEAR and MACPHERSON, JJ., that the alleged oral agreement between *C* and *M* as to obtaining loans, if necessary, from the plaintiffs and giving them a first charge on the season's indigo in respect of such loans was in direct contravention and defeasance of the mortgage deed to *A* and *B*, and was therefore inadmissible in evidence under s. 92 of the Evidence Act.

Held per PHEAR, J., that s. 243, Act VIII of 1859, does not give the Court authority to appoint a manager to carry on a judgment-debtor's business pending execution proceedings and to invest him with power to raise money for that purpose. *Quere*—Whether the Civil Courts in the Mofussil have the power possessed by the Court of Chancery in England and by the High Court in Calcutta of managing the property of parties to a cause pending suit or administration. But however this may be, the Court's manager, under such circumstances, only acquires a right to charge his costs and [80] expenditure against the parties to the suit or persons who have knowingly placed themselves in a like position relative to his management, and even then he can only do so in respect of such expenditure as has been expressly sanctioned by the Court.

Held per GARTH, C.J., and PHEAR, J., that the plaintiffs were neither in the position of managers of the concern nor of consignees of the indigo, and were therefore not entitled to any lien upon the indigo similar to the lien possessed by the manager or the consignee of a West India Estate.

Held per PHEAR, J., that the plaintiffs could not claim a lien on the indigo on grounds of a salvage character; it being essential to such a lien that the person spending the money

of which he claims reimbursement should have some interest in the property, or some right or duty towards the owners who are to be affected by the claim, impelling him to make the expenditure. A mere volunteer can in general claim no such lien.

Held on the facts *per* GARTH, C. J., PHEAR and MACPHERSON, JJ., that there was not evidence of such knowledge and acquiescence on the part of A and B with respect to the advances by and the assignments to the plaintiffs as would estop them from disputing the plaintiffs' claim.

APPEAL from a judgment and decree of PHEAR. J., dated the 6th March 1876.

The plaintiffs, who carried on trade as indigo brokers in Calcutta under the style of Moran and Co., sued to establish their right to a first charge on 360 maunds of indigo, the produce of the Arrowah Indigo Concern in the season 1872-73 for over Rs. 70,000, a portion of the moneys advanced by them for the purposes of the concern.

Kazi Ramzan Ali, deceased, the late proprietor of the Arrowah Concern, being largely indebted, and numerous attachments having issued against this and other properties belonging to him, petitioned the Court of Sarun to appoint a manager of the concern, and in October 1867 one Urquhart was appointed manager under s. 243 of the Civil Procedure Code. In the year 1870, one Macrae was appointed manager in Urquhart's stead, and a letter of appointment was given to him by the Court, under which he was directed "to file an estimate of expenditure to carry the factories on during the subsequent year," and until further orders to "file such estimates for every year in this (the Sarun) Court," and was further directed and empowered as follows :—

The expenses for carrying on all the factories or any of them [81] will be raised and paid by you. The amounts of the receipts and disbursements of all the factories and houses will be submitted by you in every month up to the 20th of every month with your signature. The yearly accounts of the factories ending on the 31st October of every year will be submitted by you on or before the 31st December of every year as long as the factories continue under the management of this Court."

Ramzan Ali died in 1869, but his estate continued after his death to be managed as theretofore for the benefit of his heirs and all parties concerned.

For several years the Arrowah Concern had been carried on mainly by means of advances made by one Banwarilal, a native banker, upon mortgage bonds executed from time to time by the manager, with the approbation of Ramzan Ali and his heirs, and with sanction of the Court of Sarun, Banwarilal's advances had been supplemented, during the last two years of his life, by loans obtained from the plaintiffs and other Calcutta Indigo brokers. In April 1872, Banwarilal died, leaving the defendants, Mussamuts Mittu and Munder Bibee, his widows and representatives. At the end of the season 1871-72 there was due from the Arrowah Concern to Banwarilal's estate a sum of more than four lakhs of rupees. The clear proceeds of the sale of the season's indigo amounted only to Rs. 1,81,325-13. In October 1872, Macrae filed his annual estimate, stating that Rs. 1,75,713 would be needed for the season 1872-73, and this estimate was sanctioned by the Judge. Macrae subsequently entered into negotiations with one Monohur Das, who was described as the general Mookteer of the Mussamuts, to obtain advances from those ladies; and on the 1st February 1873, Macrae executed a mortgage bond in the Mussamuts' favour for the sum of Rs. 1,81,325-13. The bond recited that Rs. 1,81,325-13 were absolutely necessary for the purpose of carrying on the concern for the year 1872-73, and that Rs. 50,000 were payable under an order of the Judge of

Sarun to certain judgment-creditors of the owners of the concern, making in all the sum for which the bond was given. The bond further recited that Macrae was unable to raise this sum except by loan from the Mussamuts, and [62] that he had obtained the Judge's permission in writing to raise this sum and to execute the bond. By this bond Macrae, in consideration of Rs. 1,81,325-13, which he thereby acknowledged to have received from the Mussamuts, promised to repay the unpaid balance of the original debt due to the Mussamuts and the Rs. 1,81,325-13 then borrowed (which was described in the deed as "the estimated outlay for the present season and the debts due to the judgment-creditors") with interest at 12 per cent. and a commission of 5 per cent. on the Rs. 1,81,325-13; and as security therefor mortgaged to the Mussamuts the indigo lands and factories, and pledged and assigned to them the season's crop. The bond further provided that the indigo to be manufactured from such crop should be sold by Macrae wheresoever and in such way and by such firm as the Mussamuts should direct; that the principal, interest and commission due to them should constitute a first charge on the sale proceeds; that until such principal, interest and commission should be paid in full, Macrae should have no power to transfer, sell, or mortgage the properties thereby mortgaged, pledged, and assigned, or in any way to deal with the sale proceeds of the manufactured indigo; and that the Mussamuts should have full authority to make arrangements for the appointment and dismissal of the servants of the concern and for its better and more economical management. The owners of the Arrowah Concern joined in executing this bond, and the bond was registered under the Registration Act. The sum so lent by the Mussamuts for the season's expenditure was wholly spent by April 1873 before the crop was raised, and Macrae thereupon, notwithstanding the provisions and stipulations contained in the above deed, and without applying to the Mussamuts for further advances, or informing them that the Rs. 1,31, 325-13 were spent with the verbal sanction of the Court, applied to Moran and Co. "to procure a loan for the concern to complete the season, as they had done in the previous year, on the security of the indigo." After some correspondence Moran and Co. wrote to Macrae on the 26th April:—

"DEAR SIR,

"On receipt of your favour of the 23rd instant, we went to see Messrs. [63] Lyall Rennie and Co., who, for some reason or another, have changed their minds and decline making the advances. We are much annoyed at their having been the cause of our giving you so much unnecessary trouble, but we have no desire that you should suffer by their vacillation, and therefore we advance the money on the same terms and conditions as they had entertained, viz.:—

We to advance ...	...	...	...	Rs. 50,000
To be drawn as follows:				
1st June	...	...	...	Rs. 20,000
1st July	...	...	...	" 5,000
1st August	...	...	...	" 5,000
1st September	...	...	...	" 20,000
				<hr/>
				Rs. 50,000
				<hr/>

"You as security to give us an assignment of the first 250 maunds indigo to be manufactured this season at the Arrowah Indigo Concern, and you guarantee the same shall take precedence of any claim or decree whatsoever; you pay us interest at the rate of 10 per cent.

per annum and a commission of $2\frac{1}{2}$ per cent. in advance. We enclose for your signature a form of assignment to be signed by you either now or when you require the first instalment of the loan.

Yours faithfully,
(Sd.) WILLIAM MORAN AND Co."

Macrae, on the 3rd May 1873, duly signed and returned to Moran and Co. the form referred to in the above letter, which form was in the following terms :—

"In conformity with the tenor of a letter received from William Moran and Co., dated the 26th day of April, copy of which is annexed, and pursuant to directions received from William Moran and Co., I do hereby certify and declare that I will hold 250 factory maunds of indigo, the first manufacture of this season of the Arrowah Indigo Concern in Churpa, as the property and at the disposal of William Moran and Co. for and on behalf of the said William Moran and Co., and that I hereby undertake to continue so to hold the above indigo for the sole use and disposal of the said William Moran and Co., or at the order and direction of the said William Moran and Co. and to consign it at the usual period, or when required, under invoice addressed to the said William Moran and Co. or to their order. Dated at Arrowah Factory in Sarun this 3rd day of May in the year of our Lord 1873.

(Sd.) J. MACRAE."

[64] This document bore a 2-re. stamp. In September and October 1873, Macrae applied to Moran and Co. for further advances of Rs. 12,500 and Rs. 10,000, and signed two forms in precisely the same terms as the above with the exception that the indigo purporting to be thereby assigned was 60 maunds and 50 maunds respectively. These documents likewise were stamped with 2-re. stamps.

Under these three instruments Moran and Co. advanced to Macrae the sum of Rs. 88,557. Of this sum Rs. 5,000 were received by Monohur Das on behalf of the Mussamuts by a bill drawn upon Moran and Co., and a portion of the amount was applied by Macrae for the purposes of the season 1873-74. In September 1873 the Mussamuts claimed under their mortgage possession of the indigo which had then been manufactured from the season's crop, but in this they were resisted by Macrae, who set up against them the right of Moran and Co. under the assignments which he had given to them. Upon this the Mussamuts, in November 1873, instituted a suit in the Subordinate Judge's Court of Sarun against Macrae, the manager, and against the owners of the property, parties to their mortgage, and others, to enforce the provisions of the deed, and obtained an attachment of the indigo before judgment; and in April 1874 they obtained a decree in that suit declaring their right on the footing of the mortgage deed to take possession of and to sell the indigo as against Macrae and the owners of the concern.

In the meanwhile the indigo had been sent—still subject to the Court's attachment, it was said—to Messrs. Thomas and Co. in Calcutta for sale; and in the ordinary course of affairs Messrs. Thomas and Co. on selling would have transmitted the proceeds of the sale to the Subordinate Judge's Court at Sarun towards satisfaction of the Mussamuts' mortgage debt. To prevent this, Moran and Co., brought the present suit against the Mussamuts, the owners of the concern, Macrae, and the members of the firm of Thomas and Co., seeking, amongst other things, to obtain possession of the indigo, which was then in the hands of Thomas and Co. for sale in Calcutta, and to establish a lien upon it to the extent of 360 maunds, on the strength of the [65] assignments made to them by Macrae, and to restrain Thomas and Co. from selling or parting with the sale proceeds of the indigo.

The plaintiffs in their plaint, and the defendant Macrae in his written statement, alleged that when the Mussamuts agreed to advance Rs. 1,81,325-13, Macrae informed them that as out of this sum Rs. 50,000 would have to be paid to judgment-creditors under the Court's order, only Rs. 1,31,325-13 would be applicable for outlay; that this sum would only carry on the concern till about May, and that it would be absolutely necessary to raise more money; that the Mussamuts informed Macrae they could not advance a larger sum, and that if further advances were necessary he could obtain them as before from Calcutta; that the Mussamuts were unable to advance the outlay required, and that they, by their agent Monohur Das, who was fully authorized for the purpose, agreed with Macrae that he should borrow such further sums as might be necessary for carrying on the concern from the plaintiffs' firm as had been done before, and that he should grant to the plaintiffs a first mortgage or charge upon so much of the season's crop as should be necessary to secure the plaintiffs' advances; and that they further agreed to waive their priority in favour of the plaintiffs in respect of such sums as the plaintiffs should advance.

The Mussamuts, in their written statement, denied every one of these allegations, and stated that the plaintiffs' loans were made without their knowledge or consent.

By an order made in the suit before the hearing, the defendants, the members of Messrs. Thomas and Co., were directed to sell the indigo in their hands and to pay Rs. 80,226-1-6, part of the sale proceeds, into Court to the credit of this suit, and to transmit the balance of the sale proceeds to the Court of the Subordinate Judge of Sarun, and upon complying with this order, the suit as against them was dismissed.

The plaintiffs' suit was dismissed in the Court below by

PHEAR, J. (who, after stating the facts, continued, with reference to an objection raised to the admission of the plaintiffs' [66] letter of the 26th April and Macrae's letter of assignment to the plaintiffs, dated the 3rd May).---It appeared to me that these two documents together constituted a promise or undertaking on the one side to pay money at certain specified future periods, and a pledge on the other of property to arise at a future time made by way of securing repayment of the money so to be advanced, with a guarantee of title to assign. Neither of the two documents was complete by itself, and I thought that the 2-re. stamp, which the second of them bore, was not sufficient to meet the requirements of the Stamp Act in respect of the contract which the two disclosed.

On a former occasion I threw out the suggestion that an undertaking at a given time on the part of one person to hold, at the disposal of another, property which is to be acquired in future, might not be a pledge of property within the meaning of the Stamp Act, and MACPHERSON, J., seems to have taken this view when sitting in the Court of First Instance in the case to which I refer (*Moran v. Spink*, a report of the judgments in this case will be found in 21 W. R., at p. 161. The observations with respect to the stamp were made in the course of the argument). But I now do not think the suggestion is sound, and even if it were, it would not in my opinion save the two documents, with which I am at present concerned.

It is noteworthy that the plaint, in describing the transactions of the second and third assignments, omits to set out the letter of promise, which constitutes the consideration for the pledge in each of them, and makes the pledging document refer for consideration to a letter of notice written by

Messrs. Moran and Co. on the assumption that the pledge had already been effected. I need hardly say that this gives the pledging document a singleness of character which it does not really possess.

But although the plaintiffs, for the reason which I have just now explained, have failed to establish by evidence the assignments of indigo to them upon which they have mainly relied in this suit, I may remark here that I do not think that their case has materially suffered thereby; because even if it be taken that those assignments were in fact made by Mr. [67] Macrae in favour of the plaintiffs, as described in the plaint, it appears to me, upon grounds which I shall probably have occasion in the course of this judgment to make clear, these assignments could not, upon the case made by the plaintiffs, have the effect of passing to the plaintiffs an interest in the indigo detrimental to the Mussamuts' prior right under their mortgage of the 1st February.

However this may be, the assignments being put on one side, it is still certain on the evidence that Messrs. Moran and Co. from time to time, subsequently to the date of the Mussamuts' loan, advanced to Mr. Macrae the sums of money, which it was the intention of the assignments to secure, and that these sums, or a portion of them, were applied to the purpose of manufacturing the indigo, which is the subject of this suit. Mr. Macrae in his deposition says :—

"I did, in pursuance of the said agreement, borrow Rs. 65,382-11-6 from Moran and Co. on account of season 1872-73; and I should not have been able to manufacture the quantity of indigo that I did manufacture, had I not got the necessary funds from Moran and Co.; in fact, I could not have begun manufacture at all had it not been for those funds, for the season would have been lost."

It becomes, therefore, necessary to inquire whether, by reason of this application of their money, the plaintiffs obtained any lien on the indigo of the season 1872-1873, or any right to be repaid the money advanced by them or any part of it, before the money in Court, the proceeds of that indigo, is allowed to go into the hands of the Mussamut defendants, as mortgagees.

The case has been likened to that of a consignee or manager of a West India estate, and a considerable number of decisions have been brought under my attention in argument, which bear upon the question as to such a person's rights as against others interested in the property. In *Morrison v. Morrison* (2 Sm. & G., 564, at p. 572) Vice-Chancellor STUART, in dealing with a case of consigneeship, said:—"It is, therefore, necessary to distinguish accurately what has been said by various Judges of this Court as applying to the case of a consignee [68] who seeks reimbursement on the footing that he has a lien on an estate preserved by his expenditure during a management conducted by arrangement with the owners, from what must be kept in view as to the rights of a consignee acting under the direct appointment of this Court, and making advances sanctioned by its orders." And in *In the matter of Tharp* (Sm. & G., 579), LORD ST. LEONARDS said, in reference to the equitable rights of a consignee,—“I apprehend that, generally speaking, with reference to the equity of West India estates, it could hardly ever have gone beyond this, as I said in the course of the argument that, where consignees were supplying the estate as they ought to do, sending out all the supplies, all the machinery, all the clothing, all the food in point of fact, except what was found in the place itself, and were receiving back, as they did, all the produce of the estate, except what was sold, the common portions of it sold in the island, and keeping the accounts

as they did, and charging their commission, there then was a balance on their accounts, which in the case of a tenant for life would not have properly gone to the tenant for life, until their account was cleared, and they could not and ought not to have allowed the tenant for life to have received any portion of these profits, if they were dealing with a tenant for life, until their account was paid; and if in that case, after the tenancy for life, it turned out there was still a balance due, and that balance had been properly incurred in maintaining the estate, then it might properly be represented as money laid out for the benefit of the inheritance; and therefore that balance at that period ought to be a charge on the tenancy in remainder of the estate." Lord KINGSDOWN, in *Fraser v. Burgess* (13 Moore's P.C., 314, at p. 343), reviewed many of these cases, and expressed the opinion: "There seems to be no principle for holding as a general proposition that the agent employed in the management of an estate in the West Indies by the owner of the estate, subject to charges upon it, can without more have a lien on the inheritance of the estate for the advances which he has made for its cultivation, not only against his employer but against those whose title is prior to that of his employer, and who have had nothing whatever to do with the expenditure.

[69] "When a trustee is in possession of the plantation, managing it on behalf of all parties, and employs a manager for the purpose, the expenses and proper advances of the manager for the benefit of the estate are the expenses and advances of the trustee, who is entitled to be reimbursed out of the estate, and if the manager were held entitled to be paid out of the estate, it would be as standing in the place of the trustee who employed him.

"Again, when the Court of Chancery takes possession of the estate by the appointment of a manager and receiver, it is by its officers in possession on behalf and for the benefit of all persons interested, parties to the suit; and its officers stand in at least as favourable a position as the officers appointed by trustees and are entitled to at least as extensive remedies against the estate." He then pointed out some differences in the cited cases, and said (at p. 346): "To this extent, however, the cases all agree, that when the Court of Chancery has taken possession of a West Indian estate by a manager and consignee, it will, as against all parties for whose benefit the possession has been held, refuse to permit its officers to be discharged until the amount due to them has been paid. But the cases seem to go further, and to establish that where the possession has been held by the attorney and manager of the mortgagor, yet if the mortgagees have so recognized the possession of the manager that he can be considered as acting on their behalf and for their benefit, the same consequences will follow as regards their interests, as if he had been appointed under the authority of the Court." And, finally, he states the conclusion of their Lordships of the Judicial Committee in that particular case thus: "On the whole, after a careful examination of the evidence, and a full consideration of the case, their Lordships have come to the conclusion that Grant must be considered to have been in the management of this estate on behalf of all parties interested, and under the authority of the Court of Chancery; and that the proceeds arising from the sale being now to be distributed according [70] to the rights of the several parties having claims upon it, the appellant, as the executor of Grant, is entitled to be paid what is due to him in respect of his management, in priority to the claims of the persons having charges under the will." Also in the course of the judgment Lord KINGSDOWN remarked, "it is very difficult to understand what difference there can be between the case of a manager and that of a consignee of a West Indian estate with respect to the right of lien," and he pointed out that in the case of one of the leading decisions

the question arose in the case of a manager. And in *Bertrand v. Davies* (31 Beav., 429, at pp. 435, 436), the Master of the Rolls summarized the results of the cases thus: "The three following propositions may, I think, be decided from the abovementioned cases:—

"In the first place, that a lien on the estate exists for the costs of management where the management has been conducted by a person authorized to do so by the owner of the property.

"In the second place, that though there be no express appointment of the manager, yet, if the persons interested in the estate know that he is performing the duties and do not interfere, then they must be presumed to have acquiesced in his continuance in that office, and they cannot dispute his claim to a lien on the estate for the expenditure, which, by their tacit acquiescence, they have encouraged him to make.

"In the third place, where a receiver or manager is appointed by the Court, in a suit properly constituted, such manager is to be considered as appointed on behalf of all persons interested in the property, and he is entitled to his ordinary commission and allowance, and also to a lien on the estate, as against all persons interested in it, for the balance, whatever it may be, that shall be found to be due to him on taking his accounts."

I have already quoted words of Lord ST. LEONARDS, describing what it is that gives the consignee of a West India estate his peculiar character, and furnishes the basis of his peculiar rights. Lord WESTBURY, in delivering the judgment of the [71] Privy Council in *In re Leith's Estate, Chambers v. Davidson* (I. L. R., 1 P. C., 296, at p. 304), says also on this point: "The ordinary mercantile character and position of a consignee of a West Indian plantation are well known. The custom of the mercantile world is to select, as consignee, a merchant residing in this country, to whom the whole produce of the plantations is consigned, and who, in return for that produce, accepts bills drawn upon him by the proprietor or manager in the West Indies for Island contingencies; and who, according to the orders of the manager or proprietor, purchases the supplies needed for the estate, and sends them over to the Island. There is no necessity in a case of this kind that there should be any contract for the purpose of determining the right of the consignee. The right of the consignee, as it is supposed to be established by decisions, giving him a lien on the plantation in respect of the balance due to him, is an exception to the general rule which applies to principal and agent."

Now it is certain that the plaintiffs were not themselves in any sense the managers of the Arrowah Concern, and I think it is abundantly apparent on the facts of the plaint that the situation in which they stood to the concern was materially different from that which these eminent Judges make the foundation of a consignee's rights relative to a West India estate. I might, therefore, dispose of this part of the case at once by saying that the plaintiffs have not brought themselves within reach of the principles to which they appeal.

It may, however, perhaps be open to question whether or not they are entitled to stand in the shoes of the defendant Mr. Macrae as against the Mussamuts, and it may, therefore, be as well to inquire, what precisely is that gentleman's position in the matter. The sanad granted by the Judge of the Sarun District Court runs thus:

(His Lordship read the sanad, and continued.)

So much of the authority and powers conveyed by this document, as is derived from, or rests upon, the enactment of s. 243 of the Civil Procedure Code, and for that reason might conceivably be good against all the world, is, I think, limited [72] in extent. The words of the section which apply to the case are:—

"When the property attached shall consist of debts due to the party who may be answerable for the amount of the decree, or of any lands, houses, or other immoveable property, it shall be competent to the Court to appoint a manager of the said property, with power to sue for the debts, and to collect the rents, or other receipts and profits of the land or other immoveable property, and to execute such deeds or instruments in writing as may be necessary for the purpose, and to pay and apply such rents, profits, or receipts towards the payment of the amount of decree, and costs." It seems to me that the Legislature did not intend by thus using the word "manager" to imply by the force of that word alone that the person appointed should have power to manage and carry on the property, whatever its nature, in respect of which he is appointed: I think that the word is a mere designation of a person, whose power is specified in the following sentence, namely, "with power to sue for the debts, and to collect the rents and other receipts and profits of the land or other immoveable property, and to execute such deeds or instruments in writing as may be necessary for the purpose, and to pay and apply such rents, profits, or receipts towards payment of the amount of the decree and costs." The same word "manager" is thus used in reference to cases where obviously there could be nothing to manage, and where the person appointed could be nothing more than a receiver, as to others; and in the powers expressly attributed to him there is nothing which would enable him to carry on any business, or to raise money for that or any other purpose. He appears to be even narrowly restricted in regard to the application of the rents and profits which he may collect, *i.e.*, to paying them towards the amount of the decree and costs. It is also not unimportant to remark that in the immediately following passage of the same section the Legislature employs express words to authorize the Court to raise money, by means short of selling the land, for the purpose of discharging the judgment-debt; if it had intended to give the "manager" or even the Court a like power for the purpose of merely managing the [73] property or carrying on a business concern, with a view to discharging the judgment-debt out of the profits, it surely would have conferred the power expressly among the other powers mentioned, and would not have let it simply lurk under cover of the name "manager." The last words of the section, "In any case in which a manager shall be appointed under this section, such manager shall be bound to render due and proper accounts of his receipts and disbursements from time to time as the Court may direct," do not enlarge the passage which I have quoted, because a mere receiver must, or may, have to disburse money in the course of collecting rents and profits and suing for debts, &c.

On the whole, I feel bound to say that I cannot find in s. 243 any legislative authority given to the Court to appoint a manager to carry on a judgment-debtor's business pending execution proceedings, and to invest him with power to raise money for that purpose, although I am aware that a practice of this kind has, on some ground or another, become very prevalent. And I need hardly add that if a manager appointed under s. 243 has not in himself any statutable authority to carry on and manage a business or other property, he certainly has no authority to hypothecate produce, &c., for expenditure to that end.

I do not know whether it has been decided to what extent the Civil Courts of the Mofussil have the power such as that possessed by the Court of Chancery

at home, and by this Court, of managing the property of parties to a cause, pending suit or administration; or, if so, whether their power in this respect arises in proceedings had solely for the purpose of enforcing execution of a decree. But, however this may be, the Court's manager, under such circumstances, only acquires a right to charge his costs and expenditure against the parties to the suit, or persons who have knowingly placed themselves in a like position relative to his management, and even then he can only do so in respect of such expenditure as has been expressly sanctioned by the Court. The ground of his right is that he is the Court's officer acting under the Court's discretion as between the parties to the suit and with the Court's sanction [74] which cannot of course be rightly given without specific inquiry in each matter requiring sanction; the exercise of the Court's discretion cannot be delegated to the manager by anticipation. Now, nothing whatever of the kind appears here in the matter of the three assignments to the plaintiffs. It is not pretended that the Court of Sarun made the slightest judicial inquiry in regard to either of them, or gave any other formal sanction to Mr. Macrae's action in making them, than is involved in this passage of the sanad granted three years before, "the expenses for carrying on all the factories or any of them will be raised and paid by you." The utmost that appears in the evidence of what took place on this point amounts to this that Mr. Hope, the Judge of Sarun, personally knew in a general way what Mr. Macrae was doing or about to do. Mr. Macrae says, "I applied to him verbally in Court for a written authority for raising the loan from Moran and Co., but he said that he considered a written order unnecessary. I cannot bring to my mind the date, but I spoke to the Judge in February about the time that I signed the bond in the Mussamuts' favour. I told him that the funds allowed by the Mussamuts would be insufficient for the disbursements of the year, and it was then that he told me to arrange with Moran and Co. when the money should run out." Had there been any proper inquiry in each case the Court must have given formal notice of it to the Mussamuts, and the result of the inquiry might have been that there was no need of borrowing from the plaintiffs and of hypothecating the crop to them, or if there was such need, even then the order given sanctioning the expenditure and making an hypothecation of the crop in priority to the Mussamuts' existing rights to it, could only be made binding by adding the Mussamuts as parties to the record (if the Court had authority to do so), and in that event the Mussamuts would have the right of appeal against the order. How very much short of all this Macrae's action in the matter falls is not difficult to perceive.

If, therefore, it be taken, as it probably may on the facts stated in the plaint, that Macrae was manager of the Arrowah Concern under the Court of Sarun pending execution proceedings (so far as the Court had authority to undertake such management) [75] for the benefit of the Mussamuts as well as that of other persons parties to the suit, still he does not appear to have had from that source the requisite authority to charge the estate with these advances as against them: certainly no authority to do so in defeasance of the very deed of hypothecation which he and the owners together had made to the Mussamuts only a few months before.

The plaintiffs, therefore, whether their assignments are considered as proved or not, can get no advantage as against the Mussamuts by virtue of Macrae's official character or personal rights.

And it is worthy of remark that even if Macrae himself were in a position to set up a lien on the estate block and crop, or on the season's crop alone in respect of his expenditure incurred in producing it, that expenditure included the

Mussamuts' money as well as the plaintiffs'. He could only claim for the balance of his entire accounts in which the Mussamuts' items would be prior to those of the plaintiffs'.

It seems, therefore, to be quite plain that the plaintiffs were neither legally nor in fact consignees of the produce of the Arrowah Concern, or of any part of it (for the indigo was not sent to them), nor in the position of manager thereof. Neither can they found the claim which they put forward in this suit upon any ground analogous to that on which the right of lien of a manager might be made to rest.

Had the three assignments of indigo by Macrae to the plaintiffs been made out by the evidence, the next question would have been, was there anything in the shape of an authority for making these assignments proceeding from the Mussamuts to Macrae. And I will say a few words upon this question for the sake of elucidating the rest of the case.

The defendant Macrae in his deposition says that he obtained the requisite authority for this purpose at the time when the deed of the 1st February 1873 in favour of the Mussamuts was executed. His account of the matter is this.

(His Lordship read Macrae's evidence to the effect that when he executed the bond in favour of the Mussamuts he informed Monohur Das that Rs. 1,75,613 would be needed for the [76] season's outlay, and that Monohur Das thereupon told him that, in the event of the money advanced by the Mussamuts proving inadequate for the season's expenditure, he might obtain loans from Moran and Co. and might pledge with them sufficient of the season's crop as security for their advances in priority to the Mussamuts' mortgage. Upon this his Lordship observed that "if a clause had been inserted in the Mussamuts' bond embodying the parol authority which Macrae considered to have been thus conveyed to him, its effect would have been to contradict and materially alter the written contract, and therefore parol evidence was not admissible to show that it formed part of the contract." He accordingly found that the authority contended for as having been passed to Macrae simultaneously with the making of the Mussamuts' mortgage was not established. And he further expressed great doubts on the evidence whether Monohur Das ever went the length which Mr. Macrae now said he understood him to go. It might well be that Monohur Das said generally that in the event of more money being wanted it might be got from Messrs. Moran and Co., or any one else in Calcutta, in like manner as in former years, but the learned Judge was not satisfied that he pretended to pass immediate specific authority for that purpose. He then continued.)

And if Mr. Macrae got no authority from the Mussamuts to make assignments, which should have the effect of overriding their deed, at the time when that deed was made, it seems to be certain that he did not get any afterwards. He admits that he never applied to them for any such authority, and that which passed verbally at the time of the making of the deed being out of the way, he cannot place the case any higher than this, namely, that the Mussamuts through Monohur Das knew and acquiesced in what he did. That their conduct in the matter, on the whole, was such as to estop them from now denying that in making the assignments to Messrs. Moran and Co., he acted with their sanction and authority. I need hardly say that it requires very clear evidence of knowledge and of standing by to establish an effective estoppel of this kind. But the plaintiffs do not adduce any direct evidence of actual knowledge on the part of the Mussamuts of Mr. Macrae's acts, [77] until at earliest some time after the three assignments had been made.

The facts advanced by them to furnish the estoppel are, that Monohur Das acted in all things as the agent of the Mussamuts, managed all their affairs for them and appeared to be their am-mooktear empowered to represent them in all matters; that he knew of and even directly suggested Mr. Macrae's drawings on Messrs. Moran and Co., for money wherewith to carry on the Arrowah Concern, and of the assignment of the season's indigo made by Mr. Macrae to secure Messrs. Moran and Co.'s loans; and that he even obtained at his own request from Mr. Macrae for the Mussamuts' use and benefit the sum of Rs. 5,000, portion of these drawings so secured; and finally that one of the two ladies, on some occasion after they had brought their suit in the Subordinate Judge's Court to enforce their right under their mortgage to the season's indigo, expressed her willingness that Messrs. Moran and Co. should be first paid. If these facts can be accepted as proved (and I am very far from saying they can, for the evidence bearing on them, perhaps from the fault of the examiner, is most indefinite and unsatisfactory, and some of it is even untrustworthy), still they fall short of affording material for the estoppel. It is remarkable that it is not attempted, on the part of the plaintiffs, to show that the Mussamuts, or even Monohur Das had notice, or were aware, of any specific drawing or assignment as it occurred. And there is also nothing to indicate that any one concerned, except Macrae and the plaintiffs, knew of the preferential character of the assignments. This only appears in Messrs. Moran and Co.'s letter to Macrae, the first of the two documents which constitute Mr. Macrae's contract of assignment to them. And in its absence the assignments would be nothing more than second mortgages. I cannot infer from these materials that the Mussamuts knowingly stood by and permitted Mr. Macrae to obtain from the plaintiffs money for the concern, on a pledge of the season's crop which should take priority of their own.

And the attitude assumed by Mr. Macrae throughout the affair seems to me of itself sufficient to forbid any such inference. He held himself entirely independent alike of the ladies and of [78] the owners. He did not consider that he was under any obligation to consult them. The property was in the management of the Court by his hands, and he was expressly authorized by the Court to raise the necessary moneys at his own discretion. He made his bargain with Messrs. Moran & Co., in his own name without pretending to be the agent of any one, other than the Court, and he went to them because other sources to which he had been accustomed to have recourse in former years were not this year conveniently open to him. And every one concerned shared this view of Mr. Macrae's independent authority. Abdul Hye states as much in his deposition. And I have very little doubt that neither the Mussamuts nor even Monohur Das ever supposed for a moment that Mr. Macrae possessed no authority to deal with the indigo except such as he might derive from them or from the owners of the concern. It seems to follow plainly that no legitimate inference adverse to their rights can be drawn from their non-interference with him in the matter of the assignments.

In their written statement the Mussamuts admit that they have been repaid by Mr. Macrae the sum of Rs. 5,000, part of their mortgage debt. And Monohur Das in his deposition states that the repayment was effected by Macrae drawing a hundi on Moran and Co. in favour of the Mussamuts, which was realized by him, Monohur Das, as their agent. Now, the Mussamuts must probably be taken to have known that Macrae could not procure the money wherewith to repay them except by disposing either in the way of sale or mortgage of a portion of the property which formed the subject of their mortgage, and I was at first doubtful, whether, under these circumstances, by accepting the payment they did not by implication sanction the actual pledge

by which it was raised, at least to the extent of Rs. 5,000. On consideration, however, I do not think it is necessary to come to a finding on this point, because Macrae, acting for the owners, could make a second mortgage without the Mussamut's sanction, and there is nothing whatever to justify the inference that these ladies gave their assent not merely to a second mortgage, but to one which, though made after, should have preference over their own.

[79] I come now to the last principal question in the case, the only question indeed, which has given me cause for serious hesitation in coming to my decision. I will put it in this general form, can the plaintiffs Moran and Co. claim a lien upon this indigo on grounds of a salvage character?

Mr. Macrae in his deposition states, as I have already mentioned, "I should not have been able to manufacture the quantity of indigo that I did manufacture had I not got the necessary funds from Moran and Co.; in fact, I could not have begun manufacture at all had it not been for those funds, for the season would have been lost." And the witness Mahomed Ishhake, assistant manager of the factory, is more specific. He says:—"The one lakh and thirty-one thousand odd," borrowed of the Mussamuts, "had been exhausted in factory disbursements up to April 1873. The concern, therefore, stood in further need of money, and it was to meet further expenses that the loan from Moran and Co. was taken: there was absolute need for this money, the indigo could not have been manufactured without the further loan above stated."

Lord ST. LEONARDS gives an instance of salvage lien in the observations made by him in *In re Tharp* (2 Sm. & G., 578), which I have already referred to for another purpose. He says, "In Ireland, it is a very common equity to have, as a prior charge to all other incumbrances, what is called salvage money—where a leasehold estate, or an estate held for lives to which half-a-dozen people are entitled in succession, many of them being mortgagees, according to certain priorities, the last man of all who is entitled after everybody, being in possession, redeems, I may say, the estate by paying the landlord, who otherwise would have recovered the estate, and taken it from everybody; his payment is what is called salvage money. That is an established equity, and a very proper equity. He that pays the salvage has a prior incumbrance to every other charge and interest, because, so far as any interest is left to anybody beyond the charge, it is acquired by that payment in the shape of redemption money."

[80] And there are unquestionably many cases to be found in the books, where it has been held (I am speaking generally) not equitable as between the parties, that the owner of property should be allowed to have the benefit and advantage of ownership, before the person by whose money the property had been produced or preserved was reimbursed. This was so in the cases of the West Indian consignee's and manager's liens which have been already alluded to; but, as I understand the equity, it is essential to it that the person spending the money of which he claims reimbursement should have some interest in the property, or some right or duty towards the owners, who are to be affected by the claim, impelling him to make the expenditure. A mere volunteer cannot generally say to an owner of property, I have saved your property for you by my personal exertions, or by the expenditure of my money, and therefore I am entitled to a lien upon that property, whether you agree to it or not for reimbursement and recompense. The nearest approach to this is maritime salvage, but there the right of the salvors rests upon a peculiar ground of public expediency. In the present case Messrs. Moran and Co. stood in no such relation to the estate or to the proprietors of it as to have cause on that ground for

spending their money in the cultivation of indigo on it in the season 1872-1873. They were strangers to the estate, and in the situation of ordinary money-lenders with no other motive than the expectation of pecuniary profit from the bargain itself. And there is no doubt that they advanced the money solely on the footing of, and in reliance upon, the contract which they made with Mr. Macrae. They admit that they knew, at the time of making this contract, that a prior mortgage already existed, and they could, if they had chosen, by the least possible inquiry, have ascertained exactly what that mortgage was. By putting themselves into communication with the mortgagees, as they might have done, they could have secured priority of right over the indigo to themselves, or in the alternative have abstained from making the loan. But they neglected these ordinary precautions, because, as Mr. Murdoch says, they trusted to the representations made to them in the letters of Mr. Macrae. They were content to run [81] a risk, which with very little care they might have avoided. The maxim *caveat emptor* seems to me to apply. There were no personal relations between the plaintiffs and the Mussamuts to give rise to any equities. No opportunity was afforded the Mussamuts to furnish the money themselves. The plaintiffs had in their power to say in effect to the Mussamuts, we will not advance our money for the production of the indigo which is to feed your mortgage, except on condition that our expenditure is to be a first charge upon it. They did not think proper to do so, and I cannot, on the whole, find any ground of equity upon which this Court ought to supply their omission.

During the argument some comparison was attempted to be made between the case of the hypothecation of the block or crop of an indigo concern by the manager for the purpose of raising money wherewith to carry on the requisite cultivation and manufacture, and the case of hypothecation of a ship or its cargo by the master to raise money for the repair of the ship and prosecution of the venture. I need not, however, in strictness notice this, inasmuch as the hypothecation of the indigo has not been proved. But it will not, I think, be out of place here for me to remark that the analogy, whatever it might otherwise be worth, must fail in the present case, because even if the requisite exigency existed, the parties immediately concerned, namely the Mussamuts, were at hand, and could have been most readily had recourse to.

The best consideration that I have been able to give to the case has led me to the conclusion that the plaintiffs' claim to the indigo, in priority to the undoubted right thereto of the Mussamuts, cannot be supported on any of the grounds which have been suggested for it.

From this judgment the plaintiffs appealed.

The Advocate-General, Offg. (Mr. Paul), Mr. Jackson, and Mr. Evans for the Appellants.

Mr. Branson and Mr. Bonnerjee for the Mussamut Respondents.

The defendant Macrae did not appear on the appeal.

[82] The Advocate-General.—The three documents under which the appellants claimed a first charge on 360 maunds of the indigo were sufficiently stamped and ought to have been admitted in evidence. A contract to pledge property, which, at the time of the contract is not in existence, is not a mortgage within the General Stamp Act, 1869. Under that Act a "mortgage deed includes every instrument evidencing a pledge of property for securing the payment of money," and "'property' means property being in British India"—see s. 3, cls. 81 & 26. The subject-matter of these contracts had no existence anywhere. [MACPHERSON, J.—Art. 10, sch. I, shows that, for the purposes of the Act,

there may be a mortgage to come into operation in future. If so, may there not be a mortgage with respect to property to come into existence at a future time? The property must be in existence when the mortgage is made, though possession of it need not then be given. These documents were in fact mere declarations by Macrae that he would hold the indigo for Moran and Co., if and when it came into existence. [GARTH, C. J.—Did they not give a right to possession of the indigo without anything further? They only gave a right of suit. So an agreement to sell would not be an assignment requiring registration under the Registration Act; see *per* PEACOCK, C. J., in *Currie v. S. M. Mutu Ramen Chetty* (3 B. L. R., A. C., 126, at p. 131). [Mr. Branson referred to *Fati Chand Sahu v. Lilamber Sing Dass* (9 B. L. R., 433). GARTH, C. J.—Specific performance of an agreement to sell might in some cases be refused, for instance, where damages would be a sufficient remedy; but if the deed contained a power to take possession, would not that make a difference?]. It might be so where the property was in the possession of the contracting party, but here the property was not in existence. [GARTH, C. J.—Under the Stamp Act a mortgage deed requires an *ad valorem* stamp.] Yes, and here the value could not have been computed, as it was not known how much would be advanced. [MACPHERSON, J.—The agreement was to advance up to a specified amount; that would be sufficient to fix the value. Monohur Das' agreement with Macrae respecting the advances to be obtained from Moran [83] was within the ordinary course of his employment. [GARTH, C. J.—There is no evidence of what the ordinary course of his employment was]. The evidence shows that the Mussamuts were pardanishins, and that he was their general manager and the only medium of communication between them and Macrae; he would have all such powers as the manager of a Hindu lady usually has. [MACPHERSON, J.—Whatever he did for the ladies' benefit would be deemed within his authority, but they might repudiate all acts not expressly authorized by them and which were prejudicial to their interests.] The agreement as to these advances was for the Mussamuts' benefit, since without such advances no indigo whatever could have been produced. As to an agent's power, see 3 Chitty Com. & Man., p. 196. [GARTH, C. J.—The alleged oral agreement gave Macrae not merely the right to borrow, but also to give a first charge upon the indigo which was charged with the Mussamuts' debt.] The production of the indigo was a condition precedent to the attaching of the Mussamuts' charge. The mortgage deed purports to be a formal document, but it is silent on points of the greatest importance. It is for the Court to consider how far evidence of a separate oral agreement with reference to such points is admissible; see the Evidence Act, s. 92, provisoes 2 and 3.* The money advanced by the Mussamuts might have proved sufficient. The oral agreement was as to what was to be done if it should be insufficient: that was a collateral matter, as to admitting evidence of which see Taylor on Evidence, 5th ed., p. 983. If the evidence that Monohur Das was informed that the sum the Mussamuts proposed to advance would be insufficient he believed, then the Mussamuts' mortgage deed does not contain the whole agreement, and evidence of the oral agreement is admissible—*Harris v. Rickett* (4 H. & N., 1). But apart from any such oral agreement, the appellants are

* [Sec. 92, Proviso (2) :—The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.]

Proviso (3) :—The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.]

entitled to a first charge on the indigo on the principle on which salvage liens rest, a principle which has been applied over and over again to advances and supplies by consignees of West India estates; see *Fraser v. Burgess* (13 Moore's P. C., 314). [GARTH, C. J.—[84] The salvage lien in those cases depends on the peculiar nature of such estates, such as the difficulties of communication with the parties interested in them owing to their distance and so forth.] In *Scott v. Nesbitt* (14 Ves., 438, at p. 445), Lord ELDON did not base the right on the distance of the property, but upon what he termed "a principle of English law," which equally applied to mines or alum works in England. See further Fisher on Mortgages, 2nd ed., pp. 131, 133, 670, *Myers v. The United Guarantee Co.* (7 De. G. M. & G., 112, at p. 126), *Bertrand v. Davies* (31 Beav., 429, at p. 435), *Ventura v. Richards* (1 Tay. & B., 66), *Chambers v. Davidson* (L. R., 1 P. C., 296) and *Sayers v. Whitfield* (1 Knapp 133), where Lord WYNFORD refused to send the case back to the Master to enquire as to customs respecting charges on West India estates, on the ground that the common law of England is the common law of St. Vincent's, and therefore the rules which regulate the English Equity Courts also regulate the Courts of Equity in that island. Macrae was the agent for all parties interested in the concern, amongst others, for the Mussamuts. Under s. 243, Act VIII of 1859, the Court had power to authorize him to deal with the property in the way he did; but if the Court had no such power, the Mussamuts ought to have applied to have the order sanctioning Macrae's conduct set aside; while the order stands, they cannot be heard to say that the Court had no power to make it. See *Morrison v. Morrison* (7 De. G. M. & G., 214, at p. 223).

Mr. *Evans* on the same side.—From the evidence it is clear that Monohur Das knew that further advances were necessary to secure the production of the indigo, and that such advances were being obtained from the plaintiffs upon the usual terms: the principle of the cases in which the owner of property, who allows another under mistake to improve that property, is held liable to pay for the improvements, or of those in which a first mortgagee is postponed to a second mortgagee because he has stood by and allowed the [85] mortgagor to induce the second mortgagee to advance money by fraudulent misrepresentation or concealment, would therefore apply. The conversations between Monohur Das and Macrae as to how the further advances were to be obtained did not constitute an agreement in defeasance of the Mussamuts' mortgage deed, but amounted only to a direction as to what was to be done in a certain event, namely, if the Mussamuts' advance should be insufficient. As to compensation in cases in the nature of salvage claims, see the Indian Contract Act, 1872, s. 70.

Mr. *Branson* for the Mussamut respondents.—The oral agreement under which the appellants' claim is inadmissible under s. 92 of the Indian Evidence Act, 1872, being inconsistent with the Mussamuts' mortgage deed, and even if it were not inconsistent with the deed, it would still be inadmissible as adding terms to a document of so formal a character; see illustration (h) to s. 92.* Further, the mortgage deed being registered, evidence of a subsequent oral agreement rescinding or modifying it is inadmissible under s. 92, proviso 4. It has been argued that what passed between Monohur Das and Macrae was only a direction or order, and not an agreement; but an order by a principal to his agent in fact involves two contracts—one that the principal will protect

* [Sec. 92—Illustration (h)]:—A hires lodgings of B, and gives B a card on which is written 'Rooms, Rs. 200 a month.' A may prove a verbal agreement that these terms were to include partial board. A hires lodgings of B for a year, and a regularly stamped agreement drawn up by an attorney is made between them. It is silent on the subject of board. A may not prove that board was included in the terms verbally.]



the agent if he perform the order; and another, with the third person with whom the agent deals, that the principal will carry out the agreement made by the agent. Secondly, the documents by which Macrae agreed to hold the indigo at the appellants' disposal are inadmissible under the Stamp Act. They purported to confer an interest in the indigo immediately by their own force and without the necessity of any further act on the part of the appellants upon the indigo coming into existence; they are therefore assignments; see the notes to *Ryall v. Bowles* (2 W. & Tu. L. Ca. in Eq. 4th ed., p. 773). [GARTH, C.J.—In *Lunn v. Thornton* (1 C. B., 379), TINDAL, C.J., draws a distinction between a grant of goods which are not in existence and a grant with a license to seize. At common law the further act of seizure would probably be necessary to pass the property, but in equity it is [86] different; see *Holroyd v. Marshall* (10 H. L. C., 191). [GARTH, C.J.—Suppose goods in England were mortgaged in India by a deed to take effect on the goods being brought to India, would that deed require to be stamped as a mortgage deed?] Both the *factum* of the agreement with Macrae, and Monohur Das' authority to make it, are denied. This is a case in which one of two innocent persons must suffer, but in deciding between them the Court will have regard to the caution displayed by one and the utter want of caution on the part of the other. Macrae cannot stand in any higher position than the owners of the concern would have occupied had they been in possession, and they would have had no claim upon incumbrancers for losses which they might incur in cultivation of the estate—*Fraser v. Burgess* (13 Moore's P. C., 343). The powers with which the Court could invest Macrae are limited by s. 243, Act VIII of 1859. His acts beyond those authorized by s. 243 are *ultra vires* notwithstanding the Court sanctioning it.

Mr. Evans in reply.

Cur. adv. vult.

The following **Judgments** were delivered :—

Garth, C.J.—I have felt considerable difficulty in arriving at a proper conclusion in this case.

The question we have to decide is not only a very serious one to both parties concerned, but it has also an important bearing upon the relations which exist in this country between the owners and managers of large factories on the one hand, and brokers and others, who are in the habit of advancing money for the carrying on of those factories, on the other.

[His Lordship then stated the facts, and continued with reference to the objection to the stamp borne by the three letters of assignment given to the plaintiffs by Macrae :—]

It may, perhaps, be convenient here that I should deal with a preliminary objection which has been made by the defendants. They contend that these documents, upon which the plaintiffs' [87] claim depends, and without which it is of course impossible for them to launch their case, are insufficiently stamped, and, consequently, not receivable in evidence. It is said by the defendants that the documents are "mortgages of property not delivered at the time of the mortgage," within the meaning of cl. 10 of sch. 1 of the Stamp Act, XVIII of 1869.*

* [Sch. 1, cl. 10 :—

Mortgage deed when possession of the property comprised therein is not given by the mortgagor at the time of execution.

Fee payable.

The stamp-duty with which a bond of the amount secured is chargeable (No. 5).]

On the other hand, the plaintiffs contend that, if they are mortgages at all, they are not mortgages of property within the meaning of that clause, because the word "property," as defined by the Act in s. 3, means "property being in British India."

PHEAR, J., at the trial did not think it necessary to decide this point, and he reserved his judgment upon it until he had determined how he should dispose of the whole case; and, as he decided it eventually in favour of the defendants, he did not give any opinion upon the stamp objection. I have great doubt whether it was right to go into the plaintiffs' case at all, or to deal with the document in question as proved, without first deciding whether or not they were admissible under the provision of the Stamp Act; but, at any rate, I think it right to decide the point now, before stating what conclusions I have arrived at upon the merits of the case.

I am of opinion that the proper stamp to be affixed to documents of this description is a stamp of 8 annas.

The documents are, no doubt, in the nature of equitable mortgages, but it cannot be said that the property which is the subject of mortgage exists in British India; and, as an instrument must be stamped at the time it is made, the words "being in British India" would appear to mean being in British India at the time of the making of the instrument. Thus, for instance, if a mortgage were made of property which, at the time of the execution of the deed, was in England, that mortgage would not be subject to stamp duty, although, subsequently and before it took effect, the property might be conveyed into British India (See *Meggs v. Hansraj v. Ramji Joita*, 8 Bom. H. C. Rep., O. C., at p. 180). The question of stamp must depend on the state of things existing at the time when the mortgage [88] was made; and as in the case which I have just instanced, it was possible that the property mortgaged might never find its way to British India, so, in the case of the documents in question, it was possible that the property might never have come into existence at all. If this was not the intention of the Legislature, they should have made their meaning more clear.

I am, therefore, of opinion that the stamp affixed to these documents is sufficient, and that, consequently, they are admissible in evidence.

But then comes the main question in the case, how far they are of any force, or validity, as against the defendants' mortgage.

The plaintiffs, on the one hand, insist that, so far as their advances were necessary for the realization of the indigo of the season 1872-73, Mr. Macrae had authority, either expressed or implied, to pledge the indigo to them, and secure those advances. The defendants, on the other hand, say that Mr. Macrae had no such authority.

Undoubtedly, *prima facie*, the defendants' title being first in order of date, and founded upon the mortgage of the 1st of February, the terms of which are as clear as they can be, ought to prevail; but the plaintiffs put their case in this way:—

In the first place they say, on the strength of Mr. Macrae's own statements, supported by the evidence of other witnesses, that, at the very time when the deed of the 1st of February was in course of execution, it was agreed between him and Monohur Das, who was representing the Mussamuts, that Macrae should borrow from the plaintiffs, or others, any further sums that might be required for the purpose of the concern, and that he should give the

lenders the first charge upon the indigo of the season for securing those sums. Monohur Das and other witnesses for the defendants, who were present on the occasion referred to, deny that any such agreement was made; but, although Mr. Macrae's story may not be correct in all particulars—and, of course, after the lapse of several months, it is hardly probable that he should remember exactly what occurred—I have no doubt that some [89] thing was said at that time as to further advances being required, and that Monohur Das assented to the same course being pursued in that respect as had been adopted in previous years.

But, assuming that the conversation took place precisely as Mr. Macrae describes it, it is impossible to escape from the conviction that it was an agreement made in direct contravention and defeasance of the deed which Mr. Macrae was at that very moment executing to the Mussamuts. It was, therefore, not admissible in law, as contradicting the express terms of the mortgage (see s. 92 of the Evidence Act); and I consider that the learned Judge in the Court below was perfectly right in rejecting it for that reason.

The only possible way in which it occurred to me at one time that the arrangement might be rendered effectual, was to treat what passed between Mr. Macrae and Monohur Das, not as an agreement, properly so called, but as a direction given by Monohur Das, acting for the mortgagees, to Mr. Macrae, acting as the manager for all parties interested in the production of the indigo, to borrow on behalf of the Mussamuts as well as others, such further sums as he might find it necessary to raise, and upon the same terms as money had been borrowed for the same purpose in previous years.

But there is great difficulty in construing what actually passed on that occasion, in this way:—In the first place, this construction is not in accordance with Mr. Macrae's own version of what transpired; and I feel strongly that, in a case of this nature, we ought not to assume anything inconsistent with absolute truth, which would have the effect of depriving the Mussamuts of their vested rights. And, again, we have no right to infer, in the absence of evidence, that Monohur Das had authority from the Mussamuts at that time to invest Mr. Macrae with powers directly at variance with the deed which it was his special duty to perfect. He might have been for general purposes their mooktear and man of business, but, as he was present on that occasion for the very purposes of seeing the deed executed, the contents of which had been approved by the Mussamuts, I cannot say that he had [90] authority, in the absence of any special powers, and without communication with the Mussamuts, to give Macrae directions, the effect of which, if acted upon, would be to defeat their rights.

On the other hand, I cannot look upon Mr. Macrae himself, as we are asked to do by the plaintiffs, as the agent and manager of the property on behalf of the Mussamuts. It is true that, in one sense, he was acting as manager of the factory, under the direction of the Court, for all parties concerned; but, as regards the mortgage to the Mussamuts, and the rights which they acquired under it, he was acting on behalf of the mortgagors as against the mortgagees, and he had clearly no power to invade those rights, by virtue either of his general authority derived from the Court, or of anything that passed on that occasion between him and Monohur Das.

Failing, then, to establish either a substantive agreement, as put forward by Mr. Macrae, or any directions from the Mussamuts which would justify the pledge of the indigo to the plaintiffs, the case is likened by the plaintiffs

Counsel to that of a West India estate, where the consignee, or manager, who has charge of the property for the benefit of all parties concerned, has been held, in a long series of authorities, entitled to charge upon the produce of the property any expenditure or advances which he may have necessarily made for the general benefit of the concern, and to repay himself by that means before any other claims upon the estate have been satisfied. It will be found, however, that the doctrine and principle of these cases do not apply to the present. In the first place, as pointed out by PHEAR, J., in the Court below, the plaintiffs in this suit are not themselves in the position of consignees or managers of the property which they seek to charge; nor can they legally or equitably place themselves in the position of Mr. Macrae, and treat the advances which they have made for the purposes of the factory as advances made by Mr. Macrae himself. The truth is that both the plaintiffs and defendants have advanced their money on the self-same security. Mr. Macrae has obtained the money from both parties upon the faith of each having a first charge upon the indigo, and the question in this [91] case, as I pointed out in the first instance, is not between Mr. Macrae, the general manager of the concern, and the concern itself, but between two conflicting sets of mortgagees, each of whom has advanced money upon the same security. The cases, therefore, of West India estates, as very fully explained by PHEAR, J., in the Court below, have no application to the present.

I, therefore now come to another, and the principal, ground of contention on behalf of the plaintiffs, as to which I confess I have felt very considerable difficulty.

It is urged by the plaintiffs that, however many obstacles of a technical nature may affect their right in this claim, there is no doubt of the fact that the indigo in question could not have been produced, or manufactured, without the aid of the money which the plaintiffs have advanced. They contend that this was a fact well known to Monohur Das, if not to the defendants themselves; and that Monohur Das was not only aware that the plaintiffs were making these advances, and that they were absolutely necessary for the production of the indigo, but that they were making them upon the usual terms—that is to say, that the advances were to be a first charge upon this indigo itself. It is argued, therefore, that the Mussamut defendants have for their own benefit, and in order to secure the production of the indigo in which they were deeply interested, knowingly allowed the plaintiffs to advance their money upon the faith of having a first charge upon the indigo produced; and that, having done this without making any claim adversely to the plaintiffs, or giving them any notice or information that they objected to the plaintiffs' advances, or that they themselves were entitled to the security upon which the plaintiffs were relying, they ought not in equity and good conscience to be allowed now, having had all the advantage of the plaintiff's money, to turn round and deprive them of their security.

The plaintiffs say that the case comes within the principle which has been acted upon in a great number of cases commencing with *Pickard v. Sears* (6 A. & E., 469), and which was laid down thus by [92] Lord Chancellor Campbell in the House of Lords in *Cairncross v. Lorimer* (3 Macq. H. L. Ca., 829):—"The doctrine is found, I believe, in the laws of all civilized nations that, if a man, either by words or conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not lawfully have been done without his consent, and he thereby induces others to do that from which they might otherwise have

abstained, he cannot question the legality of the act which he has so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct."

If a case of this kind could be established by evidence, as clear and strong as that which has been pressed upon us in argument by the plaintiffs' Counsel, I should be very much disposed to decide upon this ground in the plaintiffs' favour; but I am of opinion that, in order to defeat and override an engagement as solemn and distinct as that of the mortgage to the Mussamuts, the evidence that they either themselves, or through their agents, were perfectly aware, not only that the advances were being made by the plaintiffs, but of the amount of those advances and of the terms upon which they were made, should be clear and unmistakeable.

With this view, I have carefully considered the evidence in the present case, and I have reluctantly come to the conclusion that it is by no means sufficient to support the plaintiffs' contention. As regards the Mussamuts themselves, there is no pretence far saying that they were personally made aware either of the necessity for the advances, or of the advances themselves, or of their amounts, or of the terms upon which they were made. On the contrary, at the time when Mr. Macrae says that he made the arrangement with Monohur Das, the Mussamut defendants were having the mortgage deed read over to them, which would certainly convey to their minds that the expenses of the year had been estimated at the sum which they themselves were advancing, *viz.*, Rs. 1,31,325-15-0, and that, in consideration of the large amount of money which they were entrusting to the concern, they were to have a first charge upon the whole of the indigo produce. They distinctly deny that they were made [93] aware of any advances by the plaintiffs, except the Rs. 5,000, which was borrowed for their own necessities; and there is no proof whatever, nor indeed is there any attempt to prove on the part of the plaintiffs, that these ladies were personally made aware of anything further.

But then it is said that Monohur Das was not only their agent for the purpose of carrying out the mortgage transaction, but that he was their karpurdaz, or general man of business for all purposes, and, more particularly, the only person through whom they negotiated with Macrae; and it is also stated (which is perfectly true) that during the whole season these ladies kept two servants in constant attendance at the factory, in order to see how matters were going on there. Now, I quite agree that it has been proved, not only by the plaintiffs' witnesses, but also by Monohur Das, and by the Mussamuts themselves, that Monohur Das did in fact act as their general man of business, and that he was cognizant, at the time when the mortgage was executed, of the intention of Macrae to borrow some further money for the purposes of the factory. He knew also that, in former years, sums had been borrowed from the plaintiffs upon the security of the indigo, though it does not appear that those sums were anything like so large as those borrowed by Mr. Macrae on this occasion; and Banwarilal himself had always personal knowledge of those loans. Moreover, I fully believe Mr. Macrae, when he says that Monohur Das afterwards proposed that the money borrowed by him from the plaintiffs should pass through the hands of the Mussamuts, in order that he (Monohur Das) should get a commission upon it; and I think it extremely likely that, if that request had been complied with, Monohur Das would have been the means of smoothing the plaintiffs' path, and of preventing this litigation. But I do not find any evidence, nor do I in fact believe, that Monohur Das was

aware of the large amount of money which Mr. Macrae was borrowing, or of the actual terms upon which he was obtaining it; and he certainly was not aware of the fact that Macrae was borrowing a large sum, not only for the season 1872-73, but also for the season of 1873-74, upon the security of the indigo which had been mortgaged to the Mussamuts.

[94] It would, undoubtedly, have been far better, and only consistent with fair and open dealing, that the Mussamuts should have been personally informed of Mr. Macrae's requirements, and that they should at least have had an opportunity either of advancing the money themselves, or of obtaining it from the plaintiffs, or other persons. They would then have known precisely what was borrowed; they might have satisfied themselves of the necessity for borrowing it; and they might also have made their own terms with the lenders.

Giving Mr. Macrae, as I am quite disposed to do, credit for all honesty of purpose, and for endeavouring to do the best he could for the factory, I must say that the inconsiderate manner in which he transacted these loans, without taking any steps to make the Mussamuts aware of them, argued not only a want of business-like qualities, but also of that ordinary prudence and consideration which the manager of such a concern may fairly be expected to possess. Although he himself carried out the mortgage security with the Mussamuts, and was the only person then representing the mortgagors, he states in his evidence, that he does not know whether he ever read over the contents of the instrument, and we find him, according to his own account, making an agreement with Monohur Das, at the very time when the mortgage was entered into, directly at variance with its most important provisions. Having regard to those provisions, it was clearly his duty, as it seems to me, before he ventured to borrow further moneys on the security of the indigo produce, or to give any third person such a charge on that produce as would conflict with the Mussamats' rights, to give those ladies distinct notice of what he was about to do, and to inform them not only of the amounts which he proposed to borrow from time to time, but of the persons from whom, and the terms upon which, he proposed to obtain them; and under no circumstances should he have undertaken to pledge the indigo produce for the requirements of the season of 1873-74.

Strange to say, the conduct of the plaintiffs themselves also appears remarkable for a want of business-like caution. They were perfectly aware that the indigo had been previously mort-[93]gaged; and yet, without any enquiry or any notice to the mortgagees, they advance no less a sum than Rs. 88,000 upon the faith of Mr Macrae's statements, and the informal documents upon which they now rest their claim.

I should have no hesitation in finding, as a fact, that the sums advanced by the plaintiffs were, in great measure, at least *bonâ fide* required for the purposes of the factory. Mr. Macrae was not cross-examined with regard to the necessity for the advances, nor as to the items of the plaintiffs' account, nor as to the due expenditure of the sums advanced. It would certainly have been more satisfactory, if, in a case of this nature and importance, instead of being examined under a commission, he had himself appeared in Court, and produced his books, and frankly tendered himself and them for thorough investigation; but, as he was not advised to take this course, and as he was not cross-examined with regard to his expenditure, or the necessity which existed for borrowing the money, I think the defendants were not justified in suggesting that the money was either not required, or that it was improperly expended.

But, when the case of the plaintiffs is put upon this ground, that they acted with proper caution in making these advances, and that the defendants, with full knowledge of all the circumstances, stood by and allowed the plaintiffs thus to advance their money upon the faith of a security which they themselves possessed, and upon which they intended to insist,—I must say that I think in that respect the case of the plaintiffs is not proved.

However much, therefore, I may regret the result (because I quite believe that the plaintiffs acted in perfect good faith, and that the defendants have reaped the benefits of the money which the plaintiffs have been induced to advance), I am satisfied that the conclusion which we have arrived at is the only one consistent with equity and good conscience.

The claim which the Mussamut defendants make to the property in question is undoubtedly well-founded in point of priority; and I think that, upon neither of the grounds contended for by the plaintiffs, can their title to it be legally displaced.

[96] The appeal will, therefore, be dismissed with costs on scale No. 2.

Macpherson, J.—I also think that this appeal must be dismissed.

The matter in dispute is a simple question between two mortgagees as to which of them is to have priority. If the plaintiffs could make use of the arrangement which Macrae says was made at the time of the execution of the mortgage deed, of course they would be entitled to a decree. But they clearly can make no use of it; for, if any such arrangement or understanding then existed between the parties, it was essential that it should be embodied, or provided for, in the mortgage deed.

Then, again, I think it impossible to say that the plaintiffs have proved that the advances were made by them with the knowledge and acquiescence of the defendants (the Mussamuts). Nothing is proved on this issue against them personally; and as regards Monohur Das, the evidence is vague, and not such as it might have been, had Macrae taken the commonest precautions, for there ought to have been no difficulty in bringing home to Monohur Das, at any rate, express notice and knowledge of all the details of what went on between Macrae and the plaintiffs. Even as to the bill for Rs. 5,000, which Monohur Das certainly knew was drawn against Moran and Co., there is nothing to prove that he knew the terms on which it was drawn, and there is nothing to show his knowledge of any other particular advance made by the plaintiffs.

The plaintiffs failing to prove knowledge and acquiescence on the part of the defendants (the Mussamuts), there is nothing, as it seems to me, in the contention that the matter can be treated as in the nature of a case of salvage. The defendants (the Mussamuts) had a first mortgage, as security for a large sum advanced for the season's manufacture, and no reference was made to them before the further advances were taken from the plaintiffs. I am wholly at a loss to comprehend on what principle of equity they, who were present on the spot, and might at any time have been appealed to, can be held liable to give priority to the plaintiffs who were strangers, brought in [97] over their heads, without their consent, by the mortgagor's manager. I say this even on the supposition that the amount now claimed by the plaintiffs was absolutely necessary in order to enable the indigo to be manufactured, and that no indigo could have been made without it. Of course, the position would have been wholly different, had knowledge and acquiescence on the part of the defendants (the Mussamuts) been proved.

The plaintiffs, no doubt, had, in previous years, made similar advances, and had been allowed a first charge on the indigo; but, on this occasion, they knew that Banwarilal, the former mortgagee, had died, and that his representatives were mortgagees of the factory and the season's indigo. Knowing that there were new mortgagees, ordinary prudence ought to have suggested the necessity of procuring their assent before making the advances.

I agree in the opinion that only an eight-anna stamp was required for the agreement between Macrae and the plaintiffs.

I regret the conclusion at which we are compelled to arrive, because it is clear that the plaintiffs acted perfectly honestly throughout, and because I have very little doubt that Macrae also acted honestly, and that his story is substantially true, although it is impossible to say that it is proved to be so. The looseness of Mr. Macrae's mode of doing business is quite wonderful, and it is remarkable that the plaintiffs should have been ready to lend their money on such slender security.

Appeal dismissed.

Attorneys for the Appellants: Messrs. *Berners, Sanderson, and Upton.*

Attorneys for the Respondents: Mr. *Farr* and Bahoo Nemy Churn Bose.

NOTES.

[*Salvage lien*, when arises, see (1904) 81 Cal., 667.

For leave obtained to appeal to the Privy Council, (1876) 2 Cal., 228.]

[98] APPELLATE CIVIL.

The 3rd August, 1876.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Abul Munsoor.....One of the Defendants.

versus

Abdool Hamid *alias* Sabhan Miah.....Plaintiff.*

Limitation—Act IX of 1871, sch. 11, cl. 14—Suit to set aside a sale—Purchase of decree by Joint-debtor.

M sold to *S* her rights under a decree for mesne profits which she had obtained against *A* and two other persons, and *S* thereupon proceeded to execute the decree against *A*'s property, and that property was sold in execution of the decree purchased by *S*, and was purchased by *B*: but in a suit brought by *A* for a declaration that *S* was not the real purchaser, the Court found that *S* had in fact purchased the decree *benami* for *A*'s two joint-debtors, and that consequently he had no right to execute it against the property of *A*. In a suit brought by *A* against *B* in 1874 for the purpose of recovering the property, *held*, that the purchase of the benefit of the decree by *A*'s joint-debtors, although it had the legal effect of satisfying the judgment-debt, did not affect the decree itself. The decree was not void, but only voidable, and the sale under it

* Regular Appeal, No. 152 of 1875, against a decree of the Judge of Zilla Dacca, dated the 12th of February 1875.

binding on A. The suit, therefore, was in effect a suit to set aside a sale under a decree within the meaning of cl. 14 of sch. II of Act IX of 1871,* and inasmuch as it was not brought within one year from the date of the sale, was barred.

THE facts of this case were as follows :—

A certain Mrs. Munro obtained a decree for mesne profits against three persons, the present plaintiff Abdool Hamid, and two Hindus, Guru Gobind and Bykunt Nath. In the year 1268 (1861), Mrs. Munro sold her rights under this decree to one Shitul Chunder, and Shitul Chunder then took proceedings to execute the decree against the estate of Abdool Hamid. Abdool Hamid objected to this, on the ground that Shitul Chunder had purchased the decree, not for himself, but *benami* for his (Abdool Hamid's) two other joint-debtors, and he then brought a suit for the purpose of obtaining a declaration to the effect that his co-debtors were the real purchasers of the decree, and conse- [99] quently that according to a well established rule of law the judgment-debt was thus satisfied. In that suit he obtained a decree on the 16th March 1872. It was found by the Court, that Shitul Chunder had in fact purchased the decree for the two other joint-debtors, and consequently that Shitul Chunder had no right to execute the decree against Abdool Hamid's property.

Previously, however, to the institution of that suit, an order for execution under the decree had been obtained from the Court by Shitul Chunder against Abdool Hamid's property; and under that execution, the property, which is the subject of the present suit, was sold, and Abul Munsoor (defendant No. 2) became the purchaser. This sale took place on the 19th September 1870. On the 12th May 1874, Abdool Hamid, alleging that the sale having been held in execution of a decree which was at the time of sale inoperative, was null and void, brought this suit against Abul Munsoor and others for the purpose of recovering possession of the property thus sold.

The only defendant who appeared was Abul Munsoor, the appellant. His main contentions were, that as the property had come into his possession by a

* [Sch. II, cl. 14 :—

Description of suit.	Period of limitation.	Time when period begins to run.
14.—To set aside any of the following sales :—	One year...	When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought.]
(a) Sale in execution of a decree of a Civil Court ;		
(b) Sale in pursuance of a decree or order of a Collector or other officer of revenue ;		
(c) Sale for arrears of Government revenue or for any demand recoverable as such arrears ;		
(d) Sale of a Patni Taluq sold for current arrears of rent.		

Explanation.—In this clause 'patni' includes any intermediate tenure saleable for current arrears of rent.

sale in due course of law, and no objection had been taken by the plaintiff under s. 257, Act VIII of 1859,* the sale was final, and the suit not maintainable; that the suit was one to set aside a sale, and, not having been brought within one year from the date of the sale, was barred by the law of limitation and that the suit was moreover barred by s. 7, Act VIII of 1859.† The Judge held that the suit was not one to set aside the sale, which would have been unnecessary, and therefore the limitation of one year was not applicable and that the suit was not barred by s. 7. He therefore gave a decree in favour of the plaintiff, from which the defendant appealed to the High Court.

Mr. *M. Ghose* (Mr. *L. Ghose* with him) contended that under the provisions of s. 11, Act XXIII of 1861, † the suit would not lie; that the bringing of the suit amounted to a splitting of the cause of action within s. 7, Act VIII of 1859; and that the property having passed to the defendant by operation of law, the suit was not maintainable, and cited [100] *Mariott v. Hampton* (2 Smith's L. C., 405), *Najabut Ali Chowdhry v. Busseeroollah Chowdhry* (11 B. L. R., 42), *Radhagobind Shaha v. Brojenier Coomar Roy Chowdhry* (7 W. R., 372), and *Chunder Kant Surma v. Bissessur Surma* (7 W. R., 312). Even if such a suit does lie, in this case the plaintiff's suit is clearly barred by limitation. Act IX of 1871, sched. II, art. 14, provides that a suit to set aside a sale in execution of a decree must be brought within a year of the sale. Though the plaintiff chooses to call the suit one for recovery of possession, it is in effect a suit to set aside the sale, and should have been brought within a year from the date thereof—*Ram Kant Chowdhry v. Kullee Mohun Mookerjee* (22 W. R., 84). The following cases were also cited: *Krishnaji Vishvanath Josi v. Mukund Chrvanshet* (2 Bom. H. C. Rep., 18). A party bound by proceedings must, in order to set them aside, bring a suit within one year—*Brijo Kishore Nag v. Ram Dyal Bhadra* (21 W. R., 133).

The sale if not objected to for irregularity, or if the objection is disallowed, shall become absolute.

When the order to set aside a sale shall be open to appeal.

against whom the same has been given shall be precluded from bringing a suit for establishing his claim.]

Suit to include the whole claim.

Relinquishment of part of claim.

‡ [Sec. 11 :—All questions regarding the amount of any mesne profits and interest and sums paid in satisfaction of decrees, &c., are to be determined.

decree was passed and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the order passed by the Court shall be open to appeal. Provided that if upon a perusal of the petition of appeal and of the order against which the appeal is made, the Court shall see no reason to alter the order, it may reject the appeal, and it shall not be necessary in such case to issue a notice to the respondent before the order of rejection is passed.]

* [Sec. 257 :—If no such application as is mentioned in the last preceding section be made, or if such application be made, and the objection be disallowed, the Court shall pass an order confirming the sale; and in like manner, if such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale for irregularity. If the objection be allowed, the order made to set aside the sale shall be final; if the objection be disallowed, the order confirming the sale shall be open to appeal; and such order, unless appealed from, and if appealed from, then the order passed on the appeal, shall be final; and the party been given shall be precluded from bringing a suit for establishing his claim.]

† [Sec. 7 :—Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted, shall not afterwards be entertained.]

‡ [Sec. 11 :—All questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the

The learned Counsel was stopped by the Court who called upon the pleader for the respondents on the point of limitation.

Baboo Sreenath Doss for the respondents.—The only remedy the plaintiff has is to sue in a regular suit. The purchase of a decree by one of the debtors operates as a satisfaction of the decree, which cannot, after such satisfaction, be legally executed—*In the matter of Digamburee Dabec* (B. L. R., Sup. Vol., 938). If in fact there was no live decree which could be executed, anything done under it would be void *ab initio*. [GARTH, C.J.—But a decree does not lose any of its virtues because it has been paid, and a sale in execution of such decree will be void.] [GARTH, C.J.—Not void, but only voidable.] If the sale had been made under a decree in existence at the time, then only would the principle laid down in *Jan Ali v. Jan Ali Chowdhry* (1 B.L. R., A. C., 56) apply. If from a time previous to sale there was not a decree, the one year's limitation would not apply—*Badree* [101] v. *Lokeman* (4 Agra H. C. Rep., 89). Limitation of one year applies only to set aside sales on account of irregularity and not on account of fraud—*Kishen Bullub Mahatab v. Raghoob Nundun Thakoor* (6 W. R., 305).

Mr. M. Ghose in reply.

Cur. adv. vult.

The Judgment of the Court was delivered by

Garth, C.J.—In this appeal it is only necessary for us to decide one of the points which have been taken by the defendants, the appellants, and that point is upon the plea of limitation.

(After stating the facts as above, the learned Chief Justice proceeded as follows) :—

The plaintiff relies upon the same ground as that taken in his former suit, *viz.*, that Shitul Chunder's purchase was made on behalf of his (the plaintiff's) co-debtors ; and that the judgment-debt was consequently extinguished. He contends, therefore, that the subsequent sale was void as against the plaintiff.

One objection to this suit, which was made in the Court below, and is now made by the defendant, the appellant, is, that it is brought to set aside a sale in execution of a decree of a Civil Court within the meaning of cl. 14 of the 2nd schedule of the present Limitation Act, and this point was argued before us yesterday.

There are other questions in the case, and many circumstances which we should have had to take into consideration, if it had been necessary to decide the suit upon its merits. But the facts already mentioned are sufficient to raise the question of limitation, and that question we think ought to be decided in favour of the appellant.

It has been argued by the plaintiff's pleader, that this is not a suit for the purpose of setting aside the sale by which the property passed to defendant No. 2, but a suit to recover possession of that property, and that, assuming the purchase of the decree by Shitul Chunder to have been made for the plaintiff's co-debtors, the decree itself is no longer in force, and [102] the sale which took place under it was absolutely *null and void*. It is obvious, however, that this is not a correct view of the law. The purchase of the benefit of the decree by the plaintiff's joint-debtors could not affect the decree itself, although it had the legal effect of satisfying the judgment-debt which the decree created. There is no suggestion that the decree was not in itself a just one ; and the order made by the Court in the execution of that decree and the sale which took place under that order were both binding upon the plaintiff until proper

steps were taken to reverse them, and the title of the defendant who purchased under that sale was also a perfectly good title, until the sale was set aside in due course of law. The mistake into which the learned Judge has fallen in the Court below is this, that he supposes the sale which took place under a valid order of the Court and under a decree which is at this moment effectual and undisputed, is *ipso facto* void by reason of the judgment-debt having been satisfied. The sale was not void, but only voidable, and whatever may be the frame or language of the plaint in the present suit, its real object and the purpose is to avoid or set aside the sale; because that is the only means by which the defendant's title can be defeated, and the plaintiff restored to his right of possession.

We have been referred by the plaintiff's pleader to a case, *Kishen Bullub Mahatab v. Rughoo Nundun Thakoor* (6 W.R., 305), but that is a totally different case from the present, and will be found not to support the defendant's contention. The plaintiff there had obtained a decree against Pearce Lall Mahta for certain sums of money. Pearce Lall Mahta (the judgment-debtor) then died, and after his death, his wife, for the purpose of preventing her husband's property being taken in execution, made a sham sale of it in the first instance to a third person, and a collusive suit followed, in which a decree was fraudulently obtained, and the property sold under that decree to another party. In this state of things, the plaintiff (the execution-creditor) brought a suit to set aside the collusive sale and subsequent proceedings, upon the ground that they were all one [103] entire fraud, concocted for the purpose of defeating his judgment. It is obvious that this was not a suit to set aside a sale under a decree within the meaning of cl. 14 of the Act.

Another case in the Agra High Court Reports, decided by MORGAN, C. J., and ROSS, J., was also referred to, in which the point as to the one year's limitation seems also to have been taken and overruled. That case is very imperfectly reported, and the ground of the decision seems rather to have been that the one year's limitation did not apply, because the defendant had been guilty of some fraud which prevented the rule of limitation from applying. Whatever may be the correct solution of that case, we certainly do not consider it an authority by which we ought to be influenced in our present judgment.

The case cited by Mr. Ghose—of *Ram Kant Chowdhry v. Kallee Mohun Mookerjee* (22 W. R., 84) decided by KEMP and BIRCH, JJ., is a distinct authority in this Court in favour of the view we take of this question.

The appeal will consequently be allowed with costs. The decree of the lower Court will be reversed, and the plaintiff's suit will be dismissed with costs of the Court below.

Appeal allowed.

NOTES.

[This Article has practically remained unaltered.

In *Parekh v. Bai Vakhat*, (1886) 11 Bom. 119, this article (following 6 W. R., 305) was held inapplicable to a suit by a reversioner to establish his title to property sold in execution of decree obtained against a widow as representative of her deceased husband's estate, fraudulently and collusively,

See also *Bajaji v. Pirchand*, (1888) 13 Bom. 221.]

The 4th September, 1876

PRESENT :

SIR RICHARD GARTH, K.T., CHIEF JUSTICE AND MR. JUSTICE MACPHERSON.

In the matter of the Land Acquisition Act (X of 1870).

Premchand Bural and another.

versus

The Collector of Calcutta.

Land Acquisition Act (X of 1870)—Principle on which Compensation to be given.

Where Government takes property from private persons under statutory powers, it is only right that those persons should obtain such a measure of compensation as is warranted by the current price of similar property in the neighbourhood without any special reference to the uses to which it may be [104] applied at the time when it is taken by the Government, or to the price which its owners may previously have given for it. In accordance with this principle the question for inquiry is, what is the market value of the property, not according to its present disposition, but laid out in the most lucrative way in which the owners could dispose of it.

APPEAL under the Land Acquisition Act (X of 1870) from the decision of the Judge of the 24-Pergannas, who was the Judge appointed to hear cases under the Act.

The case was sent up to the Judge by the Collector of Calcutta as he was not able to agree with the owners as to the amount of compensation to be paid for 2 bighas 15 cottahs of land in Bow Bazaar Street in Calcutta, which had been taken up by the Government. The property was a portion of a block which had been purchased by the owners Premchand Bural and Nobinchand Bural in July 1875 for Rs. 42,000, and they had, since the purchase, spent Rs. 3,000 on it for repairs to a demi upper-roomed house and other buildings on the land. The portion with which this appeal is concerned was the south portion of the part facing Bow Bazaar Street, and having a frontage of about 127 feet, and contained all the buildings, which were admittedly valued at Rs. 15,590. The owners claimed Rs. 800 per cottah for the land alone exclusive of the buildings, amounting to Rs. 44,000. They claimed this as being the selling price of land in the neighbourhood, and they brought forward several instances of land in the neighbourhood having been sold at Rs. 800 per cottah and upwards.

The income of the portion, the subject of appeal, was stated by the owners to be Rs. 129-8, but they also stated that this did not represent the income fairly derivable from it ; they showed that by dividing the property differently according to the plan they put in, and by improvements in the buildings, the receipts would have been, but for the acquisition, materially increased so as to amount to Rs. 172-7 per month or Rs. 2,069-4 a year. The Collector found that there was no instance of so large a block of land being sold at the rate of Rs. 1,000 per cottah ; that there was no analogy between small plots and large blocks in this respect ; and that the true test of the value of the latter was the income derivable from them. He took the [105] owners' estimated

income of Rs. 172-7 per month, and allowed 16 years' purchase, deducting 12 per cent. on account of rates, repairs, and collection charges, which came to Rs. 29,135. This, together with the 15 per cent. allowed by s. 42 of the Act, was the amount of compensation tendered by the Collector amounting to Rs. 33,505-4.

The owners refusing to accept this amount the case was referred to the Judge.

The Judge, after stating the cases brought forward on both sides, continued: "The conclusions deducible from the foregoing are, that for small blocks with a frontage only it may be said that Rs. 1,000 per cottah is by no means high. Omitting Nos. 1 and 2 Wellington Street where the price was extravagant and Beadon Square, which was a large block valued by arbitrators in 1867, all the other instances brought forward by the Burral's shew Rs. 800 to be the lowest, and Rs. 1,867 the highest price per cottah, but with the exception of Chunee Lall Doss' purchases of 2 and 3 College Street, there were circumstances in all the cases tending to raise the price. It must, however, be noticed that 16 years' purchase of the gross income (without deducting anything for rates and taxes or depreciation) is more than the average price paid." The Judge found that the land alone represented Rs. 26,410 out of Rs. 42,000 paid by the Burral's for 7½ bighas at the rate of Rs. 170 per cottah, but that the portion now acquired was on the whole more valuable than the remainder, and that Rs. 15,602 was a fair price at which to assess the land. He arrived at this amount on a calculation of the yearly income at Rs. 2-1-9 per cottah, and assuming that the whole would be fully built upon. Adding the value of the buildings, Rs. 15,590, the sum he awarded was Rs. 31,927.

The owners appealed from this decision to the High Court.

Mr. Jackson and Mr. Macrae for the appellants.

The Advocate-General, offg. (Mr. Paul) and the Standing Counsel (Mr. Kennedy) for the respondent.

[106] The arguments sufficiently appear in the **Judgment** of the Court, which was delivered by

Garth, C.J.—(MACPHERSON, J., *concurring*).—In this case I think that the learned Judge in the Court below has not done full justice to the owners of the property. He has substantially adopted the valuation of the Collector; and has made his award upon the supposition that the fair mode of estimating the price of the property in the market is to capitalize its present rental at so many years' purchase.

I consider that, having regard to the evidence on both sides, this is not a fair way of arriving at the market value. Where Government takes property from private persons under statutory powers, it is only right that those persons should obtain such a measure of compensation as is warranted by the current price of similar property in the neighbourhood, without any special reference to the uses to which it may be applied at the time when it is taken by the Government, or to the price which its owners may previously have given for it. Of course, if it can be satisfactorily shown that the purposes to which the land is applied are as productive as any other to which it is applicable, or that the price given by the owners is its full market value, it would be very just to assess the compensation upon that basis. But in this case I find no evidence to that effect. On the contrary, it would appear that a considerable portion of the

land is virtually unoccupied, and that the owners had previously prepared a plan for laying out the whole area to much greater advantage; and, moreover, it is in evidence that the claimants bought the property at a lower rate, in consequence of the title having been seriously questioned by two professional gentlemen. We have therefore to consider, having regard to the evidence on both sides, what is a fair sum to award to the claimant in respect of this land; but, before we enter upon this question, there is a preliminary point which it is desirable that we should at once dispose of.

Mr. Jackson insists that his clients are entitled to the agreed price of the buildings, as they stand, in addition to the fair value of the land itself. But I do not see how, upon any principle of compensation which has been suggested in argument, his claim in this respect can be supported; and I have tried in vain to discover why the learned Judge who tried the case in the Court below, or the assessors, thought it right to allow the owners this sum.

If you estimate the value of the property upon its present rental, and capitalize that rental into so many years' purchase, you are, in fact, taking into consideration the value of the buildings; and if you award the sum thus arrived at to the owners, you are, in fact, paying them the value of the buildings; so that, besides giving them the value of the buildings as they stand, you would be paying them for the buildings twice over.

But, then, suppose you proceed upon another principle. Instead of estimating the value of the property according to its present uses and its present rental, suppose you ascertain what it would be worth, if occupied in a different way, as for a bazaar, or for shops, or other buildings of a lucrative character. Estimating it in this way, you must necessarily take into consideration that the present buildings must all be pulled down, because, until they are pulled down, the land could not be applied to its new and more advantageous uses; and all that the owners could possibly obtain, or ask, for the buildings, under such circumstances, would be the price of the old materials.

Then, there is again a third principle of valuation, in which the same result would follow as in the first mode of estimating the value; and that is to suppose the buildings to remain standing, and to estimate them at a capitalized rental value, while you estimate the remainder of the property at its market value, treating it as unoccupied land. This principle of valuation would prove anything but favourable to the owners, because they could not expect to get for Mrs. Romaine's house, with a bazaar or shops built round it, as much rent as they have hitherto obtained; nor could they lay out the frontage land to advantage, with the small buildings which now occupy a portion of it obstructing the full range of the street. But if this principle were adopted, the owners could not then be entitled to the capitalized rental of the buildings as well as [108] to their value as they stand, because they would in this way be again receiving the value of the buildings twice over.

This point being disposed of, it seems clear that the fairest and most favourable principle of compensation to the owners is that upon which the weight of the argument on both sides has been bestowed, *viz.*, what is the market value of the property, not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owners could dispose of it.

And, after full consideration, it appears to me that the fair amount of compensation to award to the owners upon this principle is Rs. 39,500.

Three of the claimants' witnesses—one of them Shambhu Nath Rai, a large landowner in Calcutta, who, it seems, has had extensive dealings in house property—state the value of the claimants' land, back and front, at Rs. 800 a cottah. Now, having regard to the large area of back land, as compared with the frontage, and also to the fact that 15 cottahs are occupied by the tank, Rs. 800 per cottah seems rather a high average for the land all round. The frontage is, no doubt, valuable; and, making all due allowance for some of the properties mentioned by the witnesses commanding a higher price in consequence of the purchaser's requiring them for special purposes, I cannot estimate the frontage at less than Rs. 1,000 a cottah. Making the same allowance then which it is generally fair to do in cases of this nature for a little over-statement on the part of the claimants' witnesses, Rs. 700 a cottah would, probably, be a fair price for the entire area. This would give for the 55 cottahs Rs. 38,500. If, instead of calculating the whole area together, we were to estimate the front land (say 15 cottahs) at Rs. 1,000, and the back land at Rs. 600 per cottah, the result would be very nearly the same, say—

15 cottahs at Rs. 1,000	...	15,000	0	0
40 cottahs at Rs. 600	...	24,000	0	0

Rs. 39,000 0 0

Or, if we were to adopt the evidence given for the Government, their first witness says that he purchased 32 and 33 Bow Bazaar [109] occupying an area very nearly of the same extent as the claimants' (between 54 and 55 cottahs) for Rs. 38,000. He gave this sum with the building in very bad repair—a fact which we all know depreciates, sometimes unduly, the value of house property. Taking then the claimants' property of equal extent to be worth an equal sum, the result would be much the same as the sum which we propose to allow. Then, if to this sum we add another Rs. 1,000 for severance of the portion adjoining Champatollah Lane, we consider the plaintiffs will be properly compensated. The damage caused by severance is not considerable; the two portions of the property have been, in fact, divided by a wall, and the severed portion still retains a frontage upon Champatollah Lane.

We therefore set aside the award of the Judge, and fix the amount of compensation at Rs. 39,500, to which the Collector will of course have to add the statutory 15 per cent. The owners will have the costs of this appeal, and the costs to which they are entitled in the Court below will be calculated according to the rule adopted by Mr. Beaufort,—that is to say, the costs which would be allowed in a regular suit. The owners are also entitled to interest at 6 per cent. upon the sum which we award for compensation from the time when the Government took possession of the property.

Decree varied.

Attorney for the Appellants : Mr. Carruthers.

Attorney for the Respondent : The Government Solicitor, Mr. Sanderson.

NOTES.

[In *In re Merwanji Cama*, (1907) 9 Bom. L. R., 1292, it was contended that the personal incapacity of the owner to realize the possibilities of development is to be considered in determining the compensation to be given to him. This was negatived. See also *Government v. Dayal* (1906) 9 Bom. L. R., 99.

As to valuation of frontage, see (1886) 10 Bom. 585.

See also (1890) 15 Bom. 279 ; (1907) 34 Cal. 599.]

[110] APPELLATE CRIMINAL.

The 11th September, 1876.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE MITTER.

In the matter of Juggut Chunder Chuckerbutty.*

Criminal Procedure Code (Act X of 1872), ss. 294 and 297—Revision—Power of High Court—"Material Error."

In a case of apprehended breach of peace, the Magistrate bound over the parties in sums of money aggregating on the whole to Rs. 60,000 or upwards. The High Court quashed the order, holding that it was altogether unreasonable.

Per MARKBY, J.—Ss. 294 † and 297, ‡ Act X of 1872, do not debar the High Court from interfering where in cases requiring the exercise of discretion, it appears upon the face of the

* Criminal Motion, No. 282 of 1876, against the order of the Joint Magistrate, dated 22nd February 1876, and against the order of the Sessions Judge of Backergunge, dated the 7th June 1876.

† [Sec. 294 :—The High Court may call for and examine the record of any case tried by any Subordinate Court for the purpose of satisfying itself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such Court.]

‡ [Sec. 297 :—If, in any case either called for by itself or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it it shall pass such judgment, sentence or order thereon as it thinks fit.

If it considers that an accused person has been improperly discharged, it may order him to be tried, or to be committed for trial;

If it considers that the charge has been incorrectly framed, and that the facts of the case show that the prisoner ought to have been convicted, it shall pass sentence for the offence of which he ought to have been convicted ;

Provided that if the error in the charge appears materially to have misled and prejudiced the accused person in his defence, the High Court shall annul the conviction and remand the case to the Court below with an amended charge, and the Court below shall thereupon proceed as if it had itself amended such charge.

If the High Court considers that any person convicted by a Magistrate has committed an offence not triable by such Magistrate, it may annul the trial and order a new trial before a competent Court.

If it considers that the sentence passed on the accused person is one which cannot legally be passed for the offence of which the accused person has been convicted or might have been legally convicted upon the facts of the case, it shall annul such sentence and pass a sentence in accordance with law.

If it considers that the sentence passed is too severe it may pass any lesser sentence warranted by law ; if it considers that the sentence is inadequate, it may pass a proper sentence.

The High Court may, whenever it thinks fit, order that the sentence, in any case coming before it as a Court of Revision, be suspended ; and that any person imprisoned under such sentence be released on bail, if the offence for which such person has been imprisoned be bailable.

Except as provided in sections three hundred and twenty-eight and three hundred and ninety-eight, no Court, other than the High Court, shall alter any sentence or order of any Subordinate Court except upon appeal by the parties concerned.

No person has any right to be heard before any High Court, in the exercise of its powers of revision either personally or by agent, but the High Court may, if it think fit, hear such person either personally or by agent.]

proceedings that the Magistrate has exercised no discretion at all or has exercised his discretion in a manner wholly unreasonable.

Per MITTER, J.—Under s. 297, the High Court has the power of interfering with judgments, sentences or orders of Court subordinate to it, if there has been a material error in any judicial proceeding of such Courts, meaning thereby any error appearing on the face of a judicial proceeding resulting in an unjust order.

APPLICATION under s. 297 of the Criminal Procedure Code (Act X of 1872).

The petitioner in this case had been bound over by the Joint Magistrate of Backergunge for an apprehended breach of the peace in a recognizance of Rs. 10,000 with two sureties for Rs. 5,000 each. A dispute had existed between the petitioner and one Baroda Chuckerbutty on the one hand, and one Sabir Myan on the other in respect of a plot of land. It was found by the Joint Magistrate that until Aghran last all the ryots, except a small minority, had paid the rent to Sabir Myan, but in that month, in consequence of his oppression, several of them went over to Baroda Chuckerbutty. Up to that time there had been much litigation between the parties, but no attempt to break [111] the peace. A breach of the peace being, however, then apprehended, Police were stationed near the land in dispute, which from the Magistrate's judgment appeared to have been effectual in preventing any disturbance. The Magistrate, nevertheless, thought it desirable to take some further security. Summonses were accordingly issued against four persons, including the petitioner, Baroda, Sabir, and two of their respective servants. After enquiry the Joint Magistrate bound over the principals in recognizances of Rs. 10,000 each, with two sureties of Rs. 5,000 each, and the servants in small sums.

An application was made to the Sessions Judge, among others, on the ground that the recognizance was excessive. In dealing with this objection, the Judge used the following words :—" Lastly, it is urged that the amount of the recognizance is excessive ; here I quite agree with the petitioners, and, if I could only have seen my way, I should certainly have referred the case to the High Court for this reason alone ; but this is a point on which the High Court decline to interfere."

The petitioner, thereupon, preferred the present application to the High Court.

Baboo *Ashootosh Dhur* for the Petitioner.

No one appeared for the Crown.

The following **Judgments** were delivered :—

Markby, J. (after stating the facts as above, continued) :—The Sessions Judge is quite right in supposing that this Court would not ordinarily interfere with the discretion of Magistrates, as to the amount of security to be taken in cases of this kind. The Magistrate is in a much better position than this Court for judging what would be the proper amount of security, which must vary with the danger to be apprehended and the means of the parties. But the Magistrate cannot make an order that is altogether unreasonable. Here the Magistrate, although there has been as yet no breach of the peace, and apparently no very strong determination to resort to violence, has required the parties to enter into bonds amount-[112]ing altogether to upwards of Rs. 60,000. The parties do not appear to be wealthy ; and had the security ordered been really required, in all probability it could not have been furnished. We find, however, that one of the parties, who has been accepted as surety for Rs. 5,000, is described as a *kotwal* and another as a *mookhtear*, and all the bonds were executed on the very day the order was made. It would

thus appear as if the amounts mentioned in the bond are merely nominal, and that no real security to that extent was required.

I consider that in this case, the Joint Magistrate has not done that which the law requires. Either he has wholly failed to exercise the discretion which the law requires him to exercise in taking security for good behaviour, or, if he has exercised it at all, he has exercised it in a manner which is altogether unreasonable. Whichever be the case, I do not think we ought to allow such an order to stand.

No one appears on behalf of Government to support the order, and the Magistrate has offered us no explanation. We have nevertheless thought it necessary to consider whether this is a case in which we ought to interfere under the powers of superintendence and revision over the subordinate Courts conferred upon the High Court by Chapter XXII of the Code of Criminal Procedure. It has been held, notwithstanding the very general words of ss. 294 and 297, that this Court ought not, in the exercise of these powers, to go into the evidence and examine the conclusions of the Court below upon the facts. I desire to adhere to those decisions. It seems to me necessary to do so, as otherwise an appeal would virtually lie against every decision of the subordinate Courts, which was clearly not intended by the Legislature. But, nevertheless, I do not think that we are excluded from interference where, in cases requiring the exercise of discretion, it appears upon the face of the proceedings that the Magistrate has exercised no discretion at all, or has exercised his discretion in a manner wholly unreasonable. I think that we have the power and ought to interfere in such cases, just as we have the power, and ought to interfere where a Magistrate has been guilty of misconduct. I did not myself intend to say anything contrary to this in *In* [113] *the matter of Debichurn Biswas* (20 W. R., C. R. 40). Nor do I think that the decision in *In the matter of Belilos* (12 B. L. R., 249), lays down anything contrary to this view. No doubt the language of PONTIFEX, J., in that case and my own language in the other case might be pressed to the extent of confining this Court when exercising powers of revision strictly to errors in law. As a general rule, that is so. Cases of misconduct or utter want of discretion are rare and exceptional, and were not, I think, contemplated when those decisions were given. I am of opinion that this Court, when exercising its powers of revision, is justified in dealing with such cases, and that we may do this without in any way interfering with the rule that this Court will accept the conclusions of the Court below upon the evidence in the case.

Upon the ground that it appears upon reading the proceedings that the Joint Magistrate has either exercised no discretion at all in fixing the amount of security, or that he has exercised his discretion unreasonably, and that the Magistrate has given us no explanation, I think we ought to set aside his order.

Mitter, J.—I am also of opinion that we ought to set aside the order of the Joint Magistrate in this case. Under s. 297 this Court has the power of, interfering with judgments, sentences or orders of Courts subordinate to it, if there has been a "material error in any judicial proceeding" of such Courts. These words, it seems to me, mean any error appearing on the face of a judicial proceeding resulting in an unjust order. For the reasons given by my learned colleague, there appears, on the face of the proceeding of the Court below, such a material error as would warrant this Court in setting aside the order passed by it.

Order quashed.

NOTES.

[Followed in *In the matter of Umbica Proshad* (1877) 1 C. L. R., 268. See also (1890) 14 Bom., 331.]

[114] APPELLATE CIVIL.

The 12th May, 1876.

PRESENT :

MR. JUSTICE AINSLIE AND MR. JUSTICE BIRCH.

Runglall Misser.....Plaintiff

versus

Tokhun Misser and another.....Defendants.*

Act VIII of 1859, s. 119—Ex parte Decree—Re-hearing granted after expiration of time limited for application.

The plaintiff obtained an *ex parte* decree on the 5th July 1873, of which he took out execution on the 9th August. On the 11th of November the defendant applied for and obtained a re-hearing under s. 119,† Act VIII of 1859. On the re-hearing, his suit was dismissed by both the lower Courts on the merits. *Held*, on a special appeal to the High Court, that, although s. 119 provides that an order for re-hearing shall be final, it is final only in the sense that it is not by itself open to appeal, and that the plaintiff was not precluded by that section from raising the objection that the order for re-hearing was made after the time limited therein, and therefore ought to be set aside as made without jurisdiction.

SUIT for possession of land, in which the plaintiff obtained an *ex parte* decree on the 5th of July 1873, in execution of which he obtained possession, the execution being taken out on the 9th August. On the 11th November 1873, the defendants made an application under s. 119, Act VIII of 1859, to

* Special Appeal, No. 2049 of 1875, against a decree of the Subordinate Judge of Zilla Gaya, dated the 17th of August 1875, affirming a decree of the Munsif of Aurangabad, dated the 3rd of October 1874.

† [Sec. 119 :—No appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared or from a judgment against a plaintiff by default for non-appearance. But in all cases in which judgment may be passed *ex parte* against a defendant he may apply within a reasonable time not exceeding thirty days after any process for enforcing the judgment has been executed, to the Court by which the judgment was passed, for an order to set it aside; and if it shall be proved to the satisfaction of the Court that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the judgment, and shall appoint a day for proceeding with the suit. In all cases of judgment against a plaintiff by default, he may apply, within thirty days from the date of the judgment, for an order to set it aside; and if it shall be proved to the satisfaction of the Court that the plaintiff was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the judgment by default, and shall appoint a day for proceeding with the suit. But no judgment shall be set aside on any such application as aforesaid, unless notice thereof has been served on the opposite party. In all cases in which the Court shall pass an order under this section for setting aside a judgment, the order shall be final; but in all appealable cases in which the Court shall reject the application, an appeal shall lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable, provided that the appeal be preferred within the time allowed for an appeal from such final decision, and be written upon stamp paper of the value prescribed for petitions to the Court where a stamp is required for petitions.]

No appeal from judgment passed *ex parte* or by default.

When and how judgment *ex parte* against a defendant may be set aside.

When and how judgment by default against a plaintiff may be set aside.

No judgment to be set aside without notice to opposite party.

Order for setting aside judgment shall be final.

In appealable cases an appeal from order of rejection.

Proviso.

set aside the *ex parte* decree and for a re-hearing. This application was refused by the Munsif, but on appeal his decision was reversed by the Judge, who, without determining whether the application was within time, held that the defendants were entitled to a re-hearing.

On the re-hearing before the Munsif, the plaintiff failed to make out his case, and his suit was dismissed on the merits, the order being confirmed by the Judge on appeal. The plaintiff, thereupon, preferred this special appeal to the High Court, on the ground that the application for re-hearing under s. 119 [115] having been presented after the expiry of the 30 days therein limited, the Courts below were in error in granting the application and hearing the case on the merits. He also appealed on the facts of the case.

Babu Abinash Chunder Banerjee for the Appellant.

Mr. Younan for the Respondents.

The contentions and cases cited appear in the **Judgment** of the Court, which was delivered by

Ainslie, J. (who, after stating the facts, continued):—The points which have been urged before us are, that, whereas s. 119 provides a definite limit of time, beyond which an application for a re-hearing shall not be entertained by the Court, the order of the Judge admitting the application, and all the proceedings following thereon, have been done without sanction of law; and that in this appeal from the decree, the appellant has a right to question every order of the subordinate Courts leading up to the decree objected to.

S. 119 of the Code of Civil Procedure says, that, in all cases in which the Court shall pass an order under this section for setting aside a judgment, the order shall be final. But it is contended on the strength of a Full Bench judgment in *Bhyrub Chunder Surma Chowdhry v. Madhubram Surnah* (11 B. L. R., 423), that the word "final" does not mean final absolutely, but final for the time; that the order by itself shall not be open to appeal; but that whenever the case is opened by an appeal from the decree, that order, as well as every other interlocutory order, may form the subject of appeal.

There can be no doubt that, if a case under s. 119 cannot be distinguished in principle from a case under s. 378, we ought to follow the ruling of the Full Bench. Though we are not constrained by a positive rule of the Court, we ought not to refuse to be guided by a decision on a matter which appears to us to be strictly analogous; it is for the respondent to satisfy us that the supposed analogy does not really exist, and that he has failed to do.

[116] Independently of this, there is a reported case exactly in point—*Bimola Soondurea Dossee v. Kalec Kishen Mojomdar* (22 W. R., 5. See also *Radha Binode Chowdhry v. Juggut Shurnokar*, 6. W. R., 300; *Toolsee Dossee v. Durga Churn Paul*, 15 W. R., 175; and *Keshavram v. Ramchandra Trimbak*, 8 Bom., H. C. Rep., A. C., 44)—decided by JACKSON and McDONELL, JJ., and

* [Sec. 378.—If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application, but if it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review, and its order, in either case, whether for rejecting the application or granting the review shall be final. Provided that no review of judgment shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree of which a review is solicited.]

The order of the Court for granting or refusing the review is final.

Proviso.

the view taken by JACKSON, J., is this, that a Court acting under s. 119 has jurisdiction to act under the particular conditions specified by the section, but unless an application can be shown to be within those conditions, the Court has no jurisdiction whatever to entertain it.

After referring to that portion of the section which I have read above, he says :—"Therefore if it appears that the Court had passed an order otherwise than under this section, there would be no finality, and it has been held in a matter very much analogous to this, viz., where an application to review a judgment has been admitted, and where a decision afterwards takes place on re-hearing, and that decision comes to the lower Appellate Court on appeal, that the lower Appellate Court is competent to look into the question whether the admission of the review has been in accordance with the restrictions imposed by the law."

On the face of these proceedings, it is manifest that s. 119, which strictly limits the period for making an application for re-hearing to thirty days, to be computed from definite starting points, absolutely barred the hearing of the application by the first or any other Court.

It has been argued that the plaintiff had a remedy by motion in this Court under s. 15 of the Charter Act. It may be conceded that he had a remedy, but no authority has been shown to us for the proposition that, if a man has two remedies, and does not choose to take the one, he shall forfeit the other. If the plaintiff has a right to appeal against this order, the fact that he had a right to question it by motion under s. 15 cannot take away the former right. It was also urged that it is a matter of discretion with the Court to give or withhold from the plaintiff the advantage of the limitation prescribed in s. 119. But if this is a point that he may fairly and properly [117] raise in special appeal, it is not a matter of discretion with the Court. Our judgment is claimed on this point, and we can neither refuse to decide it in favour of the plaintiff, nor having decided it in his favour, can we refuse to give him the benefit of the decision.

The result is, that the order made for the re-hearing of the case, and dated the 25th of June 1874, and all the proceedings subsequent thereto, must be quashed, and the whole of the costs of these proceedings must be paid by the respondents.

Appeal allowed.

NOTES.

[EX PARTE DECREE—RE-HEARING—]

Note the following remarks on this case in Messrs. Woodroffe & Amcer Ali's Civil Procedure Code, 1908 :—

"Though there is some authority to the contrary (citing this case), the better and more recent opinion is that such an order (ordinarily at least) is not one affecting the decision of the case under sec. 99, and cannot be contested on appeal from the final decree," citing, (1905) 9 C. W., N. 584 : (1895) 22 Cal., 981 ; *contra*, (1903) 26 Mad., 604.]

APPELLATE CRIMINAL.

The 10th June, 1876.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE MITTER.

In the matter of Pursooram Borooah.....Petitioner.*

Powers of Magistrates—Summary Jurisdiction—Transfer—Criminal Procedure Code (Act X of 1872), ss. 56 & 222—Furlough.

The petitioner had been convicted by Mr. Carnegie, the Assistant Commissioner of Kamroop, in the exercise of a summary jurisdiction, under s. 222 of Act X of 1872. † This officer was, in the year 1872, in charge of the Jorehaut Division in the district of Seebaugor, "with first-class powers and powers under s. 222" of the Act. In 1874 he proceeded on furlough to England, and, on his return in 1875, was posted to the district of Kamroop, and invested with the powers of a Magistrate of the first class.

Held, that s. 56 of Act X of 1859 did not apply, and that Mr. Carnegie had no summary jurisdiction in Kamroop—

Per MARKBY, J., on the ground that, by the terms in which the Government had conferred that jurisdiction on Mr. Carnegie, it had in effect "directed," within the meaning of s. 56 of Act X of 1872, ‡ that he should not exercise that jurisdiction anywhere but in Seebaugor.

Per MITTER, J., on the ground, that the office to which Mr. Carnegie was appointed in Kamroop was not equal to or higher than that which he had held in Seebaugor.

Quere per MARKBY, J., whether the posting of Mr. Carnegie to Kamroop, after his return from furlough, was a transfer from Seebaugor within the meaning of s. 56 of Act X of 1872.

* Criminal Motion, No. 92 of 1876, against an order of the Assistant Judicial Commissioner of Kamroop, dated the 3rd December 1875.

† [Sec. 222 :—The Magistrate of the district may try the following offences in a summary way, and, on conviction of the offender, may pass such sentence as may be lawfully inflicted under section twenty of this Code :—

- (1) Offences referred to in section one hundred and forty-eight of this Code.
- (2) Offences relating to weights and measures under sections two hundred and sixty-four, two hundred and sixty-five, and two hundred and sixty-six of the Indian Penal Code.
- (3) Hurt, under section three hundred and twenty-three of the Indian Penal Code.
- (4) Theft, under section three hundred and seventy-nine of the Indian Penal Code, where the value of the property stolen does not exceed fifty rupees.
- (5) Theft, under section three hundred and eighty of the Indian Penal Code, where the value of the property stolen does not exceed fifty rupees.
- (6) Theft, under section three hundred and eighty-one of the Indian Penal Code, where the value of the property stolen does not exceed fifty rupees.
- (7) Receiving stolen property, under section four hundred and eleven of the Indian Penal Code.
- (8) Mischief, under section four hundred and twenty-seven of the Indian Penal Code.
- (9) House-trespass, under section four hundred and forty-eight of the Indian Penal Code.
- (10) Insult with intent to provoke a breach of the peace, under section five hundred and four, and criminal intimidation, under section five hundred and six of the Indian Penal Code.
- (11) Abetment of, or attempt to commit (when such attempt is an offence), any of the foregoing offences.]

‡ [Sec. 56.—Whenever any person holding an office in the service of Government, who has been invested with any powers, under this Act or any enactment hereby repealed, in any district, is transferred to an equal or higher office of the same nature within another district, he shall, unless the Local Government otherwise directs, continue to exercise the same powers in the district to which he is so transferred.]

[118] Baboos *Rash Behary Ghose* and *Krishna Komul Bhattacharjee* for the Petitioner.

The Junior Government Pleader (Baboo *Juggodanund Mookerjee*) for the Crown.

THE facts and arguments are sufficiently stated in the judgment of MARKBY, J., which was as follows :—

In this case an important question is raised as to the powers of a Magistrate in the province of Assam.

It appears that one Pursooram was, in December last, tried summarily and convicted by Mr. Carnegy for the offence of giving false information to a public servant. A reference was made upon the subject to this Court by the Judicial Commissioner of Assam upon other points than those now before us, and this Court, upon that reference, refused to interfere. A petition was then presented on the 5th April on behalf of the prisoner, praying that the conviction and sentence be set aside, upon the ground that Mr. Carnegy had not the power to try the prisoner summarily.

The circumstances of the case, so far as they bear upon the power of Mr. Carnegy to try this prisoner summarily, appear to be these :—

Mr. Carnegy, in the year 1872, held the office of Assistant Commissioner in the district of Assam, which was then what is called a non-regulation district under the Local Government of Bengal. On the 1st of January 1873, a Resolution of the Local Government of Bengal was published in the *Calcutta Gazette*, by which it was directed, under the provisions of the Code of Criminal Procedure, that the officers and others whose names appeared in the schedule therewith published should in each case exercise the powers shown opposite their names in the districts shown in the schedule. In the schedule we find under the heading "Sebsaugor District" the name of Mr. Carnegy, and opposite his name are the words "charge of Jorehaut Division, with first class powers and powers under s. 222." This latter section is the one which relates to summary trials.

No earlier Gazette or appointment of Mr. Carnegy has been produced before us, but I think this is sufficient evidence that [119] Mr. Carnegy was the Magistrate of the Jorehaut Division of the District of Sebsaugor (see s. 28 of the Code of Criminal Procedure) at that time and had the power to try offences summarily in that district.

On the 6th February 1874, certain territories, including the districts of Sebsaugor and Kamroop, were removed from the Government of the Lieutenant-Governor of Bengal and placed under a Chief Commissioner. In April 1874, Mr. Carnegy, having obtained furlough on medical certificate from the Government of India for one year, left India shortly afterwards. Several officers in succession were appointed, whilst Mr. Carnegy was absent, to take charge of the Jorehaut Sub-division. In the month of September 1875, Mr. Carnegy, having obtained leave from the Secretary of State to return to duty, arrived in India. He never returned to the district of Sebsaugor, nor up to this time has he resigned or vacated his office as Magistrate in that district, otherwise than he may have done so by reason of the circumstances above mentioned. On the 25th September there appeared a notification in the *Assam Gazette* that Mr. Carnegy, Assistant Commissioner, was "posted" to the district of Kamroop, and on the same day there appeared a further notice in this *Gazette* that Mr. Carnegy was vested with the powers of a Magistrate of the first class.

Upon these facts it seemed to us, when the matter was before us on a former occasion, that Mr. Carnegy had no power to try prisoners summarily in the district of Kamroop. The exercise of those powers was originally limited to the district of Seesaugor, and when Mr. Carnegy was posted to Kamroop (whatever that may mean), whilst on the one hand he was expressly authorized to exercise the powers of a first class Magistrate in the district of Kamroop, the remaining power which had been formerly conferred upon him of trying prisoners summarily was not re-granted.

It was at this juncture that we released the prisoner upon bail, but we abstained from quashing the conviction, because the matter being one which affected the jurisdiction of a judicial officer and possibly of many judicial officers, we thought the Local Government ought to be represented.

[120] Babu Juggodanund Mookerjee has now appeared for the Local Government. He has not given us any additional information, but he relies entirely upon the provisions of s. 56 of the Code of Criminal Procedure, by virtue of which he contends that all the powers conferred upon Mr. Carnegy in Seesaugor are extended to Kamroop.

That section provides as follows :—" Whenever any person holding an office in the service of Government, who has been invested with any powers under this Act or any enactment hereby repealed in any district, is transferred to an equal or higher office of the same nature within another district, he shall, unless the Local Government otherwise directs, continue to exercise the same powers in the district to which he is so transferred."

Upon this section two questions have been raised : 1st—Was Mr. Carnegy "transferred" within the meaning of the section ; 2nd—Is the operation of the section prevented because the Local Government has "otherwise directed."

Neither of these questions is free from difficulty. With regard to the first it is said, that by going on furlough Mr. Carnegy vacated his former appointment, and could not therefore on his return be transferred ; that no order transferring him has been made, and that the term "posted" indicates not a transfer, but a fresh appointment. But that word is ambiguous, and, before deciding the question upon this ground, it would be necessary to see whether Mr. Carnegy ever really vacated his former appointment. Upon this matter there is, as far as I am aware of, no rule laid down by authority. Prior to 1868 it was, I believe, always understood that any officer going on furlough vacated his appointment, and under an order of the Government of India of the 16th December 1861, it is expressly declared that "Civil Servants taking furlough will vacate their offices." Mr. Carnegy was not a Covenanted Civil Servant, and to what furlough rules he may have been subject prior to 1868 I am not quite sure, but I believe the rule that officers going on furlough vacated their appointments was universal.

On the 16th June 1868, however, an order was published, which directs that, except as hereinafter provided, "an officer, when on furlough, shall retain a lien on his substantive appointment-[121]ment, or on an appointment of similar character and not less salary." This is applicable to all officers, whether covenanted or uncovenanted. It seems to me extremely doubtful whether the effect of this last rule is that the officer taking furlough retains his appointment. To my mind it rather indicates the contrary. The matter, however, may not depend entirely

upon those rules, which are furlough rules only issued by Government in the Financial Department. It may be that what really vacates an office is not the going on furlough, but the appointment of another person to the office; and, as far as I have seen, no person was especially appointed to succeed Mr. Carnegie in his office as Magistrate in the district of Seesaugor. The number of Subordinate Magistrates in a district being unlimited, there was no necessity for doing so. And this seems to be the view of the Local Government of Assam: for whilst Mr. Carnegie's powers were conferred afresh, it does not appear that he ever received any fresh appointment as Magistrate. He is, no doubt, treated as having ceased to be Magistrate of a division of a district, but he is apparently treated as being still, on his return, a Subordinate Magistrate *in or of* a district, which district could have been no other than the district of Seesaugor.

I should, therefore, desire further consideration before holding that Mr. Carnegie vacated his former appointment by going on furlough, and that on this ground he was not transferred to the district of Kamroop within the meaning of s. 56; I desire to be understood as expressing no opinion upon this point.

But there remains the second question, whether the operation of the section is prevented, because the Local Government has otherwise directed.

If we take s. 56 quite literally, it would seem to indicate that the "direction otherwise" there alluded to was a direction contemporaneous with the transfer. This would render a special direction necessary in every case of transfer where the powers had already been locally restricted under s. 38*. But when the Local Government had already declared its intention on this subject, this would seem to me to be superfluous. And it does not appear to me necessary to put this construction on s. 56. I think that the words "unless the Local Government [122] otherwise directs" reasonably construed will include a previous restriction under s. 38, as well as one imposed when the transfer is made. This accords with the view taken by the Local Government of Assam, which (as before pointed out) clearly treated the powers conferred upon Mr. Carnegie as having come to an end.

* Upon this last ground, therefore, I hold that Mr. Carnegie has no summary powers under s. 222 in the district of Kamroop; and I, therefore, think that we ought to quash the conviction and discharge the sureties.

Mitter, J.—I am also of the same opinion. It seems to me that the effect of the Government Resolution, dated 1st of January 1873, was to confer upon Mr. Carnegie powers under s. 222 of the Criminal Procedure Code within the Subdivision of Jorehaut only. That being so, it cannot be said that he was "transferred to an equal or higher office" of the nature of that which he held in the district of Seesaugor; because, supposing he was transferred within the meaning of that section and that he never vacated his appointment, the office to which he was transferred in the district of Kamroop is neither equal to nor higher than that he held in the district of Seesaugor. A reference to ss. 27

Power to determine local jurisdiction of a Magistrate of District.

* [Sec. 38:—The Local Government may, by notification in the *Official Gazette*, prescribe the local limits of the jurisdiction of a Magistrate of the District and may by such notification from time to time alter such local limits.]

and 28 of the Code* will show that the powers of a Magistrate of a division of a district are higher than those of a Magistrate of the first class not in charge of any subdivision. I am, therefore, of opinion that, under the section (56) referred to above, Mr. Carnegy did not continue to exercise the same power which he had while in charge of the Subdivision of Jorohaut.

Conviction quashed.

NOTES.

[See (1891) 15 Mad., 132; (1898) 22 Mad., 47; (1881) 3 All. 563.]

Powers which may be conferred on Magistrates of the 1st class. * [Sec. 27 :—In addition to the powers given and referred to in section twenty-six, a Magistrate of the first class may be invested with the following powers :—

(a) By the Local Government—

- (1) Power to make over cases taken up on a complaint, &c., to a Subordinate Magistrate. (S. 44.)
- (2) Power to hold inquests. (S. 135.)
- (3) Power to entertain complaints of offences, and receive Police reports. (S. 141.)
- (4) Power to entertain cases without complaint. (S. 142.)
- (5) Power to issue process for person within jurisdiction who has committed an offence outside Magistrate's local jurisdiction. (S. 157.)
- (6) Power to try summarily. (S. 222.)
- (7) Power to hear appeals from convictions by Magistrates of the 2nd and 3rd classes. (S. 266.)
- (8) Power to sell suspicious or stolen property. (S. 417.)
- (9) Power to issue order to prevent obstruction, &c. (S. 518.)
- (10) Power to issue order prohibiting repetition of nuisance. (S. 519.)
- (11) Power to make orders, &c., in local nuisance cases. (S. 521.)

(b) By the Magistrate of the District—

- (1) Power to hold inquests. (S. 135)
- (2) Power to entertain complaints of offences, and receive Police reports. (S. 141.)
- (3) Power to issue order to prevent obstruction, &c. (S. 518.)
- (4) Power to issue order prohibiting repetition of nuisance. (S. 519.)

Sec. 28 :— Magistrates who, under the provisions of section forty, are Magistrates of Divisions of Districts shall, as such, have all the powers given to Magistrates of the first class, and referred to in section twenty-six, and, in addition, shall have the following powers :—

- (1) Power to make over cases to a Subordinate Magistrate. (S. 44.)
- (2) Power to pass sentence on proceedings recorded by a Subordinate Magistrate (S. 44.)
- (3) Power to withdraw cases, but not appeals, and to try or refer them for trial. (S. 46.)
- (4) Power to hold inquests. (S. 47.)
- (5) Power to entertain complaints of offences, and receive Police reports. (S. 141.)
- (6) Power to entertain cases without complaint. (S. 142.)
- (7) Power to issue process for person within jurisdiction who has committed an offence outside Magistrate's local jurisdiction. (S. 157.)
- (8) Power to sell suspicious or stolen property. (S. 417.)
- (9) Power to issue order to prevent obstruction, &c. (S. 518.)
- (10) Power to issue order prohibiting repetition of nuisance. (S. 519.)
- (11) Power to make orders, in local nuisance cases. (S. 521.)

Provided that, if a Magistrate of a Division of a District exercises the powers of a Magistrate of the second class, he shall not have power to demand security to be of good behaviour.]

[123] ORIGINAL CIVIL.

The 7th December, 1876.

PRESENT:

MR. JUSTICE PONTIFEX.

Poorno Chunder Coondoo.

versus

Prosonno Coomar Sikdar and another.

Limitation—Act IX of 1871, sched. II, cl. 157—Execution of Ex parte Decree.

Notice of execution of decree is not sufficient "process for enforcing" it within the meaning of cl. 157, sched. II, Act IX of 1871. Such process means actual process by attachment in execution of the person or property of the debtor.

APPLICATION on notice under s. 119 of Act VIII of 1859 to set aside an *ex parte* decree.

The decree had been made on 3rd July 1876; and, without proceeding to execute it, the original plaintiffs assigned it on the 7th September to Poorno Chunder Coondoo, the present plaintiff, by whom, on the 21st September, a notice of execution was served on the defendants, calling on them to appear and show cause why execution should not issue against them. On the re-opening of the Court after the Durga Poojah vacation, the attorney for the defendant Ramnarain Dutt, on 16th November, attended before the Judge in Chambers, but the matter was ordered to stand over. On the 29th November, the defendant Ramnarain served the plaintiff with notice of the present application to set aside the decree.

Mr. T. A. Aparcar, for the plaintiff, objected that the application was barred by lapse of time. The provisions with respect to the time within which such an application must be made are laid down in Act IX of 1871, sched. II, cl. 157, under which the time limited for making the application by a defendant is 30 days from the date of executing any process for enforcing the judgment. It is submitted that notice of execution is sufficient process for enforcing the judgment within this clause: see *Obhoychurn Dutt v. Mudoosudan Chowdhry* (5 Wym., 172), a decision on the same words in s. 119, Act VIII of 1859.

[124] Mr. Bonnerjee for the defendant Ramnarain.—This is not a notice under s. 216 as in the case cited. Here the decree has been assigned, and we received notice of execution by a party who was not the original plaintiff. Such a notice would not necessarily give us any knowledge of the decree obtained by the original plaintiff. There are cases opposed to that cited. [PONTIFEX, J.—Another decision on that section lays down that the words mean process against the person or property of the defendant—*Shib Chunder Bhadoree v. Luckhee Dabia Chowdrain* (6 W. R., Mis., 51).]

Mr. Aparcar in reply.—That case does not decide the present point. In the Full Bench case of *Ram Sahai Sing v. Sheo Sahai Sing* (B. L. R., Sup. Vol., 492), it was held that the issue of a notice under s. 216 of Act VIII was a sufficient proceeding to enforce a decree within s. 20, Act XIV of 1859. [PONTIFEX, J., refers to the Full Bench decision in *Radha Benode Chowdhry v. Digumburee Dabee* (B. L. R., Sup. Vol., 947; S. C., 9 W. R., 236), where it was held that process for enforcing the judgment is executed within the

meaning of s. 119, when attachment has taken place.] There it is not decided that notice of execution would not be a sufficient process. [PONTIFEX, J.—Suppose your application to execute had been refused, there would then have been no process.] The time is intended to run from the date when the defendant gets knowledge of the decree, which he would do by receiving notice of intention to execute it.

Pontifex, J.—I have very little doubt that process of execution means actual process by attachment in execution of the judgment-debtor's person or property. The case of *Obhoychurn Dutt v. Mudoosudan Chowdhry* (5 Wym., 172) is opposed to this : but I prefer the decision in *Shib Chunder Bhadoree v. Luckhee Debn Chowdhra* (6 W. R., Mis., 51). In my opinion mere notice of execution is not sufficient process for enforcing the decree.

Attorney for the Plaintiff. Mr. W. G. Francis.

Attorney for the Defendant Ramnarain Dutt : Babu Nobin Chunder Bural.

NOTES.

[EX-PARTE DECREE EXECUTION.]

The Limitation Act, 1908, enacts as follows :—

Art. 164 :—

Description of suit.	Period of limitation	Time from which period begins to run.
By a defendant, for an order to set aside a decree passed <i>ex parte</i> .	Thirty days.	The date of the decree or where the summons was not duly served, when the applicant has knowledge of the decree.

The old Limitation Act, 1877 contained in art. 164 the words "executing" instead of the words "execution of" in art. 157 of the Limitation Act, 1871, set out *supra* at 2 Cal. page 123. This case was followed in *Chudambura v. Arunachela* (1910) 8 Ind. Cases 663, which held a notice under sec. 248 C.P.C., 1882 insufficient. See *per contra* 110 P.L.R. 1905. Execution against one of two defendants only is not within the article :—(1907) 9 Bom. L. R. 323.]

[125] APPELLATE CIVIL.

The 21st March, 1876.

PRESENT :

MR. JUSTICE GLOVER AND MR. JUSTICE R. C. MITTER.

Nil Money Singh Deo.....Plaintiff

versus

Chunderkant Banerjee.....Defendant.*

*Enhancement of Rent, Notice of—Tullubi Bromuttur Tenure—
Regulation VIII of 1793, s. 51.*

A tullubi bromuttur tenure, which has been held as such from the time of the decennial settlement, is such an intermediate tenure as entitles the holder to a notice under s. 51, Reg. VIII of 1793.

* Special Appeal No. 149 of 1875, against a decree of the Judicial Commissioner of Zilla Chota Nagpore, dated the 21st of November 1874, affirming a decree of the Assistant Commissioner of Maunbhoom, dated the 26th of August 1874.

SUIT for arrears of rent for the year 1278 (1871-1872) of Mouzah Charpotia, held by the defendant after notice of enhancement under s. 13, Act X of 1859.*

The main defence was, that the mouzah in question was held by the defendant as a tullubi bromuttur tenure, and had been held as such from the date of the decennial settlement at a fixed rate of rent, and, therefore, the rent could not be enhanced on any of the grounds specified in s. 17; and the notice under s. 13 was, consequently, illegal and inapplicable to tenures of the nature of that held by the defendant.

The suit was dismissed in the first Court and also on appeal, and on special appeal to the High Court, it was remanded for a distinct finding as to the nature of the defendant's tenure.

The Deputy Collector of Maunbhoom, on remand, found that the mouzah had been held from the time of the decennial settlement as a tullubi bromuttur tenure, and that, as the holder of such a tenure, the defendant had an intermediate holding between the proprietor of the estate and the ryots, and inasmuch as he should, therefore, be proceeded against under s. 51, Regulation VIII of 1793, the notice served on him under s. 13, Act X of 1859, was not sufficient. He, therefore, [126] dismissed the suit, and his finding and decision were affirmed on appeal by the Judicial Commissioner.

The plaintiff preferred a special appeal to the High Court, on the grounds, among others, that even admitting the tenure to be one contemplated by Regulation VIII of 1793, no particular form of notice was necessary, and the notice served was sufficient; and that the finding of the lower Courts, that the tenure was a tullubi bromuttur tenure, and had been held as such from the decennial settlement, did not bring the tenure within the class of talooks or tenures the rent of which could not be enhanced without service of notice on the holder under s. 51 of Regulation VIII of 1793.

The Advocate-General, offg. (Mr. Paul), Mr. Woodroffe, and Bahoos Umbica Churn Bose and Opendro Chunder Bose for the Appellant.

Baboo Chunder Madhub Ghose for the Respondent.

The Judgment of the Court was delivered by

Glover, J.—We cannot go behind the order of remand made by this Court on the 15th January 1874. The case was then sent back to the Assistant Commissioner "to have it distinctly tried what is the nature of the defendant's

* [Sec. 13:—No under-tenant or ryot, who holds or cultivates land without a written engagement not specifying the period of such engagement, or whose engagement has expired, or has become cancelled in consequence of the sale for arrears of rent or revenue of the tenure or estate in which the land held cultivated by him is situate, and has not been renewed, shall be liable to pay any higher rent for such land than the rent payable for the previous years, unless a written notice shall have been served on such under-tenant or ryot, in or before the month of Chait, specifying the rent to which he will be subject for the ensuing year, and the ground on which an enhancement of rent is claimed. Such notice shall be served by order of the Collector on the application (which may be on plain paper) of the person to whom the rent is payable, and shall, if practicable, be served personally on the under-tenant or ryot. If for any reason the notice cannot be served personally upon the under-tenant or ryot, it shall be affixed at his usual place of residence, or if he has no such place of residence in the District in which the land is situate, the mode of service of such notice shall be by affixing it at the Mal Outcherry of such land or other conspicuous place thereon, or at the village Chowree or Chowpal or at some other conspicuous place in the village in which the land is situate. (Amended by Act XIV, 1863, ss. 10, 11 and 12).]

tenure. On the finding on that issue will depend whether or not the plaintiff is entitled to recover in this suit on the notice which he has already served."

Both the lower Courts have now found that the defendant's tenure is a "tullubi bromuttur one," held as such from the time of the perpetual settlement, and, therefore, such an intermediate tenure as entitles the holder to a notice under s. 51, Regulation VIII of 1793.

* * * * *

There is, undoubtedly, evidence on the record showing that, at the time of the decennial settlement, the defendant's holding was entered in the records as a tullubi bromuttur one paying a quit-rent of sicca Rs. 182-9, and that the Judicial Commissioner has found that this was the nature of the holding.

[127] In *Rajah Nilmoney Singh v. Chunderkant Banerjee* (14 W. R., 251), a case almost precisely similar to this and between the same parties, it was held that a tullubi bromuttur tenure was one that entitled the owner to notice under Regulation VIII of 1793. And in *Rajah Nilmoney Singh v. Ram Chuckerbutty* (21 W. R., 439), the result was much the same. It was held in that case that the defendant's tenure, being found to represent a permanent transferable interest in the land intermediate between the proprietor of the estate and the ryots, came under the provision of the Regulation, and gave its owner the right to notice under the law of 1793. In that case also the plaintiff was the same person as the plaintiff in this case, and the defendants set up the same defence as that made in the present suit. This suit has, moreover, been twice remanded, so that it is hardly possible to conceive a case in which the plaintiff had a better opportunity to ascertain what his rights were and to bring them forward in a proper and legal manner.

It is argued that the evidence on which the Judicial Commissioner has relied does not prove that the defendant is an intermediate holder. This was a question of fact with which the Court below had exclusive power to deal, and it has not been in any way shown us that the finding was come to upon no evidence. It cannot indeed be said so in the face of the entry of this holding as a tullubi bromuttur one in the settlement papers of 1790.

It may be that the defendant has cultivated, or does cultivate some part of the holding himself, but this would not deprive him of his position as the holder of an intermediate tenure.

We think that the Judicial Commissioner has found upon sufficient legal evidence that the defendant holds an intermediate tenure, and upon this finding, as laid down in the remand order of 1874, depended the question whether the plaintiff was entitled to sue for enhanced rent under the notices he had already served.

The special appeal is dismissed with costs.

Appeal dismissed.

[128] *The 15th December, 1876.*

PRESENT:

MR. JUSTICE MARKBY.

In the matter of the Petition of Lalla Gopee Chand and others.*

Privy Council Appeals—Act (VI of 1874), ss. 8 and 11, cl. (b)—Limitation Act (IX of 1871), s. 5—Practice—Closing of the Court—Deposit of money under cl. 6, s. 11, Act VI of 1874—Power of the Court to grant special permission.

The petitioners had obtained a certificate on the 1st of September to appeal to Her Majesty in Council from a decision passed against them by the High Court on the 4th of May. Accordingly the period during which they were required to deposit the amount for the translation of the record, under s. 11, cl. b, of Act VI of 1874, † expired on the 4th of November. The offices of the Court re-opened after the vacation on the 23rd October, but the Benches did not begin to sit till the 16th November. On the last-mentioned date, the petitioner brought in the money, and it was refused by the officer of the Court as being too late. *Held*, that it was rightly refused, and that the Court had no power to grant permission to deposit it after the prescribed time (*see* 23 W. R., 220).

APPLICATION for special permission to deposit in Court the amount required from the petitioners under cl. b, s. 11, Act VI of 1874.

The petitioners had, on the 1st of September 1876, obtained a certificate under s. 9 of the Act to appeal to Her Majesty in Council from a decision of the High Court passed against them on the 4th of May. Under s. 11 of the Act they were bound to deposit the amount required to defray the expense of translating, transcribing, indexing, and transmitting to Her Majesty in Council, a correct copy of the whole record of the suit within six months from the date of the decree complained of, or within six weeks from the grant of the certificate, "whichever is the later date." The six months from the date of the decree expired on the 4th of November; and the six weeks, on the 13th of October. The last day, therefore, for making the deposit was the 4th of November. **[129]** The estimate upon which the deposit was to be made was ready on the 18th of September. The offices of the Court were closed from the 21st of September until the 23rd of October, both days inclusive. The money, however, was not brought to the officer until the 16th of November, and he then declined to receive it. The petitioners claimed the benefit of s. 8 of Act VI of 1874, and prayed for special permission to make the required deposit.

* Privy Council Appeal, No. 28 of 1876, in Regular Appeal No. 103 of 1875.

† [Sec. 11, cl. (b)]:—Deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to Her Majesty in Council a correct copy of the whole record of the suit except

(1) formal documents directed to be excluded by an order of Her Majesty in Council in force for the time being;

(2) papers which the parties agree to exclude;

(3) accounts, or portions of accounts which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included; and

(4) such other documents as the High Court may direct to be excluded; and when the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also, within the time mentioned in the first clause of this section, deposit the amount required to defray the expense of printing such copy.]

Baboo Mohesh Chuttdar Chowdry appeared in support of the petition.

Baboo Chunder Madhub Ghose appeared to oppose it.

Markby, J.—(after stating the circumstances connected with the application, continued):—In my opinion the officer was right in declining to receive the deposit. The applicant claims the benefit of s. 8 of Act VI of 1874 and s. 5 of Act IX of 1871 *, the 16th of November being the day on which the Court re-opened in the sense that that was the day upon which the Benches sat as usual for the first time. But those sections only apply to suits, appeals, and applications. No application was necessary in this case; the money is merely brought to the officer of the Court, who receives it making the usual entries, and this could have been done on any day after the 23rd of October.

I have enquired as to the practice, and I find that it has always been usual, when the last day falls during the period when the offices are closed, for the money to be brought in before the holidays commence.

I am also asked to give permission that the money be deposited now. I do not think I have power to do that.

Application refused.

[130] ORIGINAL CIVIL.

The 11th January, 1877.

PRESENT:

MR. JUSTICE PONTIFEX.

Nirmul Chandra Mookerjee and another

versus

Doyal Nath Bhuttacharjee and others.

Suit in forma pauperis—Act VIII of 1859, ss. 367—371—Continuation in forma pauperis of suit commenced in ordinary form.

The power of the Court to allow a suit to be instituted *in forma pauperis* includes the power to allow a suit to be continued as a pauper suit after it has been commenced in the ordinary form.

THIS suit was filed in the ordinary way under Act VIII of 1859, and the defendants appeared and filed their written statement, and the suit was ready for hearing; but, in consequence of the illness of one of the defendants, the

* [Sec. 5:—In each of the cases mentioned in clauses (a) and (b) of section four, the amount or value of the subject-matter of the suit in the Court of First Instance must be ten thousand rupees or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum or upwards, or the decree must involve, directly or indirectly, some claim or question to, or respecting, property of like amount or value, and where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law.

Sec. 8 :—Such application must ordinarily be made within six months from the date of such decree. But if that period expires when the Court is closed, the application may be made on the day that the Court re-opens.]

hearing was postponed on three occasions. After the postponement on the last occasion, the plaintiffs presented a petition, praying to be allowed to continue the suit *in forma pauperis*, stating that they had no means to carry it on by paying the Court fees. After a preliminary enquiry as to the plaintiff's means, the Court ordered that notices should be issued to the defendants, calling on them to show cause why the plaintiffs should not be allowed to continue the suit *in forma pauperis*. On the matter coming on for hearing—

Mr. *Bonnerjee*, for the defendants, objected that the Court had no power to grant the application—Act VIII of 1859 not providing for a case like the present. Under that Act a person is only entitled to commence a suit *in forma pauperis*, but not to continue as a pauper suit a suit commenced in the ordinary way. Act VIII of 1859, too, enacts, that the petition to be allowed to sue as a pauper is to be taken as the plaint in the suit, but the plaintiffs had had the advantage of seeing the defendants' written statement before filing that petition. There cannot be two plaints in the suit. The proper course is to allow the plaintiffs to withdraw their suit with liberty to bring a fresh one as paupers.

[131] Mr. *D. Orr*, for the plaintiffs, was not called on.

Pontifex, J.—I think the Court has power to grant this application if the plaintiffs are actually paupers. The power to allow a case to be continued as a pauper suit is, I think, included in the power given to the Court to allow a suit *in forma pauperis* to be instituted.

Attorney for the Plaintiffs : Mr. *Pearson*.

Attorney for the Defendants : Baboo *P. C. Mookerjee*.

NOTES.

[This case was followed in *Hevi v. Sakharam* (1884) 8 Bom. 615 and in *Thompson v. The Calcutta Tramway Company*, (1892) 20 Cal. 319.

In *Doorya Churn v. Nittokally*, (1880) 5 Cal., 819, the defendant was allowed to defend *in forma pauperis*.]

[3 Cal. 131]

PRIVY COUNCIL.

The 24th May, 1876.

PRESENT :

SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH AND
SIR R. P. COLLIER.

[*On appeal from the High Court of Judicature at Fort William in Bengal.*]

In the matter of the Petition of Hadjee Abdoollah.

Reasut Hossein v. Hadjee Abdoollah and another.

Registration Act (VIII of 1871), s. 76—District Court—Order refusing registration—Proceeding to compel registration—Review—Act XXIII of 1861, s. 38—Act VIII of 1859, s. 376.

The Registration Act of 1871 gives power to the Government to appoint districts and sub-districts for the purposes of registration ; but the " District Courts " mentioned in the

Act (except where the High Court when exercising its local jurisdiction is said to be a District Court within the meaning of the Act) must, in the case of a regulation province, be taken to import the ordinary Zilla Courts.

Semle.—The final words of the 76th section of the Registration Act, which declare that "no appeal lies from any order made under this section," apply to an order rejecting, as well as to an order admitting, an application for registration.

Quere.—Whether after an order has been made under s. 76 of the Act rejecting an application for registration, it is open to the parties benefited by a deed to propound it in, and to obtain its registration by means of, a regular suit? *Futleh Chund Sahoo v. Leelumber Singh Doss* (14 Moore's L. A., 129; S. C., 9 B. L. R., 433) referred to and distinguished.

[132] An order rejecting an application for registration, under s. 76 of the Registration Act of 1871, being, in respect of the Court pronouncing it, a final order of adjudication between the parties, is so far in the nature of a 'decree' within the meaning of Act VIII of 1859, as to fall within the operation of the sections of that Act which provide for the admission of a review.

Section 38, Act XXIII of 1861, which enacts that "the procedure, prescribed by Act VIII of 1859, shall be followed as far as it can be in all miscellaneous cases and proceedings which, after the passing of the Act, shall be instituted in any Court," renders the whole procedure of Act VIII of 1859, including the power of admitting a review, applicable to a proceeding to compel registration under the Registration Act.

It may be competent to a Judge to entertain an application for a review, although such application contains no distinct allegation of an error in law in the order sought to be reviewed, nor any suggestion of the discovery of new evidence.

THIS case arose out of an application made by the appellant Reasut Hossein for the registration of a deed of gift which he alleged had been executed by Mussamut Noorun, the mother of his deceased wife Bechun, in favour of the children of the appellant by Bechun. The deed purported to have been executed by Noorun on the 19th November 1871, and to confer on the said children the share of certain immoveable property which Noorun had, under the Mahomedan law, inherited from her daughter. Noorun died on the 18th December 1871, and the deed was presented for registration in the January following, at the office of the Sub-Registrar of Gya, within whose district a part of the lands affected by the deed lay. In accordance with ss. 34 and 35 of the Registration Act, the Sub-Registrar summoned before him the respondents, who are the sons of Noorun's brother, and her heirs by the Mahomedan law, to ascertain whether they admitted the execution of the deed. On their appearing and denying its execution, the Sub-Registrar refused to register the deed. The appellant, thereupon, presented a petition, under the 73rd section of the Registration Act, to the Zillah Judge of Gya, praying that an order might be passed, directing the Sub-Registrar to register the deed. The respondents presented a counter-petition, in which they alleged the deed to be a forgery. On the 23rd August 1872, the Judge, having heard witnesses in support of the deed and none to impeach it, [133] was of opinion that the circumstances of the case "created serious doubts as to the genuineness of the alleged execution," and refused to order registration. The appellant, on the 17th September 1872, petitioned for a review and for the reversal of this order, urging that the Judge had not rightly weighed the evidence submitted to him, and had refused to look at, or consider the effect of, certain deeds which the petitioner alleged were material evidence in the case. Before this petition was presented, Mr. Tayler, the Judge who had pronounced the order of the 23rd

August, was removed to another district, and the petition fell to be heard by his successor in office, Mr. Craster, who admitted the case for review by an order dated the 4th January 1873 (*See* 10 B. L. R., 395, where the order is set out).

Against this order, as made without jurisdiction, the respondents petitioned the High Court invoking its extraordinary jurisdiction. The case coming before a Division Bench (PHEAR and AINSLIE, JJ.), a rule was granted, calling on the appellant to show cause why the order of the 4th January 1873, admitting the application for review, should not be set aside as made without jurisdiction. On the 2nd April 1873, after hearing the parties, the rule was made absolute with costs; and the order of the Judge, admitting the review, was set aside (10 B. L. R., 394).

From this judgment, Reasut Hossein appealed to Her Majesty in Council.

Mr. *Doyle*, for the appellant, contended that the order passed by the High Court was *ultra vires*, since that Court has no superintending power over the "District Courts" contemplated by the Registration Act of 1871. By the interpretation clauses contained in s. 3 of that Act, "District and Sub-District" are respectively explained to mean "a district and sub-district formed under this Act;" and s. 5 provides that, "for the purposes of this Act, the local Government shall form districts and sub-districts, and shall prescribe, and may, from time to time, alter the limits of such districts and sub-districts." It followed that the "District Courts," referred to in s. 10 of [184] the Act, were Courts exercising jurisdiction within the districts so created by the Government, and were, therefore, not identical, or necessarily co-extensive as to the area of their jurisdiction with the District Courts ordinarily so called, which are undoubtedly subject to the control and revisional superintendence of the High Court. [SIR J. COLVILLE.—No power is given to the Government by the Act to create District Courts. I should infer that the District Courts, referred to in s. 10, are the ordinary Zilla Courts. The districts which the Government is authorized to create are merely administrative, for purposes of registration.] It is submitted that, under the Act, the jurisdiction of the Judge in dealing with registration cases, is distinct from his ordinary jurisdiction, and is not subject to the interference of the High Court.

Assuming that the High Court has a power of superintendence in registration cases, that Court has exercised it wrongly in setting aside the order of the Judge admitting a review of his predecessor's judgment. Under s. 76 of the Registration Act, there is no appeal from the order of a Judge who refuses to enforce registration. The appellant was consequently obliged to seek a remedy by review. [SIR J. COLVILLE.—The purpose of a review is to correct errors, not to retry a case on the same evidence.] Under s. 376 of the Civil Procedure Code, a review may be applied for for any good and sufficient reason, and under s. 378, may be granted, "where it is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice." [SIR R. COLLIER.—Under s. 376 you must show that what you asked to be reviewed was a decree, and further that there was good and sufficient reason for the review.] The refusal to register was a final order, which could not be made the subject of an appeal to a superior Court. It was a decree within the meaning of s. 376. That section has been held to admit a review of orders passed in execution proceedings—*Haradhun Mookerjee v. Chunder Mohun Roy* (Marshall, 205). To obtain a review, it is not necessary to show that there has been an error in law, or that fresh evidence [185] has been discovered; other reasons may be good and sufficient. But here there was an error in law, for the Judge not only decided

the case against the weight of evidence, but also refused to admit evidence which he should have admitted. The Judge, moreover, had dealt with the case, as if he were trying the validity of the deed in a suit to set it aside as forged. That was a mistaken view of his duty.

Mr. J. D. Bell for the Respondents.—The appellant's proper remedy was by appeal, see ss. 23 and 38, Act XXIII of 1861. Where a Judge refuses to make an order for registration, an appeal is not excluded by the provisions of s. 76 of the Registration Act. Assuming that a refusal to order registration is subject to review under ss. 376—378 of the Civil Procedure Code, here no case had been made for granting a review. The application for review did not show that there had been any mistake in law, or that new evidence had been discovered; it merely alleged that the judgment was opposed to the weight of evidence, and asked that it might be reversed on the evidence already before the Court. A contention that the Court has decided against the weight of evidence is matter for an appeal, not for a review—*Nasiruddin Khan v. Indronarayan Chowdhry* (B. L. R., Sup. Vol., 367 at p. 371) and *Juggodumba Dabee v. Munneeruttun Mookerjee* (S. D. A., 1858, p. 1539)

Mr. C. W. Arathoon on the same side.—Assuming that under s. 76 of the Registration Act no appeal lies against the order of a Judge refusing to enforce registration, still the order is not of the nature of a final decree, since the person whose application is rejected has a remedy by way of a regular suit to have his deed registered; see *Futteh Chund Sahoo v. Leelumber Singh Doss* (14 Moore's I. A., 129; S. C., 9 B. L. R., 433). [SIR B. PEACOCK referred to Daniell's Chancery Practice, Vol. II, p. 1422, as showing the distinction recognized in the Court of Chancery between a review and a re-hearing.] As to when a review should not be admitted, see *Jhuhoo Sahoo v. Mussamut Jusoda Koer* (17 W. R., 230).

Mr. Doyne in reply.

[136] At the close of the argument, their Lordships' Judgment was delivered by

Sir J. W. Colville.—This is an appeal against an order of the High Court of Calcutta, dated the 2nd April 1873, by which that Court, in the exercise of its extraordinary and statutory jurisdiction of superintendence over the inferior Courts, set aside an order of the Judge of Gya, dated the 4th January 1873.

(After shortly stating the facts as to the presentation of the deed for registration, His Lordship continued):—It is admitted to be one which can have no force or validity, or be capable of being produced in any Court of Justice in evidence, unless it be registered; and the heirs of the party who is alleged to have executed it, having denied the execution of it by her, the Registering officer was under the Act bound to refuse to register it. The Act gives an appeal from the Sub-Registrar to the principal Registrar, but, as he was equally bound to refuse registration of an instrument of which the execution was thus disputed, such an appeal would have been obviously infructuous; and the appellant accordingly took the course of applying, under the 73rd and following sections, to the Zilla Judge at Gya, for an order upon the Registrar to register the deed.

(His Lordship, after stating the proceedings up to the application for review to Mr. Craster, continued):—That application in terms purported to be made under ss. 376 and 378 of Act VIII of 1859, and the counter-petition filed by the respondents seems to admit that the application was so made, and that a review

of such an order might be had under those sections upon proper grounds, although it contends that what the petition sought in the particular case was in the nature rather of an appeal than of a review within the meaning of the Act.

(After stating the further proceedings, His Lordship continued):—A point was taken, though not very strongly pressed, at the Bar, to the effect that this order of the High Court was itself *ultra vires*, inasmuch as the order which it set aside must be taken to have been made, not by one of the ordinary Zilla Courts, over which the High Court has an unquestioned power [137] of superintendence, but by a District Court created by the Registration Act, over which it has no such power. Their Lordships can see no ground for this contention. It appears to them, looking at the Act of 1871, that although power is there given to the Government to appoint districts and sub-districts for the purpose of registration, the District Courts mentioned in the Act (except where the High Court is said to be, when exercising its local jurisdiction, a District Court within the meaning of the Act), must be taken to be the Courts exercising the ordinary civil jurisdiction within that district; and, therefore, in the case of a regulation province, to import the ordinary Zilla Courts.

Another question raised was whether under the 76th section (of which the final words are, "no appeal lies from any order made under this section"), an order, against which no appeal can be preferred, must not be taken to mean only one by which the Judge directs the Registrar to register a deed, and whether there may not be an appeal from an order like that passed by Mr. Tayler rejecting the application for registration. Their Lordships would have great difficulty in saying that an order of rejection does not fall within the term "an order made under this section;" because if the Judge does not make his order of rejection under the 76th section, it is difficult to see what other section gives him jurisdiction to make it. They do not, however, think it necessary to decide the question, because it is obvious that, whether an appeal lies from the order or not, the right, if it exists, of reviewing an order may co-exist with the liberty to appeal; and, consequently, that the question whether the power of the Judge of first instance to review his order exists cannot be affected by the consideration whether an appeal lies from that order.

Another question raised, which it is equally or perhaps still more unnecessary to decide, is that suggested by Mr. *Arathoon*, viz., that, although a final order rejecting the application for registration may be made in this summary way, it would still be open to the parties benefited by the deed to propound it in a regular suit, and to obtain its registration by means of such suit. Their Lordships conceive [138] that it will be time enough to decide this question when it arises. They only desire to observe that the case of *Futteh Chund Sahoo v. Leelumber Singh Doss* (14 Moore's I. A., 129; S. C., 9 B. L. R., 433) is no authority upon it. In that case, the suit was for the specific performance of an unregistered agreement for sale, and sought to have, not the agreement, but the conveyance to be executed in pursuance of it, registered; and all that was decided was that the agreement not having been registered could not be given in evidence in the suit.

The principal question which their Lordships have to decide upon this appeal is whether the power to admit a review which is given by Act VIII of 1859 (ss. 376—378, and the following sections) does exist in such a proceeding as that under consideration, as it would unquestionably exist in a regular suit.

If the general power is found to exist, a subordinate question may arise, whether if the exercise of the power is not in strict accordance with the provisions of those sections, the order admitting the review can be quashed as one made wholly without jurisdiction.

Their Lordships are disposed to think that an order, rejecting an application for registration, under the Act of 1871, must be taken to be so far in the nature of a decree, within the meaning of Act VIII of 1859, as to fall within the operation of the sections in question. The proceeding may be what is technically called in India a miscellaneous proceeding, or it may be a summary suit; but the order made upon it is, so far as concerns the matter in dispute, final between the parties. Whether it is subject to appeal or not, it is, so far as the Court pronouncing it is concerned, a final order of adjudication between the parties.

But it seems to their Lordships that the determination of this question does not depend upon the mere construction of Act VIII of 1859, because by the 38th section of the amending Act of 1861 it is expressly enacted, "that the procedure described by Act VIII of 1859 shall be followed as far as it can be in all miscellaneous cases and proceedings which, [139] after the passing of the Act, shall be instituted in any Court." This provision, their Lordships conceive, expressly makes applicable to a proceeding to compel registration under the Registration Act the whole procedure of Act VIII of 1859, including the power of admitting a review. And this was in fact almost admitted at the Bar by Mr. Bell, when he was contending that the right of appeal to the High Court would, under the 23rd section of the Act XXIII of 1861, have existed in this case.

It is argued, however, that if the 376th and following sections of Act VIII of 1859 do apply to an order rejecting an application for registration, they do not justify the particular exercise of jurisdiction in this case. The 376th section says:—"Any person considering himself aggrieved by a decree of a Court of original jurisdiction from which no appeal shall have been preferred to a Superior Court, or by a decree of a District Court in appeal, from which no special appeal shall have been admitted by the Sudder Court, or by a decree of the Sudder Court from which either no appeal may have been preferred to Her Majesty in Council, or, an appeal having been preferred, no proceedings in the suit have been transmitted to Her Majesty in Council, and who from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time when such decree was passed, or for any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree." The application is to be made within ninety days of the date of the decree, unless the party can show just and reasonable cause for having delayed his application. Then the 378th section enacts:—"If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application; but if it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review, and its order in either case, whether for rejecting the application or granting the review, shall be final." And then follows a provision that the opposite party is to have notice. And the respondents contend that the [140] order admitting a review in this case, though not the proper subject of appeal, was liable to be quashed, on the ground that the Judge had no jurisdiction to entertain the application, inasmuch as there was before him no distinct allegation of an error of law, nor any suggestion of the discovery of new evidence.

Their Lordships, looking to the original application to review, are by no means satisfied that it does not contain enough to give the Judge cognizance of the matter upon the strictest construction of Act VIII of 1859. They allude particularly to the eighth ground of the petition, which refers to certain deeds and to certain evidence which seems to have been tendered in the course of the inquiry before Mr. S. H. C. Tayler, and rejected by him as unnecessary. That evidence, if not very material to the general question, was by no means immaterial with reference to one ground which the learned Judge gave for rejecting the application, because he dealt with the fact of the deed being for consideration, whereas that which was propounded was not for consideration. Therefore, if he allowed that matter to influence his judgment, it seems to be reasonable that the parties should have the opportunity of explaining those circumstances, and of having that evidence which he refused to admit brought before the Court upon a review; the evidence in fact would be in the nature of evidence which they had been from some cause prevented from adducing on the original hearing.

Their Lordships, however, do not rest their decision upon that narrow ground, because looking to the extreme generality of the terms used in these sections, particularly to these terms: "other good and sufficient reason" and "necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice," they are not prepared to say that there is an absolute defect of jurisdiction whenever the parties have failed to show that there was either positive error in law, or new evidence to be brought forward which could not be brought forward on the first hearing. They do not consider that the case of *Nasiruddin Khan v. Indronarayan Chowdhry* (B. L. R., Sup. Vol., 367) and the other cases [141] cited (only?) limit the discretion of the Court in saying what reason is good and sufficient, or what may be so far requisite to the ends of justice as to support an application for review. Upon an appeal, where an appeal lies, it may be open to the Court of Appeal to say that the Judge ought not to have admitted a review; but that is a very different thing from ruling that he has acted wholly without jurisdiction. In the first case, the Appellate Court reverses the order, because the Judge has erred in the mode in which he has exercised a judicial discretion; in the latter case, it quashes the order, because there was no discretion at all to be exercised.

Their Lordships, for these reasons, are of opinion that the order of the High Court which is under appeal cannot be supported; and they must humbly advise Her Majesty to allow this appeal, to reverse the order of the High Court, and in lieu thereof to order that the rule to show cause why the order of Mr. Craster should not be set aside be discharged, with the usual costs in the High Court.

The appellant, who has been obliged to come here, must, of course, have his costs of this appeal.

Appeal allowed.

Agent for the Appellant: Mr. T. L. Wilson.

Agent for the Respondents: Mr. Horace Earle.

NOTES.

[I. INTERPRETATION OF "SUFFICIENT REASON."]

Applied to the Limitation Act, 1877, sec. 5, "sufficient cause," (delay in review):-
(1906) 33 Cal. 1323 : 3 C. L. J. 543.

II. REVIEW "FOR ANY OTHER SUFFICIENT REASON"—

Terms wider than English Law; ground may depend on a question of law, or of fact, or of mixed question of law and fact, (1886) 9 All. 38.

No authority to review predecessor's judgment on the ground of injustice:—(1876) 2 Mad. 10.

Review of order receiving deposit of rent (Bengal Tenancy Act, VIII of 1865), "only where a party is affected and bound by the order reviewed against, and when he has a right to be heard in the matter, that he can apply for review but not otherwise:—(1887) 15 Cal. 166.

Order granting review on a ground which would not support it does not render it illegal (discovery of new evidence after second appeal):—(1900) 10 M. L. J., 134.

Mofussil Small Cause Court Judge's jurisdiction to direct new trial of a case tried by his predecessor, s. 21 of Act XI of 1865:—(1880) 6 Cal. 236.

Effect of remand in contravention of s. 564 of C. P. C., 1882:—(1889) 12 A. 510.

III. RIGHT OF APPEAL BY IMPLICATION—

Order rejecting application to appoint a receiver:—(1886) 10 Mad. 179.

Order refusing to grant an application to be made an insolvent appealable under C. P. C. 1882, s. 588 (17):—(1880) 6 Cal., 168.

IV. EXTENSION OF THE C. P. C. TO ALL PROCEEDINGS IN CIVIL COURTS—

Interim injunction in second appeal.—(1904) 14 M. L. J. 471, F. B.

Guardian and Wards Act (VIII of 1890) proceedings:—(1899) 23 Bom. 698.

See also (1882) 6 Bom., 416; (1871) W. R., 222; (1868) 5 Bom., H. C. 215.]

[2 Cal. 141]

FULL BENCH.

The 14th August, 1876.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE KEMP,
MR. JUSTICE JACKSON, MR. JUSTICE MACPHERSON AND MR. JUSTICE.
MARKBY.

Bhyrub Chunder Bundopadhya.....Plaintiff.

versus

Soudamini Dabee.....Defendant.

Sale in Execution of Decree—Period from which Title of Purchaser dates—

Confirmation of Sale— Liability of Purchaser for Government Revenue.

The defendant became a purchaser at an execution-sale of a share of certain property, of which the plaintiff held another share partly as [142] zamindar and partly as putnidar: the sale took place in September 1872, but the defendant did not obtain possession until confirmation of the sale in May 1873. Between the date of the sale and the confirmation, a considerable sum became due for Government revenue on the whole property, and to prevent its being sold, the plaintiff paid the whole of the revenue due. In a suit to recover the proportion due in respect of the share purchased by the defendant, held, that, on confirmation of the sale, the share purchased by the defendant must be considered to have vested in her from the date of the sale; and, therefore, she was liable for the amount of Government revenue in respect of her share which became due between the date of the sale and its confirmation.

* Special Appeal No. 2715 of 1874, against the decree of a Subordinate Judge of Zilla East Burdwan, dated the 28th July 1874, modifying a decree of the Sudder Munsif of that district, dated the 29th of October 1873.

THIS case was referred by GARTH, C.J., and BIRCH, J., for the opinion of a Full Bench, in the following order of reference :—

Garth, C.J.—The plaintiff and defendant in this suit became purchasers respectively of two different shares in the same property at an execution sale. (The defendant only was a purchaser at the execution-sale: the plaintiff held his share partly as zamindar and partly as putnidar). The sale was completed on the 15th Assin 1279 (30th September 1872), but the defendant did not obtain possession until the 24th Bysack 1280 (5th May 1873). Between the date of the sale and the time when the sale was confirmed (and when the defendant obtained possession) a considerable sum became due, in respect of the whole property purchased, for Government revenue; and, in order to prevent proceedings being taken by the Government authorities to enforce payment of this sum, the plaintiff, who was the purchaser of by far the largest share of the property, paid the amount due to the Government authorities, and then brought a suit to recover from the defendant the proportion due in respect of her share.

The defendant's answer was that she did not become liable to pay any revenue to Government upon her share until after the confirmation of her purchase, and that no part of the revenue claimed accrued due after that time.

These facts being admitted, the question arises whether the defendant became liable to pay revenue in respect of her share from the date of her purchase, or from the date of confirmation of it.

[143] Upon this point there are conflicting authorities in the High Court. The case of *Kalee Dass Neogee v. Hur Nath Roy Chowdry* (W. R., 1864, Gap., No. 279) appears to have decided, that the title of an auction-purchaser under a decree relates back to the date of sale although the sale may not have been confirmed until long afterwards; the case of *Bepin Beharee Biswas v. Judoonath Hazrah* (21 W. R., 367), on the other hand, appears to have decided, that the title of a purchaser under similar circumstances accrues only from the date of confirmation of the sale. The point, therefore, is referred to a Full Bench for their determination.

Baboo Sham Lal Mitter for the Appellant. —The plaintiff having paid the whole of the Government revenue is entitled to bring a suit for contribution. If the revenue had not been paid, the sale would not have been confirmed. The certificate of sale being a valid transfer, the holder is entitled to rents and profits from the date of the sale (Act VIII of 1859, ss. 259 and 264: see Macpherson's Civil Procedure Code, 5th edition, p. 304), and there is a remedy to recover against the judgment-debtor. In the form of certificate given in Broughton's Civil Procedure Code, p. 799, there is not even a blank left for the insertion of the date of confirmation, nor is there any allusion to it made in the form of confirmation of sale in use on the Appellate Side of this Court. S. 259 states what is necessary to be set out in a sale certificate, and does not mention the date of confirmation. If the judgment-debtor were to pay Government revenue, the amount paid by him would be deducted from the debt due from him. If a sale takes place in execution of a decree in force and valid at the time of sale, and the decree or judgment be afterwards reversed, the reversal does not affect the validity of the sale or the title of the purchaser—*Chunderkant Surmah v. Bissessur Surma Chuckerbutty* (7 W. R., 312). The Court must refuse to go into facts behind a sale certificate—*Lalla Bissessur Dyal v. Doolar Chand Sahoo* (22 W. R., 181). It is bound to give full effect to the terms of a sale certificate, and cannot limit the effect of that certificate by conclusions [144] and inferences drawn from other documents—*Mookhya Hurruckraj Joshee v. Ram Lal Gomasta* (14 W. R., 435).

Babu Bykanto Nath Pal for the Respondent.—The purchaser of a tenure at a sale for arrears of rent is held liable for rents from the date on which the sale may be confirmed—*Beepin Behari Biswas v. Jadoonath Hazrah* (21 W. R., 367). The purchaser is required to pay only 25 per cent. of the purchase-money (Civil Procedure Code, s. 253), and his right to take possession does not accrue until after 30 days, within which time the sale is liable to be reversed. If the sale is not reversed, the judgment-debtor has the right of appeal. If the sale is not confirmed, the purchaser has not any right whatever to the property, and is entitled only in the discretion of the Court to interest on the money paid: he is not held liable to debts with respect to the property purchased, until he is entitled to rents and profits. The sale is of no effect until after the confirmation: and the purchaser is not entitled to receive any benefit until he has paid the purchase-money in full.

Baboo Sham Lall Mitter in reply.

The following **Opinions** were delivered by the Full Bench :—

Garth, C.J. (KEMP, JACKSON, and MACPHERSON, JJ., *concurring*).—The question which we propose to decide in this case is whether the plaintiff is entitled to recover from the defendant certain sums paid by the plaintiff for Government revenue due in respect of a share, now owned by the defendant, in a zamindari, the larger share of which belongs to the plaintiff.

The proceedings do not show very accurately what the precise position of the parties is: but the facts seem to be as follows: The plaintiff owns as zamindar and putnidar (or partly as zamindar and partly as putnidar) a 15 annas 3 gandas 3 cowris share of an estate, Lot Nimdaha, registered as No. 75 in the Collectorate of Burdwan; and Krishnaprosonno Mozumdar and another were the zamindars of the remaining small share, 16 gandas 1 cowrie. The total revenue payable to the [146] Collector in respect of the estate was Rs. 8,807, 4 annas 11 gandas. Of this, Rs. 8,356, 9 annas 11 gandas represented the plaintiff's share, and Rs. 450, 11 annas was the share of Krishnaprosonno Mozumdar, &c. And the plaintiff states in the plaint that he was entrusted with the payment of the whole revenue as well what was due in respect of his own share of the zamindari and his own share of the putni, as what was due in respect of the share of Krishnaprosonno Mozumdar, &c. The share of Krishnaprosonno Mozumdar, &c., having been attached and sold in execution of the decree of a Civil Court, one half of it was purchased by the defendant Soudamini. Certain instalments of Government revenue having fallen due between the date of the execution sale and the date on which Soudamini's purchase was confirmed by the order of Court, they were paid by the plaintiff, who, in truth, was obliged to pay them in order to save the whole estate from being sold by the Collector. The question is, whether, as the sale to Soudamini was eventually confirmed, she is not now liable to refund to the plaintiff the sums so paid by him.

The defendant denies her liability in respect of any Government revenue which accrued due prior to the date of confirmation of her purchase.

In our opinion the sale having been confirmed, and the purchaser having obtained a certificate, the interest of the judgment-debtor must be held, for the purposes of this suit, to have ceased from the date of the sale and to have thus become vested in the purchaser. That being so, we think that the purchaser, the defendant Soudamini, must be deemed the person liable to pay the amount of Government revenue in question, and that, therefore, the plaintiff is entitled to recover from her the payments which he made on account of her share of

the property amounting (after giving her credit for the Rs. 25 which she had paid) to Rs. 168-15½, with interest on that sum at the rate of 6 per cent. from the time or times when the payments were made.

The judgment of the lower Appellate Court will be altered accordingly, and the plaintiff, the appellant, will have the costs of this appeal.

[146] Markby, J.—I concur in thinking that, under the circumstances of this case, the appellant had a right to recover from the respondent the amount claimed in respect of the two payments of Government revenue made by the appellant for the January and March quarters of 1872.

NOTES.

[TITLE OF THE EXECUTION-PURCHASER.]

I. STATUTORY CHANGES--

The provisions relating to this subject have been frequently modified :—

By Act XII of 1879, there were introduced into sec. 316 of C. P. C., X of 1877, these words—

“ the title shall vest in the purchaser from the time when the sale is confirmed.”

The C. P. C., 1882, sec. 316 (which repealed C. P. C., 1877) enacted as follows :—

“ * * * such certificate shall bear the date of the confirmation of the sale ; and so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before : Provided that the decree under which the sale took place was still subsisting at that date.”

The Civil Procedure Code, 1908, which repealed the C. P. C., 1882, enacts as follows :—

Sec. 65.—Where immoveable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

II. TITLE BEFORE CONFIRMATION UNDER THE PREVIOUS CODES—

The following cases were under the repealed enactments :—

The title did not vest until confirmation, (1888) 15 Cal., 546 and the right to mesne profits or possession did not arise till then :—(1902) 24 All., 475.

In the following cases it was held that though there passed to the purchaser no full perfected title, there yet remained in him an equitable or inchoate title outstanding :—(1892) 17 Bom., 375 ; (1886) 10 Bom., 453 ; (1906) 11 C. W. N., 158 ; (1898) 2 C. W. N., 589.

When foreclosure proceedings were instituted subsequently to the sale but before confirmation, the purchaser in execution sale was held entitled to notice :—(1885) 11 Cal., 341.

Without any alterations made in the Limitation Act, 1877, art. 138, corresponding to the change introduced by Act XII of 1879, in the C. P. C. of 1877, a suit which with reference to the date of sale was beyond the period of limitation but was within it when computed from the date of confirmation, was held barred :—(1893) 17 Mad., 89.

Government revenue is bound to be discharged by the owner of the estate at the specified time when it falls due, and is not liable to apportionment :—(1880) 6 Cal., 389.

A sale of certain villages, forming part of an estate, in execution of a decree, was followed by default in payment of Government revenue. The sale was afterwards confirmed, and subsequently thereto the estate was sold for the default in Government revenue. For the rights of the execution-purchaser in these circumstances, under the old law, see (1907) 7 C. L. J., at 28.]

The 4th September, 1876.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE KEMP, MR. JUSTICE JACKSON, MR. JUSTICE MACPHERSON, AND MR. JUSTICE MARKBY.

Rajendronath Mookhopadhyas.....One of the Defendants

versus

Bassider Ruhman Khondkhar and another.....Plaintiffs.*

Landlord and Tenant—Notice to quit—Suit for Ejectment—Procedure.

A ryot whose tenancy can only be determined by a reasonable notice to quit, expiring at the end of the year, can claim to have a suit for ejectment brought against him by his landlord dismissed on the ground that he has received no such notice.

THIS case was referred to a Full Bench in the following **Order** of Reference (in which the facts sufficiently appear) by

MARKBY, J.—The facts of this case may be very shortly stated. The plaintiff was a cultivating ryot, not having (as far as appears) any right of occupancy and not holding for any specified term. In Jeyt 1277 (13th May to 13th June 1872), his landlord, without giving him any notice at all, put in a fresh tenant. In Pous 1279 (14th December 1872 to 12th January 1873), the plaintiff brought this suit to recover possession. The zemindar, who together with the in-coming tenant, defended the suit, alleged that the plaintiff had relinquished his tenure in 1276 (1869-1870). Both Courts have found that there was no relinquishment, and have given the plaintiff a decree.

In special appeal it is contended that the plaintiff had no title upon which he could recover possession. Of course, as against [147] any one but his own landlord, it is clear that the plaintiff had a title to recover possession ; and even as against his own landlord, I should have thought that the plaintiff could have recovered possession. It is, I think, clear upon the authorities that he could not have been ejected without reasonable notice, and then only at the end of the year—*Bakranath Mandal v. Binodram Sen* (1 B. L. R., F. B., 25) and *Janoo Mundur v. Brij Singh* (22 W. R., 548). And unless his tenancy has been put an end to by this present litigation, it is still subsisting.

This last point is the one upon which the doubt arises in consequence of a decision in *Hem Chunder Ghose v. Radha Pershad Paleet* (23 W. R., 440). There the learned Judges, whilst recognizing the right of the tenant to a reasonable notice to quit, expiring at the end of the year, seem nevertheless to consider that the institution of a suit is itself a sufficient demand of possession for the purpose of maintaining the suit, and that the tenant's claim for a reasonable notice, expiring at the end of the year, will be satisfied by fixing such a date for giving up possession as will be fair towards himself.

* Special Appeal No. 3205 of 1874, against a decree of the Officiating Subordinate Judge of Zilla Nudden, dated the 22nd of September 1874, affirming a decree of the Munsif of Kustia, dated the 30th of May 1873.

If that be so, I do not think the plaintiff in the present case could recover possession; he would only be entitled to some compensation for having been ejected too soon.

But with very great deference, I cannot bring myself to think that the decision I have referred to is correct. I do not see how the landlord, who has not determined the tenancy by a proper notice, can recover in ejectment. Even in the case of a tenancy-at-will, it is necessary under English law that the will should be determined—*Doe d. Jacobs v. Philips* (10 Q. B., 130), where it was argued that the will was determined by bringing the action, but the Court held that it was not so. The case of a ryot whose tenancy can only be determined at the end of the year by a reasonable notice to quit is a much stronger one.

It seems to me impossible to consider such a ryot otherwise than as a tenant from year to year. I do not say that the incidents of the tenancy are precisely the same as those of a yearly [148] tenancy in England. But I cannot think that the ryot can be ejected without a proper notice to quit.

The case of *Hem Chunder Ghose v. Radha Pershad Paleet* (23 W. R., 440) is based upon the decision in *Mahomed Rasid Khan Chowdhry v. Jadoo Mirdha* (20 W. R., 401); but I am strongly disposed to think that the learned Judges did not there intend to lay down any proposition of law at all. I think that decision only carries out a suggestion made by the Court for the benefit of the parties and in order to avoid further litigation.

The question being one of great importance, I feel myself justified in referring to the Full Bench the question whether a ryot, whose tenancy can only be determined by a reasonable notice to quit, expiring at the end of the year, can claim to have a suit brought against him by his landlord dismissed on the ground that he has had no such notice, or whether in such a case the Court ought to give a decree in favour of the landlord, fixing a date for giving up possession, which shall be fair towards the tenant.

Babu Bama Churn Banerjee, for the Appellant, contended, that a ryot without either right of occupancy, or under-lease, was liable to be ejected by the landlord without a notice to quit having been given. [MACPHERSON, J.—Reasonable notice is necessary—*Bakranath Mandal v. Binodram Sen* (1 B. L.R., F. B., 25).] The form in which the case is referred raises the question whether or not the bringing of an action is sufficient notice, but that question does not arise here. This suit is not by a landlord against a tenant, but by a tenant suing to be restored to possession. [GARTH, C.J.—If the tenant is entitled to notice to quit, although he has been turned out, yet he has an interest in the land.] The suit, when it is instituted, is sufficient notice—*Hem Chunder Ghose v. Radha Pershad Paleet* (23 W. R., 440). The procedure required by Beng. Act VIII, 1869, s. 53, does not contemplate a notice to quit in the English sense. [JACKSON, J.—Section 53 provides for execution of decrees.] Unless the tenant has a right of occupancy, he can have no protection at all except that provided [149] by the Act. [GARTH, C.J.—It must be taken for granted that a notice to quit must be given: a reasonable notice at the end of the year—*Mahomed Rasid Khan Chowdhry v. Jadoo Mirdha* (20 W. R., 401).] Notice is not a question of right, it may be given for the sake of convenience. When a landlord brings a suit, the only ground on which the tenant can defeat the landlord is by showing, by an under-lease or by right of occupancy, a right of possession in the land. The tenant can only claim a sufficient time, and such time can be fixed by the Court.

Moulvie *Murhamat Hossein* for the Respondent, was not called upon.

The **Opinion** of the Full Bench was delivered by .

Garth, C.J.—We are of opinion that, in the case of a ryot of the class specified in the question referred to us,—i. e., a ryot whose tenancy can only be determined by a reasonable notice to quit expiring at the end of the year,—the ryot can claim to have a suit for ejectment brought against him by his landlord dismissed on the ground that he has had no such notice.

NOTES.

[NOTICE TO QUIT—

I. REASONABLE NOTICE REQUIRED—

Reasonable notice is required in the case of a yearly holding.—(1878) 1 Cal., 339; (1904) 8 C. W. N., 774.

II. WHAT IS REASONABLE NOTICE—

This is a question of fact; not necessarily six months.—(1899) 26 Cal., 761 (case of *Korfa rayyat* in Manbhum).

Six months would be reasonable:—(1897) 24 Cal., 720.

Institution of the suit is no notice:—(1901) 29 Cal., 203; (1900) 6 C. W. N. 199.

III. WHEN NOTICE SHOULD EXPIRE—

At the end of the year of tenancy:—(1901) 6 C. W. N., 69; but see (1882) 9 Cal., 48.

IV. CASE OF TENANT HOLDING OVER—

See as to this:—(1881) 7 Cal. 710.

V. OBJECTION WHEN TO BE PREFERRED—

May be raised on second appeal:—(1878) 2 Mad., 346.

VI. GENERAL—

In (1907) 34 Cal., 516 F. B. : 11 C. W. N., 626 . 5 C. L. J., 457 this case was referred to for the views held as regards heritability of the non-occupancy rayati holding.]

[2 Cal. 149]

APPELLATE CIVIL.

The 14th September, 1876

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE R. C. MITTER.

Nathuni Mahton.....Defendant

versus

Manraj Mahton.....Plaintiff.

Hindu law—Mitakshara—Joint family—Suit by one member for a specific share.

To a suit by one member of a Hindu joint family, living under the Mitakshara law, for a specific share of the joint family property, all the members of the family are necessary parties.

THIS was a suit for recovery of possession of a two anna eight pie share* in certain immoveable property.

* Regular Appeal No. 26 of 1875, against a decree of Baboo Ram Prosaud, the Second Subordinate Judge of Zilla Patna, dated the 8th of October 1874.

[130] The plaint stated that the property in question was acquired by the plaintiff's grandfather, who died leaving four sons, to whom the property descended in equal sharés; that the plaintiff's father, the defendant Talawar, had two sons, and, on a private partition between them, Talawar took one-third of the four-anna share inherited by him, and his two sons each took a one-third share thereof; that in execution of a decree obtained by one Bhurrut Das, the right, title, and interest of Talawar was put up for sale, and purchased by the plaintiff out of his self-acquired funds; that, subsequently, the defendant Nathuni, in execution of a decree, which he alleged he had obtained against Talawar, advertised the property in dispute for sale as the property of Talawar, and, notwithstanding a claim thereto preferred by the plaintiff, the property was sold and purchased by the defendant Nathuni, who dispossessed the plaintiff. The plaintiff, accordingly, brought this suit, making Nathuni and Talawar defendants, for possession with meane profits of his original one-third share and the one-third, subsequently purchased by him. He alleged that the decree was obtained and the property brought to sale by the defendant Nathuni acting in collusion with Talawar, who had no power to alienate or encumber the property without legal necessity, which did not exist.

The plea of the defendant Nathuni, upon which the case was decided in the High Court, was contained in the 3rd paragraph of his written statement, and was to the following effect: --That the partition alleged by the plaintiff had never taken place, the family being still joint, and that the suit for a portion of the joint family property was not sustainable, all the members of the family not having been made parties.

The lower Court, whilst holding that the family was still joint, upon the authority of *Mahabeer Persad v. Ramyad Singh* (12 B. L. R., 90), overruled the objection of the defendant as to the right of the plaintiff to maintain the suit, and awarded him a decree for a one-anna four pie share. The first defendant appealed to the High Court. The plaintiff objected by way of cross-appeal to the lower Court's finding as to the family being still joint.

[151] *Baboo Kally Mohun Dass* for the Appellant.

Baboo Chunder Madhub Ghose (Mr. Sandel with him) for the Respondent.

The Judgment of the Court was delivered by

• **Garth, C. J.** (who, after stating shortly the facts of the case and the finding of the lower Court, continued):—We think that, having regard to the evidence, the lower Court has rightly held that the family of the plaintiff is still joint, and that there has been no partition of the family property as alleged in the plaint.

That being so, it only remains for us to decide the question of law raised by the defendant, viz., that the present suit is not maintainable, and should be dismissed upon that ground.

We think that this contention is well founded, and we find that the question has been settled by several authorities—*Rajaram Tewari v. Lachman Pershad* (4 B. L. R., A. C., 118), *Sheo Churn Narain Sing v. Chukraree Pershad Narain Sing* (15 W. R., 436), and *Chey Narain Sing v. Bunwaree Sing* (23 W. R., 396).

The decision referred to by the lower Court does not support the view which the Subordinate Judge takes; in fact, it rather supports the contrary

view, because it decides that one out of several members of a joint Hindu family is entitled to recover the whole of the joint property in a suit in which all the members are parties. It does not decide, as has been erroneously supposed by the lower Court, that a single member of a joint Hindu family governed by the Mitakshara law can recover a fractional share of the family property, which would on partition fall to his lot. That decision further points out the mode in which the joint property should be partitioned and the divided shares disposed of, but with that question we are not concerned in this case.

For the reasons given above, we think the plaintiff's suit should be dismissed, upon the ground that he, still being a member of a joint Hindu family, consisting of himself, his [132] father, and his brother, cannot maintain this suit for the recovery of a two-third share of a joint family property.

Upon this ground, the decree of the lower Court must be reversed with costs.

Appeal allowed.

[2 Cal. 152]
FULL BENCH.

The 14th August, 1876.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE KEMP,
MR. JUSTICE JACKSON, MR. JUSTICE MACPHERSON AND
MR. JUSTICE MARKBY.

Denobundhoo Chowdhry.....Defendant

versus

Kristomonee Dossee.....Plaintiff.*

Res judicata - Act VIII of 1859, s. 2 - *Former suit to recover same property on different grounds.*

Certain property, originally belonging to the husband of the plaintiff, was conveyed by him by deed of gift to his daughter, after her marriage with the defendant, as her stridhan. Some years after the daughter's death, the plaintiff brought a suit to recover the property, on the ground that the deed of gift was a forgery, and that she was entitled to the property as heiress of her husband, but her suit was dismissed, the deed of gift being found to be genuine. In a suit subsequently brought to recover the same property, on the ground that the plaintiff was heiress of her daughter, *held* by the majority of a Full Bench (GARTH, C. J., *dissenting*) that the suit was barred.

THIS case was referred by GARTH, C. J., and BIRCH, J., to a Full Bench in the following **order of reference** : -

GARTH, C. J.--In this case the plaintiff sues to establish her right to certain land as heiress of her daughter, the deceased wife of the defendant Denobundhoo, and the facts were as follows : -

The property in question originally belonged to the plaintiff's husband, and, some time after the marriage of their daughter, *viz.*, in the year 1262 (1855), the plaintiff's husband conveyed this property by deed of gift to the daughter as her stridhan. The [153] daughter died in the year 1268 (1861) and, some

* Special Appeal No. 373 of 1875, against a decree of Baboo Obhoy Churn Roy, the Subordinate Judge of Zilla Bungpore, dated the 4th of December 1874, reversing a decree of Baboo Mothoora Lall Roy, the Munsif of Badiakhalee, dated the 19th of March 1874.

eight years after her death, the plaintiff claimed and brought a suit to recover this property, upon the ground that the deed of gift was a forgery, and that she was entitled to the property as heiress to her husband. In that suit it was decided, that the deed of gift was genuine and valid, and consequently the plaintiff's suit was dismissed. The plaintiff then brought the present suit, claiming the property as heiress of her daughter, and the answer which the defendant makes to her claim is two-fold : 1st, that she is estopped or otherwise legally prevented from bringing this suit by the judgment in the former suit, inasmuch as she is seeking to recover the self-same property, although by a different right, which she claimed in the former suit : and 2nd, that, under the circumstances, the defendant, as the husband of the plaintiff's daughter, is entitled to the property as the heir of his deceased wife, and that the plaintiff has no claim to it as heiress to her daughter.

Upon both these points, there are conflicting decisions in this Court.

As regards the first point, the case of *Nufar Chunder Pal Chowdhry v. Luckhee Monce Dabee* (9 W. R., 300) decides, that a party who brings a suit to recover land under one title, and is defeated, is barred from recovering that same land in another suit, though by a different title : and the case of *Aughore Nath Ghosal v. Roop Chand Mundul* (13 W. R., 97) appears to decide that, under somewhat similar circumstances, a party may bring a second suit, though defeated in the first, if he claims by a different title.

As regards the second point, the case of *Judoonath Sircar v. Bussunt Coomar Roy Chowdhry* (11 B. L. R., 286, at p. 287) decided, that the daughter's husband was entitled as his wife's heir to succeed to her stridhan in preference to her brother or mother, and in the same case on review (11 B. L. R., 295) it was held by two other learned Judges, that the mother, and not the husband, is the preferential heir.

[154] The following questions, therefore, are referred to a Full Bench for decision :

1. Whether a plaintiff, who has brought a suit to recover property upon the strength of one title, and has been defeated in that suit, can bring a suit to recover the same property upon the strength of another title, of which he might have availed himself at the time the former suit was brought, but which he did not set up in the plaintiff then filed ?

2. Whether, under the Hindu law of the Bengal school, a husband is the preferential heir to the stridhan of his wife given to her after marriage by her father, such wife dying without issue, and having a mother her surviving ? (The point raised by this question was abandoned by the appellant in argument.)

Baboo Bhuggobutty Churn (he, for the Appellant, contended that the plaintiff had lost her right by any title, existing at the time of the institution of the first suit, which was not then urged—*Shih Shrinukur Neogy v. Huro Soonduree Goopta* (13 W. R., 209). She was bound to disclose her titles at once ; the cause of action is a very different thing to the title—*Braro Lall Roy v. Khettur Nath Mitter* (12 W. R., 55) ; see also *Aunungo Mohun Deb Roy v. Unnoda Dossee* (17 W. R., 351). A plaintiff is debarred from suing to recover possession of land claiming it as a part of a talook, after having previously sued unsuccessfully to recover possession of the same land claiming it as a *towfir* (or excess)—*Umatara Debi v. Krishna Kamini Dasi* (2 B. L. R., A. C., 102), the judgment in which case was upheld by the Privy Council (11 B. L. R., 158).

[GARTH, C. J.—In that case the claim was as a talookdar in both suits, and the evidence in both exactly the same, so that it was not on two titles that the suits were brought.] In each case the character of the land had to be proved. The fact of the plaintiff in that suit being kept out of possession gave a cause of action in both suits. The cause of action here was the alleged wrongful withholding of the land. A plaintiff is bound to include in his suit all the existing grounds [155] against the validity of a sale, and is not allowed to bring a second suit to show additional grounds—*Abhiram Doss v. Sriram Doss* (3 B. L. R., A. C., 421). [GARTH, C. J.—In all these cases it has been taken that the title is no part of the cause of action. I do not agree with that.] A suit, claiming property by a title on inheritance, is barred by ss. 2 and 7, Civil Procedure Code,* where a claim on a title derived by gift has been already adjudicated—*Dudsar Bibeev. Shakir Burkundaz* (15 W. R., 168). [GARTH, C. J.—It seems to me that in a country like this, where, as in the mofussil, good advice may not be always available, a person may not claim a property in the proper manner.]

Bahoo Gria Sunker Mozoomdar for the Respondent.—The plaintiff could not have raised the alternative claim in the first suit: the claims would have been contradictory. [JACKSON, J.—It might have been made in the lower Court, though perhaps not in special appeal.] The cause of action is not the same in both suits: in the first suit it accrued when the husband died: in the second, when the daughter died. The right to the property accrued at different times, although the daughter had died before the institution of the first suit. The rule of law applicable to the defence of *res judicata* in bar of a suit is not only when the same property or subject of demand is in dispute; but it must also appear that the identical question of right or title had been *in judicio*—*Chinnaya Mudali v. Venkatachella Pillai* (3 Mad. H. C. Rep., 320). It is not compulsory on the plaintiff to join all his causes of action in one suit—s. 8, Civil Procedure Code.† A claim on deed of gift having been defeated, does not estop a claim of inheritance—*Jugdissoree Debee v. Kalechunder Lahoree* (S. D. A., 1855, 446). It is a mistake to suppose that s. 2, Act VIII of 1859, applies to the present suit. The land sued for may be the same, but there is no identity of cause of action in the two suits. A suit to recover rent against a tenant, and a suit to recover possession against the same tenant as a trespasser, are not for the same cause of action—*Kadir Buksh v. Golam Ali* (9 W. R., 90); nor is a suit [156] to enhance rent on the same cause of action as one to recover arrears of rent—*Soorasoonderree Dabee v. Golam Ally* (15 B. L. R., 125, note).

*[Sec. 2.—The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.]

Unless suits previously heard and determined.

Suit to include the whole claim. Relinquishment of part of claim.

quished or omitted, shall not afterwards be entertained.]

Sec. 7:—Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted, shall not afterwards be entertained.]

Joinder of causes of action in the same suit.

†[Sec. 8:—Causes of action by and against the same parties, and cognizable by the same Court, may be joined in the same suit, provided the entire claim in respect of the amount or value of the property in suit do not exceed the jurisdiction of such Court.]

The following cases were also cited and distinguished :—*Soorjomones Dayee v. Suddanund Mohapattra* (12 B. L. R., 304), *Woomatara Debia v. Unnepoorna Dassce* (11 B. L. R., 158), *Srimut Rajah Mooltoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v. Katama Natchiar* (11 Moore's L.A., 50).

Baboo Bhuggobutty Churn Ghose in reply. —The case of *Chinniya Mudali v. Venkatachella Pillai* (3 Mad. H. C. Rep., 320) is disposed of by *Kashee Kishore Roy Chowdhry v. Kristo Chunder Sandyal Chowdhry* (22 W. R., 464).

The following **Opinions** were delivered by the Full Bench :—

Garth, C. J. —In this case I have the misfortune to differ in opinion from my learned colleagues. The question which we have to decide is, whether the plaintiff in this suit is barred by the judgment in a former suit. It is said that she is so barred by the second section of the Civil Procedure Code, which enacts, "that the Civil Courts shall not take cognizance of any suit brought on a 'cause of action' which has been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties."

Is then the "cause of action" in the present suit the same cause of action which was adjudicated upon in the former suit? This depends upon what is meant by the words "cause of action," and I believe it has never been seriously doubted, either here or in England, that the true meaning of that expression is not the claim itself, as for instance, the money, or goods, or land, which the plaintiff seeks to recover, but the grounds upon which that claim is founded. For authorities upon this point in England, see *Jackson v. Spittal* (L. R., 5 C. P., 542), *Durham v. Spence* (L. R., 6 Exch. 46), and the cases cited in Day's Common Law Procedure Acts, 47 and following pages. It seems clear from other sections of the Civil Procedure Code, that this is the sense in which the framers of that Act intended to use the phrase. The 7th [157] section of the Code enacts, that "every suit shall include the whole of the claim arising out of the cause of action," treating the claim as one thing, and the cause of action as another, and obviously meaning this —that if, for example, the plaintiff's claim is Rs. 500 founded upon a bond (the Rs. 500 being his claim, and the bond and breach of the condition of the bond being his cause of action) he shall not divide his claim, and sue for part of the Rs. 500 in one suit, and for part in another. And so in the case of land, if a man claims an estate upon the ground that he is heir to his father (the estate being his claim, and his title by inheritance being his cause of action), he is not to be allowed to claim a portion of that estate in one suit, and the remainder in another suit.

If then the true meaning of the words "cause of action" is the ground upon which the plaintiff's suit is founded in each particular case, it will be found that the rule which is laid down in s. 2 of the Civil Procedure Code is really the same (so far as plaintiffs are concerned), and has the same force and effect as the rule of "*res judicata*," as it has always been recognized and acted upon in England and in other countries in Europe where the civil law obtains.

According to that rule, in order to make an adjudication in one suit a bar to a plaintiff's proceeding in another, it must be shown : 1st, that the parties in both suits are the same ; 2ndly, that the thing sought to be recovered is the same ; 3rdly, that the grounds upon which the claim is founded are the same ; and 4thly, that the character in which the parties sue or are

sued is the same. This is the law established in England by a long current of authorities, which will be found collected in the notes to *The Duchess of Kingston's case* (2 Smith's L. C., 695, *et seq.*) and in 2 Phillips on Evidence, 16th and following pages.

The rule of civil law to the same effect, adopted generally by the English as well as the Civil Courts, is thus stated by Vinnius, whom Lord Chancellor WESTBURY quotes in the case of *Hunter v. Stewart*, 31 L. J., Ch., 346, (to which I shall presently refer) as being the best exposition of the civil law upon the subject.

[158] "*Exceptio rei judicatee non aliter Agenti obstat, quam si eadem questio inter easdem personas revocetur. Itaque, ut denum nocet, si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa pretendi, eademque conditio personarum.*" It is not enough that the parties and the subject of the suit should be the same, but also that the ground or right upon which the plaintiff's claim is founded should also be substantially the same. By using the word "substantially," I desire to exclude the supposition that a plaintiff may evade the application of the rule, merely by varying his form of pleading, or by describing the subject-matter of his suit, or expressing his rights, in different language. If the self-same question of right or cause of action has been in substance heard and decided between the same parties, no matter what the form or language of the pleadings may be, the decision is conclusive between them. It is especially necessary to bear this last consideration in mind, because I believe it will be found that much apparent contrariety of opinion in the authorities may be explained by a careful attention to this point.

Let us now proceed to examine the facts of the present case.

In the first suit the plaintiff (a widow) sued to recover certain land which once belonged to her husband, upon the ground that she was *his heir*. She and her husband had had one child only, a daughter, who was dead, and that daughter's husband was the defendant in the suit: and he claimed the property on the ground that the plaintiff's husband had, in his lifetime, after the daughter's marriage, conveyed it by deed to the daughter, and that he, the defendant, was the daughter's heir. The plaintiff's case was that the deed under which the defendant claimed was a forgery; and the sole question raised and determined in that case was as to the validity of this deed. The deed was found to be genuine, and the plaintiff's suit was consequently dismissed.

The plaintiff then brought the present suit, founded upon the fact that the deed, having been held valid, passed the property to the daughter, and that she (the plaintiff), and not the defendant, was her daughter's heir. Whether or no she was right in this, depended upon a doubtful question of Hindu law, [159] which was decided differently by two different Benches of the High Court: NORMAN and LOCH, JJ., deciding first that the daughter's husband was the heir; and LOUIS JACKSON and MITTER, JJ., deciding on review that the mother was the daughter's heir. It should be specially noted that this question, upon which the merits of the second suit entirely depended, was never raised in the first suit. The first suit was to establish the plaintiff's title as heir to her husband, by invalidating the conveyance to the daughter. The second suit was to establish the plaintiff's title as heir to her daughter through the medium of that very deed. It should also be noted, and it will be found extremely important, when we come to examine presently the decisions of the Privy Council, that in these cases the plaintiff had never been in possession of the land in dispute, and that, consequently, she was not suing for any dispossession

by the defendant. She was seeking to establish her title to land which she had never possessed, and consequently she was bound, as I conceive, and as I shall explain more at length presently, to state in her plaint what her title was.

It is obvious that the only question raised in the second suit was 'not (in the words of s. 2) heard or determined in the first suit, and that if, under these circumstances, we are compelled to decide this case in the defendant's favour, we shall be depriving the plaintiff of what is manifestly her right. Still, if law and authority oblige us so to decide, we are of course bound by law and authority whatever may be the right of the parties in this particular suit.

The defendant contends, as I understand, that the cause of action in both cases was the same, because both suits were to recover the same land, of which the defendant was alleged to be in wrongful possession, and that the fact of the plaintiff in the one suit claiming under a totally different title from that on which she relied in the other suit makes no difference. The justice of this contention seems to me to depend upon the question which I have already discussed, viz., what the cause of action really was, and whether the statement of the plaintiff's title in each suit formed a material part of her cause of action.

[160] The solution of this question will, I think, be materially assisted by a reference to the 26th section of the Civil Procedure Code, which directs what statements the plaint shall contain. It is to contain the relief sought for, the subject of the claim, and the cause of action (here again treating the cause of action as a different thing from the claim), and then, in the instance given under paragraph 4 of the same section it is said: "If the suit be for an estate, that plaint should ask for possession of the estate, of which the plaintiff was dispossessed by the defendant, on the—day of—or to which the plaintiff became entitled by inheritance or gift, or purchase or otherwise, as the case may be, on or about the—day of—."

These instances or examples will be found to comprise two distinct classes of suits: 1st, those which might be the subject of an action of trespass in England, where the plaintiff had been once in possession and has since been wrongfully dispossessed by the defendant, and in which it is unnecessary to state specifically in the plaint the nature of the plaintiff's title, because his possessory right is sufficient to enable him to maintain the suit; and 2ndly, cases where the plaintiff never has been in possession, and where consequently he cannot rely upon his possessory right, but must state the grounds or title upon which his claim is founded, as by purchase, or by gift, or by inheritance, as the case may be. In these cases, a plaintiff could not have sued in trespass in England, nor could he have relied upon his possessory title, because he never had a possession [see *Litchfield v. Ready* (5 Exch., 939), *Turner v. Cameron's Steam Coal Company* (5 Exch., 932), and the cases cited in *Bullen and Leake*, 359], and consequently the Code requires, as I read it, that in these cases the plaintiff shall state what his ground of claim is, and that ground of claim, whether it be by right of inheritance or purchase, or otherwise, forms his cause of action, and is a material portion of the plaint. It seems difficult to explain the 26th section of the Code and the examples which are given in any other way.

[161] In this case, therefore, the plaintiff, never having been in possession of the land in question, was bound to state her ground of claim to it, and she did so in the first suit by claiming as heir to her husband. Having made

her claim on this ground, if at the trial she had proceeded upon some other ground, as, for instance that she had purchased the estate from a stranger, the Court, in my opinion, ought to have refused to hear her upon it, because she would then have been proceeding upon a cause of action materially different from that disclosed in the plaint, and which the defendant did not come to trial prepared to contest. If, therefore, the plaintiff's title as heir to her husband was her cause of action in the first suit, how can it possibly be said that the second suit, which was founded on an entirely different title, viz., as heir to his daughter, upon a different state of facts, was upon the same cause of action as the first.

But then it is further argued by the defendant, that if the cause of action in the second suit was not included in the first, it ought to have been; and that the plaintiff was bound to bring forward in her plaint any ground or title upon which she could possibly have claimed the property at the date of the first suit. My answer to this contention is, that there is no law that I know of which obliges the plaintiff to do this; and that, in the absence of any such law, the Court has no right or power to impose such an obligation upon a suitor.

The 2nd section of the Civil Procedure Code does not lay down any rule of the kind, unless indeed the words "cause of action" are intended to have a very different meaning from that which I attribute to them. If in every case where land is sought to be recovered, the cause of action is merely that the plaintiff is entitled to possession (no matter by what right he claims, or whether he ever has or has not been previously in possession of it), the defendant's contention may be right. But then it is difficult to see why the 26th section of the Civil Procedure Code should require the plaintiff to state his title or ground of claim in his plaint. The examples given in section 26 would seem in that case to be only misleading and superfluous.

[162] I have already explained that such is not my view of the section: and if it were the true one, I can see that, in very many instances, it might be productive of great injustice and inconvenience. Suppose, for example, that *A* sues *X* to recover land, upon the ground that it belonged to *B*, and that he, *A*, is *B*'s son and heir. The answer of *X* is, that *A* is not the legitimate son of *B*, and *A* is defeated upon that ground. *A* then brings another suit against *X*, in which he claims a portion of the same property, setting up a will of *B*, by which he divided the property in equal shares to his two illegitimate children, *A* claiming to be one of those children. The defence is, that *A* is barred by the adjudication in the former suit. Now, if *A* was bound to bring forward in the first suit every ground of claim which he had to any part of the property in question, then no doubt he would be barred in the second suit. But surely it would be highly unjust and inconvenient that he should be obliged to set up in one and the same suit two distinctly conflicting claims. The first suit being founded on the contention that he was *A*'s legitimate son, his evidence in that suit would, of course, be directed to that contention. If he were to be compelled in that same suit to bring forward his other claim, and to show by other evidence that he was the illegitimate son mentioned in the will, it is obvious that he would be placed in a most difficult and unfair position. Again take another instance: *A* brings a suit for land against *X*, claiming as heir to his father. He is defeated on the ground that the property was his uncle's, and not his father's. At the time this suit was brought, his uncle was in fact dead, though *A* did not know it. He then brings a suit against *X*, as heir to his uncle. Is the previous adjudication a bar? If the cause of action in both actions is that *A* is entitled to the land, no matter how or why, *A* is, no doubt,

barred, because the second section makes no exception in favour of persons who are not aware of their rights, and Courts of law have no power to import such an exception into the section. If the cause of action in the second suit is really the same as in the first, it is no less the same because the plaintiff when he brought the first suit was not aware of the other title upon which he relied in his second suit. The section says nothing either as to the plaintiff's knowledge of his rights, or as to the time when those rights accrued, and, therefore, if the defendant's contention is correct, a man who has once brought his suit to recover an estate and failed, has exhausted his whole cause of action in respect of that estate, not only all his grounds of claim which he may then have, and of which he may not be aware, but also, if the argument of the defendant is right, every other ground of claim to which he may become entitled in the future. It is impossible, as it seems to me, that this can be the real meaning of the section.

I now come to deal with the authorities; and I am aware of course that not only in this Court, but in the other High Courts of this country, the question now under consideration has been frequently discussed, and that there are conflicting decisions upon it. So far as this Court is concerned, I consider that those decisions are now under review, and, therefore, with great respect for the authors of them, I shall abstain from noticing more than one or two cases; but I will refer to some other high authorities, which I consider particularly deserving of attention; and more especially, to certain judgments in the Privy Council, which it is said compel us in this instance to decide in favour of the defendant.

The first case to which I shall refer is *Chinniya Mudali v. Venkatachella Pillai* (3 Mad. H. C. Rep., 320).

In that case the plaintiff sued to set aside the sale of a village which had been made by his grandfather (so far as concerned his (the plaintiff's) share in that village), upon the ground that the grandfather had made the sale without his (the plaintiff's) consent, and not for any family purposes. One answer to this claim was, that the plaintiff was barred by a previous adjudication in another suit. Two other suits had in fact been brought some years before; the first by the plaintiff's father against the father of the defendant, to set aside the same deed, upon the ground that the grandfather, when he made it, was imbecile, and that the sale was without the plaintiff's father's consent. This suit was decided against the then plaintiff on the ground that the grandfather, when he made the deed, was not imbecile. [164] and the Judge distinctly refused to decide the case upon any other ground. In 1862 the plaintiff again sued the defendant on the same ground as his father had proceeded, and that suit was dismissed, because it was *res judicata*. It was then contended that the third suit was founded on an entirely different cause of action, not heard or adjudicated upon in either of the former suits, inasmuch as it impugned the validity of the deed, not on account of the imbecility of the grandfather, but on the ground that the sale was without the plaintiff's consent and not for family purposes: and the Court (SCOTLAND, C. J., and HOLLOWAY, J.) were of that opinion. They held, that although the Judge in the first of the former suits might have adjudicated upon the subject of the third suit, he advisedly and distinctly refused to do so, and consequently that the cause of action in the third suit had not been heard or adjudicated upon in the first. A very learned judgment was delivered by SCOTLAND, C. J., and HOLLOWAY, J., in that case, in which the principles of the law, and especially of the civil law upon the subject, are very clearly explained.

Another well-known case in England to the same effect was decided by Lord Chancellor WESTBURY in the year 1868—*Hunter v. Stewart* (31 L. J., Ch., 346). In that case the plaintiff had filed a bill in the Supreme Court of Sydney in the year 1843, claiming to be admitted as a shareholder in a Loan and Banking Company upon certain grounds set forth in the bill, and this suit was decided against him. He subsequently filed his bill in England to obtain similar relief, but his claim was founded upon different grounds and equities from those upon which he relied in his former suit, although he might, if he had pleased, have relied upon them in that suit. The Lord Chancellor, held notwithstanding that the suit was not barred. His Lordship says:—"It is indeed true, that the case made by the second bill must be taken to have been known to the plaintiff at the time of the institution of the first, and might have been then brought forward; and it may be said, therefore, that it ought not now to be entertained; but I find no authority for this [166] position in civil suits, and no case was cited at the bar, nor have I been able to find any in which a decree of dismissal of a former bill has been treated as a bar to a new suit, asking the same relief, but stating a different case, giving rise to a different equity." That case has never, as far as I know, been overruled, and it is, undoubtedly, a very strong authority in favour of the present plaintiff.

I now come to the cases in the Privy Council, which are said to be at variance with the plaintiff's contention. The first of these is *Srimut Rajah Mootoo Vijaya Raganada Bodha Gooroo v. Katama Natchiar* (11 Moore's I. A., 50). In that case suits had been brought in the year 1832 to recover possession of a zemindary, and one of the principal questions was, whether the zemindary was a divided or an undivided estate; one of the parties (A) claimed under an alleged will of the zemindar last seized. The Courts in this country decided against the validity of the will, and, upon appeal to the Privy Council in 1844, their Lordships considered that the question whether the property was a divided or undivided estate was a very important one, and had not been properly tried; they, therefore, remitted the case to India, giving liberty to the parties to bring a fresh suit for the purpose of trying that question. Fresh suits were, accordingly, brought in this country, and in those suits A again claimed the zemindary under the alleged will made by the late zemindar; though at the trial he rested his case rather on the ground of the property being undivided than upon his claim under the will. Upon this suit being appealed to the Privy Council, A's Counsel distinctly and advisedly gave up all claim under the will, admitting that he did not intend to treat it as a will at all, and resting his case entirely upon other grounds. A, being defeated in these suits, instituted a fresh suit in this country for the purpose of establishing the validity of the very will upon which he had founded his claim in both the two former suits, and which he had afterwards expressly renounced by his Counsel in the second suit; and the Courts here held that he was barred by the judgment [166] in the former suit from making this fresh claim. He then appealed to the Privy Council in 1866, and their Lordships decided that as in the former suit the plaintiff had distinctly put forward his claim upon the will, and then abandoned it, the abandonment must be considered as conclusively binding upon him, as if the Court had actually decided against the validity of the will and that in attempting again to enforce his claim under the will he was proceeding to enforce a cause of action which had already been put forward in a former suit and disposed of. There is nothing in that decision, as it seems to me, which conflicts in any way with the opinion which I entertain in the present case. The will upon which the plaintiff's suit was founded had been made

the actual subject of claim in the previous suit, and it was no less adjudicated upon in that suit, because the plaintiff by his Counsel chose to renounce it.

Then comes the very important case of *Woomatara Debia v. Unnopoom-Dassee* (11 B. L. R., 158). In that case certain disputes had arisen in this country between the plaintiff and other persons on the one hand, and the defendants on the other, as to the boundaries of certain parcels of lands : and these disputes became the subject of proceedings (1st) before the Deputy Collector, (2nd) before the Superintendent of Surveys, and lastly, before the Revenue Commissioner, who made an order as to the boundaries, which, as the plaintiff contended, deprived her of upwards of 3,000 bighas of land, to which she was entitled. The defendants, accordingly, took possession of this land from the plaintiff, and the plaintiff then brought a regular suit against the defendants to recover it back, alleging that they had dispossessed her of the property. In that suit she described the land of which she had thus been dispossessed as *towfir* land, and upon the suit being tried the plaintiff was defeated. She then brought another suit to recover the self-same land from the defendants, alleging a dispossession precisely as before, but describing the land in her plaint as belonging to her ancient talook. The Principal Sudder Ameen upon [167] the trial came to the conclusion that the plaintiff was making in substance precisely the same claim as she had made in the former suit, and considered that she was, therefore, barred. The plaintiff then appealed to the High Court, and the appeal was heard by PHEAR and HOBHOUSE, JJ., who dismissed it upon the same ground (2. B. L. R., A. C., 102). PHEAR, J., in his judgment says :— "In both suits they sought to recover from the defendants the same land, on the ground that it was wrongfully held from her by the defendants ; and the wrong-doing of the defendants was in the one suit the same act or series of acts as in the other." The case then came on before the Privy Council, and was heard in 1872, when their Lordships affirmed the decision of this Court, considering that the case was barred by s. 2 of the Civil Procedure Code. It was argued in that case, that the plaintiff, in the first suit, made her claim upon an entirely different title from that which she put forward in the second suit ; but their Lordships' judgment, as I understand it, distinctly proceeds upon the ground that the cause of action in that case had nothing to do with title : that she was in fact setting up precisely the same right in the one case as in the other, and that the allegation of diversity of title was merely a shift for the purpose of endeavouring to try the same question over again under another phase. Their Lordships say :—"The first question which occurs to their Lordships (upon s. 2 of the Civil Procedure Code) is, what is meant by the 'cause of action' : and, in the present case, they are clearly of opinion that the cause of action in both suits was the dispossession of the appellant by the fixing of the boundary which is now complained of, and the other proceedings which culminated in the decision of the Judge in the Act IV case." Their Lordships then go on to say :—"Nor does it appear to their Lordships necessary to decide whether, in some of the cases put by Mr. *Doyme* (the Counsel for the plaintiff), where the party was suing entirely under a new and different title, such a distinction as he contended for might not be taken ; because here it seems clear to their Lordships that the [168] matter in dispute throughout was the title of the talookdar of this talook to the land in question, and the possession which she had thereby acquired ; and it is perfectly clear upon the proceedings in the earlier suit, that her right in any way to this land was capable of being therein determined. The Court in that suit seems almost to have considered that the title now sued upon had been put forward, and could not prevail ; and that, if the talookdar had any title at all, it was by way

of *towfir*. The Court of appeal, proceeding on the admission of the plaintiff that the whole of the originally settled talook was in her possession, and that all she had been dispossessed of was claimed by her only as *towfir* lands, dealt with that claim; but it is perfectly clear that if the plaintiff had chosen to put forward the other title in the way that I have suggested, the Court could have dealt with the whole question and considered it; that question being in point of fact a mere question of quantity and boundary, and whether the plaintiff was in any way entitled to recover the land sued for from the defendants, who are the defendants also in the present suit."

I certainly do not understand from this judgment that their Lordships intended to lay down any rule such as is now contended for by the defendant. Indeed they appear to me to guard themselves most carefully against doing so. That case was precisely one of those which I have already described, which might have been made the subject of an action of trespass in England, and in which it would have been quite sufficient for the plaintiff, under cl. 4, s. 26 of the Civil Procedure Code, to have merely alleged in her plaint that she had been dispossessed of her estate by the defendants, without stating how or by what title she had acquired that estate. Having once been in possession, she was entitled to stand upon her possessory right, and to sue the defendants for a wrongful dispossession; and their Lordships say expressly at the outset of their judgment, that they consider the plaintiff's cause of action in that particular suit to have been her dispossession. That case, therefore, in my opinion, does not govern the present, which, as I have already explained, [169] comes under a different class of suits, in which the plaintiff could not rely upon her possessory right, but was bound to show by what other right or title she claimed the land in dispute.

This is in fact one of those very cases, as it seems to me, in which the question to be tried was not dispossession but of substantive title, and which their Lordships in the Privy Council especially except from the operation of their judgment. It is true, that in one passage they appear to adopt the judgment of PHEAR, J., in the High Court, and PHEAR, J., does undoubtedly use expressions apparently laying down the rule for which the defendant contends as applicable to all cases; but I consider that those expressions of PHEAR, J., even though confirmed by the Privy Council, were extra-judicial, or at any rate can only be considered as an authority with reference to the particular case or class of cases which was then *sub judicio*.

The only other authority which I think it necessary to notice, is that of *Kashee Kishore Roy Chowdhry v. Kristo Chunder Sandyal Chowdhry* (22 W. R., 464). The plaintiffs in that case had, in a former suit, laid claim to the land in dispute as being an accretion to an estate of theirs called Mouzah Rughoorampore. In that suit they were defeated; and they then brought a second suit for the same land, describing it as an accretion to another estate called Mouzah Lakhichur, and the Court (Sir R. COUCH, C. J., and AINSLIE, J.), decided that the plaintiffs were barred. They considered that the case was not distinguishable from that in the Privy Council, *Woomatara Debia v. Unnopoorna Dassee* (11 B. L. R., 158), to which I have just referred; and I perfectly agree with them. The plaintiffs in that suit were not relying upon a different title from that which they set up in their former suit. In both suits they claimed the land in question as an accretion to other land, which was their undisputed property, and whether they claimed it as an accretion to one estate or another, or to one village or another, or to one field or another, they

were in each case claiming it as an accretion to land of which they were confessedly in possession. The difference between the two suits was merely matter of description, not of title. This case, therefore-[170]fore as it seems to me, is also clearly distinguishable from the present: and the main reason why I notice it is, that the learned Judges in that case appear to have misapprehended an important passage of the very excellent judgment of HOLLOWAY, J., in *Chinniya Mudali v. Venkatachella Pillai* (3 Mad. H. C. Rep., 320), to which I have referred. Sir RICHARD COUCH apparently considers that HOLLOWAY, J., was guilty of some inconsistency in quoting as an authority in one passage a doctrine which he distinctly contradicts in another passage, whereas upon reference to the report, pp. 329 and 330, it will be found that HOLLOWAY, J., is there taking considerable pains to explain what he calls the *untenable* position which had been once held by certain of the civilian jurists, viz., that "every possible claim to a particular subject-matter is exhausted by that claim having been once agitated." HOLLOWAY, J., then quotes the texts which induced this misconception of the law; and he points out the distinction which was always observed in actions *in rem* (even during the time when that "untenable position" was upheld by some jurists) between those cases where a plaintiff made his claim without specifying any ground upon which he made it, and other cases where his claim was founded upon some particular title. In the first class of cases, he was barred by the judgment from bringing any other suit, in the last class he might always bring a new suit founded on a different title. HOLLOWAY, J., explains how this doctrine of the Roman law, which he shows to be untenable, disappeared in the time of Diocletian, after the abolition of the order of *judices*, and that since that time the accepted rule of the civil law has always been as he had previously described it in the earlier part of his judgment.

As far as I can see, therefore, neither of the decisions in the Privy Council, nor the last authority to which I have alluded in this Court, militate in any degree against the view which I have taken of the present case. That view is supported, as it seems to me, not only by the provisions of the Civil Procedure Code itself, but by a long current of authorities in England, and [171] by the rule of the civil law as laid down by the most eminent jurists. On the other hand, the construction which some of my learned brothers are disposed to put upon the provisions of s. 2, and the review which they take of the law as laid down by the Privy Council, is not only, as I consider, at variance with the highest authorities, but I fear it will be productive in a large number of cases, as it undoubtedly must be in this, of great injustice.

The state of the law in India upon the subject of land tenures and inheritance is exceedingly difficult and complicated. It is quite impossible that the great mass of the people can properly comprehend its details; and it must constantly happen, that, until the differences between contending parties have been ventilated and discussed in a Court of law, the litigants themselves are entirely ignorant of what their legal rights and position may be. I do not believe that the Legislature of this country, nor the Lords of the Privy Council, in interpreting the language of the Legislature, ever intended to impose upon a people, who are for the most part uneducated and imperfectly advised, a more stringent rule upon this difficult subject than has obtained for centuries past in civilized Europe.

I desire to add, that I make these observations with every respect for the views of my learned colleagues, and with sincere regret that there should be any difference of opinion amongst us upon such an important question.

Kemp, J.— This case has been referred by the Chief Justice and Mr. Justice BIRCH with the following question :—

“ Whether a plaintiff who has brought a suit to recover property upon the strength of one title, and has been defeated in that suit, can bring a suit to recover the same property upon the strength of another title, of which he might have availed himself at the time the former suit was brought, but which he did not set up in the plaint then filed ? ”

Another question was referred for our opinion, but as it has been abandoned in argument on the part of the defendant appellant, it is unnecessary to allude to it.

[172] The plaintiff, respondent, sues as heiress of her daughter, Parbutty Dassee, claiming three jotes. It appears that the late Anund Narain Sircar, the husband of the plaintiff, a few days after the marriage of his daughter Parbutty Dassee, with the defendant Denobundhoo, conveyed by deed of gift, dated the 18th of Bysakh, 1262 B. S., to his daughter the three jotes, the subject of the present suit. The donee Parbutty died first, and then the donor, the aforesaid, Anund Narain Sircar. He left a widow, the plaintiff. It is alleged in the plaint that, after the death of Anund Narain and his daughter, the three jotes were held by Denobundhoo, the defendant, who sued for the recovery of the rents thereof. The plaintiff intervened, but was defeated in the rent-suit. She then sued some years—about eight years—after the succession opened out to her, alleging that the deed of gift was a forgery. That suit was for two out of the three jotes, omitting all claim to the third jote situated in Mouzah Door-gapore. In that suit it was held that the deed of gift was valid, and the plaintiff's suit was dismissed. She brings the present suit within a few days of the period of limitation, dating from the death of her daughter Parbutty, claiming the three jotes as heiress to her daughter.

The defendant Denobundhoo, the son-in-law, contends that the suit is barred under the statute of limitation ; that it is barred under s. 2 of Act VIII of 1859, as also, with reference to jote No. 3 in Mouzah Doorgapore, under s. 7 of Act VIII of 1859, and on the merits, that he and his son by another marriage are, under the Hindu law, the preferential heirs to the estate of Parbutty Dassee.

Both the lower Courts have held that the suit of the plaintiff is in time, as it has been instituted within 12 years from the date of the death of Parbutty Dassee ; that it is not barred under s. 2 of Act VIII of 1859, or under s. 7 of the same Act, with reference to the claim for possession of the jote in Doorgapore. On the merits it was held that the plaintiff was the preferential heiress to her daughter's stridhan.

I am of opinion that the plaintiff's suit is barred under s. 2 of Act VIII of 1859. Her cause of action in her first suit, [173] and which obliged her to seek the aid of the Court, was that she alleged that she had been wrongfully deprived of possession of land which she was entitled to have. She had to make out a title to possession such as to prevail against the defendant. It is true that the title set up in the present suit is different from the title set up in the former suit ; but the cause of action is not, in my opinion, changed within the meaning of s. 2 of Act VIII of 1859. The title she now sues upon was a title which she could have set up in the first suit, as it is admitted that both her husband and her daughter were dead, and had been so for many years when she brought her first suit. If she omitted to put forward her strongest or any title then available to her and within her cognizance, “ so much the worse for her,” to use the words of PHEAR, J., in his decision in

Umatara Debia v. Krishna Kamini Dasi (2 B. L. R., A. C., 102; S. C., on appeal to P. C., 11 B. L. R., 158), which decision was affirmed by the Privy Council.

As to the jote in Doorgapore, it seems clear that the plaintiff cannot, under the provisions of s. 7 of Act VIII of 1859, claim it in the present suit, having omitted to do so in her first suit.

I would reverse the decision of the Subordinate Judge and decree the special appeal.

Jackson, J.—In my opinion the plaintiff is concluded by the previous decision, on the authority of the Privy Council judgment in *Woomatara Debia v. Unnopoorna Dassee* (2 B. L. R., A. C., 102; S. C., on appeal to P. C., 11 B. L. R., 158); but I should have been of the same opinion upon other grounds and independently of that authority.

This case is not precisely analogous to any of those which have been referred to, and in my opinion there is, strictly speaking, no new title set up by the plaintiff constituting a new cause of action. In the first suit she claimed the property in question as heir of her deceased husband. Defendant's case was that it was not property left by the deceased husband, but had been given by him in his lifetime to his daughter, the defendant's wife, who at the time of bringing the suit was dead, and that [174] defendant held it, and was entitled to it as the heir of that daughter, his own wife.

Under the procedure before Act VIII of 1859, the plaintiff, in the filing of an answer to this effect, would have been entitled to put in an application, and doubtless would have done so, if she had chosen to contest the point, to the effect that, assuming such gift, then the plaintiff, and not the defendant, was heir to the donee, and so entitled. And therefore the Court, I conceive, would have been bound to try as well the issue of fact as to the deed of gift, as also the further question whether, if the gift was true and valid, the defendant or the plaintiff was heir.

Under the Code there is neither answer nor replication, but the parties may tender issues upon a further allegation, written or oral, and in my opinion it was incumbent on the plaintiff, if she had a claim as heir of her daughter, to ask for an adjudication of it upon the opposite claim being set up by the defendant.

The present suit, therefore, has for its purpose the raising of an issue which was triable in the former suit, but which the plaintiff then declined.

In the Madras case [*Srimut Rajah Mottoo, &c., v. Katama Natchiar* (11 Moore's I. A., 50)] decided by the Privy Council, the plaintiff, in a later suit for the same subject-matter, sought to rely upon a will which, by his counsel, he had formally and deliberately abandoned, and Lord WESTBURY, who as Lord Chancellor had decided *Hunter v. Stewart* (31 L. J., Ch., 346), which case had been referred to in the Court below, said, in delivering judgment:—"It is impossible that any such suit should be allowed to proceed. In the first place it is clear upon the former record, that the appellant had then the power of relying on that document as being a valid will. He in effect stated, or might have stated, his defence in the suits of 1856 in the alternative. He might first have insisted that it was an undivided property, and that therefore the plaintiff in those suits had no interest therein; and secondly, he might have pleaded, but if it shall turn out to be a divided property, [175] then my title arises under this instrument, and I plead and rely on it as a valid decree in my favour." The alternative case for the plaintiff in this suit appears to me to present no greater difficulties than the suggested alternative plea for the defendant in the other. It is true that the argument was stronger

against the plaintiff in that case than in the present, because their Lordships considered that there was a want of *bona fides* in the plaintiff, but that only contributed to the grounds of the decision, and was not the sole or the main ground. The judgment further lays it down that "when a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward." And it seems to me that the same principles would apply with equal force, and certainly with equal reason, to claimants in this country who are seeking to disturb possession.* Their Lordships say further on, "the thing was in issue, and what was in issue must be taken to have been decided by the judgment." Here if the heirship to the daughter was not in issue, it was only not so because the plaintiff would not recite the issue.

In *Hunter v. Stewart* (31 L. J., Ch., 346), Lord WESTBURY said that he could find no authority for the doctrine that in civil suits a case, which was known to the plaintiff when he filed his first bill, could not be entertained as made by the second bill. But that is not the present case; what we have now before us is a question raised by the opponent in the first suit, and not gainsaid then, for which no doubt there is an excellent reason, viz., that if the plaintiff had met it, he was pretty sure of an adverse decision at least in the lower Court. But a change in the view of the law upon any particular point taken by the highest tribunal in this country is of course no justification for bringing a suit which principle excludes.

I think it unnecessary to enter here upon a discussion of what is meant by "a cause of action which has been heard and determined, &c." But it may be observed that the term [176] "cause of action," as cited in Indian Courts, is much older than the Civil Procedure Code, for it occurs in many parts of the first regular enactment touching the Civil Courts in Bengal, Regulation III of 1793.

I may also remark that the issues which exhaust what is termed (s. 141)* the real question, in controversy between the parties, are drawn not so much from the plaint, as from the allegations, written or oral, made by them respectively; and my impression, founded on much consideration of the several provisions of the Code, certainly is that the Legislature clearly intended the whole controversy between plaintiff and defendant upon the subject-matter, so far as their knowledge permitted, to be tried out and conclusively decided, subject only to appeal and review of judgment. As to the judgment of the Privy Council in *Woomatara Debia v. Unnopoorna Dassee* (11 B. L. R., 158), if I were satisfied that the decision of their Lordships really rested upon narrower grounds, I should not be much influenced by the terms of general concurrence in the judgment of PHEAR, J. But I think justly, for the reasons stated by MARKBY, J., in his judgment, which I had had the advantage of reading, that their Lordships really adopt the whole of PHEAR, J.'s reasoning, and that their judgment could not otherwise have well been precisely what it was.

Finally, I would say that it is extremely difficult to discover real injustice or hardship in any of the supposed cases which are put, and, so far as that argument is entitled to any consideration, that the balance of public convenience is very much, in this country at least, in favour of a stringent rule.

* [Sec. 141 :—At any time before the decision of the case, the Court may amend the issues or frame additional issues on such terms as to it shall seem fit, and all such amendments as may be necessary for the purpose of determining the real question or controversy between the parties shall be so made.]

I would dismiss the present suit.

Markby, J.—In this case one of the questions referred to us, and which we took time to consider, is, whether a plaintiff who has brought a suit to recover property upon the strength of one title can bring a second suit to recover the same property upon the strength of another title of which he might have availed himself at the time the former suit was brought, but which he did not set up in the plaint then filed.

[177] I think this question is concluded by authority.

PHEAR, J., in the case of *Umatara Debia v. Krishna Kamini Dasi* (2 B. L. R., A. C., 102), dealing with a second suit brought to recover possession of property which the plaintiff had failed to recover in a former suit, said, "it appears to me that her cause of action was in both suits the same. In both she (the plaintiff) sought to recover from the defendants the same land, on the ground that it was wrongfully withheld from her by them, and the wrong-doing of the defendants was the same act or series of acts in the one case as in the other. It is true that the title to possession on which the plaintiff now relies is different from that which she set up in 1851. But I think the difference in the title put forward does not change the cause of action within the meaning of s. 2 of Act VIII of 1859. The plaintiff's cause of action, that which obliges her to seek the aid of the Court of Justice, is simply this, namely, that she is, as she alleges, wrongfully deprived by the defendants of the enjoyment by possession of certain lands which she is entitled to have. It is for her at the trial to make out such a title to possession as will prevail against the defendants. If she omits to put forward her strongest title, or her real title, so much the worse for her. The adjudication of the suit determines as between her and the defendants not only the matter of the particular title which she sets up, but the actual right to possession at the date of the plaint by whatever title it might be capable of being then supported." This judgment was concurred in by Sir CHARLES HOBHOUSE, the other Judge before whom the appeal to this Court in that case was heard.

These broad and general principles had not, I believe, been laid down in this country before. On the other hand, I believe I am justified in saying that in every country in Europe which has adopted the civil law, the matter was settled the other way. The French law on the subject will be found in Pothier, *Traite des Obligations*, section 895, who gives the following example:—"If I being the heir-at-law of the deceased [178] attacked his will as being not genuine or invalid, and on that ground I claim the inheritance, even should I fail, that will not prevent me from claiming the inheritance on other grounds." For the general modern views upon the subject I may refer to a work recently added to our library, Arndt's *Pandekten*, section 116, note 5, where the matter is very clearly and concisely treated. It there appears that the doubt which has been recently started, whether a particular passage in the digest, upon which the practice of modern Europe in this matter is in part founded, has been correctly understood, has had no effect whatsoever in shaking the rule of law hitherto observed, namely, that in a suit brought to recover possession founded upon title, only that title which is put forward is adjudicated upon.

All this was pointed out by HOLLOWAY, J., in the case of *Chinniya Mudali v. Venkatachella Pillai* (3 Mad. H. C. Rep., 320), where that learned Judge expresses an opinion upon the general question precisely the opposite to that taken by two Judges of this Court in the case I have referred to. Prior therefore to the Privy Council case, to which I shall hereafter advert, the law in this country was not settled.

In England, as is well known, the title to property is tried in a way wholly different from that in which it is usually tried in the continental countries of Europe and in this country. Here, and in most other countries, the suit generally brought is a suit to recover possession founded upon title. In England the suit is either ejectment, which has a special and peculiar history of its own, or trespass; and there is no practical difficulty in trying separately as many titles as a man chooses to put forward.

This being the general state of the law which, upon a matter of this kind, the Privy Council no doubt fully considered, their Lordships have, as it appears to me, thought fit deliberately to adopt as the law of this country what I may call the stricter of the two views which have been expressed in the Courts here. The case of *Unatara Debia v. Krishna Kamini* [179] *Dasi* (2 B. L. R., A. C., 102), above referred to, was carried by the plaintiff on appeal to the Privy Council, and a decision was given, which, in my opinion, has settled the law. Their Lordships, after referring to the terms of the second section of Act VIII of 1859, say, "the first question is what is meant by the 'cause of action.' And in the present case, they are clearly of opinion that the cause of action in both suits was the dispossession of the appellant." It is there shown how that dispossession took place, but the title of the plaintiff is not anywhere alluded to as forming any part of the cause of action. In the subsequent part of the judgment, their Lordships expressly say that "they entirely concur with the judgment delivered by PHEAR, J., in the High Court," and they dismissed the appeal (11 B. L. R., 158).

The question has come before this Court once since this decision of the Privy Council was given, and in that case Sir RICHARD COUCH, referring to this decision and to another decision of the Privy Council in *Srimut Rajah Moottoo Vija Raghanada v. Katama Natchiar* (11 Moore's I. A., 50), (but which does not appear to me to be so applicable), says that the plaintiffs in the case before him "having the means in the former suit of proving the title by accretion to Rughoorampore, or by accretion to Lukhede, or by accretion to both, they are barred by the judgment in that suit, and cannot bring another setting up a title by accretion to Lukhede, and whether the Subordinate Judge put a proper construction upon the plaint or not is not material. If they did set up a title by accretion to Lukhede, that has been decided against them. If they did not they ought to have done it, and having omitted to do it, they cannot do it now"—*Kashee Kishore Roy Chowdhry v. Kristo Chunder Sandyal Chowdhry* (22 W. R., 464). Sir RICHARD COUCH goes on to refer to the judgment of HOLLO-WAY, J., in *Chinniya Mudali v. Venkatachella Pillai* (3 Mad. H. C. Rep., 320) as supporting this view. But (I say it with deference) there seems to have been some misapprehension in Sir RICHARD COUCH's mind as to the effect of that judgment.

[180] It does not support the view taken by the late learned Chief Justice; it is precisely the other way. But of course having been delivered before the judgment of the Privy Council, it is of no weight. It has, however, induced me to consider very carefully indeed the decision of the Privy Council, and to see whether their Lordships do really adopt the broad and general rule laid down by the two learned Judges of this Court.

I, therefore, proceed to consider the reasons which have suggested themselves, or which have been suggested to me, why the decision of the Privy Council may be treated as not conclusive upon the question before us.

It is said in the first place that, in the case before the Privy Council, the titles put forward in the two suits were not different, and that it was a mere question of "quantity and boundary." Their Lordships, in one part of their judgment, speak of the claim to the land as *towfir* as a claim by gradual squatting and encroachment. That is not generally the meaning of *towfir*, though the word may have been so used in that case. It is, however, difficult now to say exactly how the plaintiff's case was there put. But this is clear, that the Judges who heard the appeal in this Court had no doubt whatever that the titles were different in the two cases, and the Privy Council say (at p. 167) "with the full knowledge of all the circumstances, she chose to say 'I admit that I am in possession of all that I was entitled to under the doul, but I claim this land, the whole of it, as *towfir* land.' The contention now is that, although she thought fit to take that course then, she has now a right to fall back upon the other title, and it is with the case so put that their Lordships deal." At any rate, therefore, the Privy Council seemed willing to adopt for the purpose of argument the view taken by this Court that the titles were different.

Again, it is said that the cause of action in both the suits under the consideration of the Privy Council was actual dispossession, whereas, in the special appeal now before us, the plaintiff never has been in possession. Possibly that may be so, though it is not very clear. But I confess that I am unable to see any sound distinction upon this ground. The important [181] question is, whether in s. 2 of Act VIII of 1859 the words "cause of action" include the title upon which the plaintiff relies to recover possession in a suit. I can quite understand it being held that they did include this. But I cannot understand how they can be interpreted to include the title where the plaintiff is wrongfully put out of possession of land of which he has never had possession, and not to include it when the plaintiff is wrongfully kept out of possession of land of which he has been in possession. PHEAR, J., carefully words his judgment so as to exclude any such distinction. The Privy Council say nothing to the contrary, and in my opinion it is clear that the suit brought in this country to recover possession upon title, whether there has been dispossession or not, is what is known as a suit *in rem*, and not a suit *in personam* arising upon an obligation *ex delicto*, or what in England would be called an action of *tort*.

Further, the Privy Council do, no doubt, use these words:—"Nor does it appear to their Lordships necessary to decide, whether in some of the cases put by Mr. *Doyle*, where the party was suing entirely under a new and a different title, such a distinction as he contended for might not be taken; because here it seems to their Lordships that the matter in dispute throughout was the title of the talookdar of this talook to the land in question, and the possession which she had thereby acquired, and it is perfectly clear upon the proceedings in the earlier suit that her right in any way to this land was capable of being therein determined." The report of the argument in the case does not assist us in discovering what the class of cases is which is here referred to. But I think it is clear that by the words "new and independent title," the Privy Council meant some title which could not have been put forward in the former suit. This must mean a title newly acquired, because it is clear that under our procedure a person may put forward in one and the same suit as many different titles as he likes.

It is further said that the Privy Council did not intend to decide anything more in the case under consideration than was decided in the case reported in 11 Moore's Indian Appeals, page 50, from which a passage is quoted. Between

the facts of the [182] case reported in the 11th Moore and the facts of the case in the Privy Council now under consideration, there is a vast difference. In the earlier case—Kattama Natchiar's case as it is called—the defendant had deliberately through his Counsel disclaimed all title under a certain document as a will, and insisted that it must be regarded by the Court as not testamentary. It would seem, therefore, that there had been in the earlier suit what was in fact equivalent to a judicial determination of the very claim put forward in the second suit. But Lord WESTBURY, in giving judgment, put the case upon more general grounds. He laid down this general proposition, that "where a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward." That passage is quoted in the judgment I am now seeking to interpret. If we were to strike out the words "according to his knowledge," the principle there applied to a defendant would be identical with the principle it is now sought to apply to a plaintiff. Probably it was in consequence of these words that the Privy Council recognize that the two cases are not quite identical. Nothing is said in the more recent case about the knowledge of the plaintiff.

There are some passages in the judgment of the Privy Council which refer to admissions made by the plaintiff in the former suit inconsistent with her second case, and the Privy Council also say (p. 168), "the Court in that suit seems almost to have considered that the title now sued upon had been put forward and could not prevail." Of course, if there had been a previous adjudication of this very question, or an admission deliberately made and recorded equivalent to an adjudication, *cadit questio*; but the Privy Council do not say there had been either the one or the other, as they would assuredly have done, had they intended to place their judgment upon either of these grounds. And if they had intended to confine their judgment to either of these grounds, they would not have expressed their entire concurrence in the judgment of this Court then under appeal.

I have considered the matter at this length, both because I [183] feel the importance of the question raised, and because we are not unanimous as to the effect of the Privy Council decision. I confess that I have not been without doubt upon the matter, but, upon the best consideration I can give to the words of their Lordships, and with great deference to those who think otherwise, the conclusion I have come to is that the Privy Council has already determined the question put to us in the negative, and that this Court has no other duty than to follow that decision.

Upon the other question referred to us our opinion was expressed during the argument.

Macpherson, J.—I also am of opinion that this suit is barred. *

I think that the question of the defendant's being his wife's heir as regards this property was in fact before the Court (although there may have been no contest about it) in the first suit, and that the decision then given against the plaintiff necessarily contains a decision of the defendant's right, as heir of his deceased wife, to hold the property against the plaintiff. We unfortunately have not before us the actual pleadings and proceedings in the former suit. But there can be no doubt that in that suit the plaintiff took it for granted, and admitted, that the defendant was his wife's heir, so far as this property was concerned.

Further, I agree with MARKBY, J., in thinking that, even if the question was not in any way decided in the former suit, we now are bound to hold, in accordance with the recent decisions of the Privy Council, that it ought to have been raised in the former suit if at all, and that not having been raised then, it cannot be raised in the present suit.

NOTES.

[I. STATUTORY PROVISION—

C. P. C. (X OF 1877), S. 13, EXP. II.

Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit (C. P. C., 1882, s. 13, Exp. II). This explanation is still retained in the C. P. C., 1908, sec. 11, Exp. IV.

II. CASE-LAW.

(a) Two suits for possession of the same land cannot be brought although the title set up in the first suit was not the title set up in the second :—(1876) 2 Cal., 152; (1878) 3 Cal., 705. Following this, it was held that two suits to recover a specific sum of money as due on partition and as on account were held barred :—(1877) 3 Cal., 23.

(b) The Madras and the Bombay High Courts did not adopt the views of the majority in this case :—

- i. First suit to recover certain land on the ground of oral lease being dismissed without trial of the title, the second suit to recover possession on the ground of title was held not barred :—(1881) 4 Mad., 308. See also 7 Mad., 264; 9 Mad., 251; 8 Bom., 174; 13 Bom., 326.
- ii. Failure to recover certain property under an alleged partition deed in the first suit by a member of a Hindu family is no bar to a suit to recover the same on a general partition :—(1881) 5 Bom., 589.
- iii. Suit for partition under the general law, being dismissed on the Court refusing amendment of plaint to insert claim for partition on the basis of a previous award; subsequent suit on award held not barred :—(1889) 14 Bom., 31 (*vide* expln. in 25 Bom., 189).
- iv. But in 25 Bom., 189, this case was approved and it was held that where there were two suits for possession of the same land, first as surviving members of the joint family and secondly as reversioners, the latter was barred :—(1900) 25 Bom., 189, where previous authorities are reviewed.

See, however, the observations of BHASHYAM AYYANGAR, J., on this case in (1903) 26 Mad., 760.

- v. A plaintiff who seeks to redeem a specific mortgage or to eject on a specific lease, and fails in such suit because the mortgage or lease is not proved, is not thereby precluded from seeking to redeem the same property or a portion thereof from another specific mortgage or to eject on the strength of his title the person in possession. The real test is whether the cause of action or transaction on which the two suits are based is the same and not whether the transaction is sought to be established in different modes or by different means :—*Per* BHASHYAM AYYANGAR, J. (1903) 26 Mad., 760, which contains a very instructive review of the previous cases.
- vi. All the bases on which reversionary heirship can be based should be alleged in the same suit for recovering property :—(1908) 31 Mad., 385.

(c) Where the subject matter claimed is different the rule does not apply :—(1896) 24 Cal., 83.

(d) Several suits in respect of the liability to sale of certain land in separate proceedings in execution under different decrees not barred :—(1880) 6 Cal., 559.

(e) All the reliefs available to the creditor under the same agreement of the reversioner with the widow should be alleged in the same suit:—*Kamaswar Pershad v. Raj Kumari Rattan* (20 Cal. 79 P. C).

(f) Dismissal for default might lead to *res judicata*:—(1896) 10 Mad., 272.

(g) Rent being admitted to be due in the first action for rent under an agreement, in the second action it was not open to raise the defence of no consideration for the agreement:—*Cooke v. Rickman*, (1911) 2 K. B., 1125.

(h) *First action* for rent, under an agreement for a lease, defence,—no agreement concluded; *second action* under the same for further arrears of rent, defence—no memorandum or note in writing as required by the Statute of Frauds; not permitted:—*Humphries v. Humphries*, (1910) 2 K. B. 531 C. A.]

[184] PRIVY COUNCIL.

The 9th, 16th, 17th and 18th May, 1876.

PRESENT:

SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH AND SIR
ROBERT P. COLLIER

Khajooroonissa, Widow of Enayut Hossein, deceased.....Defendant

versus

Rowshan Jehan.....Plaintiff.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Compromise—Appeal—Fraud—Mahomedan Law—Devolution of property—
Deed of gift—Will—Presumption of marriage.*

In a suit brought on behalf of an infant daughter by her mother as guardian, a decision was given partly for and partly against the defendant, who thereupon filed an appeal, which he afterwards withdrew in accordance with the terms of a compromise purporting to have been made with the mother and daughter. Subsequently, at the suit of the daughter, the compromise was set aside as fraudulent and occlusive, and a review of the original decision, in so far as it was adverse to the plaintiff's interest, was allowed. The defendant then applied that his appeal might be revived, but his application was rejected by the High Court, on the ground that he had deprived himself of his opportunity of appeal by his own fraudulent conduct. *Held*, by the Judicial Committee, that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the plaintiff was to be allowed to be heard against so much of the original judgment as was unfavourable to her, the defendant must similarly be heard against so much of the same judgment as was unfavourable to him.

The policy of the Mahomedan law is to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs. But a holder of property may defeat the policy of the law by giving in his life-time the whole, or any part, of his property to one of his heirs, provided he complies with certain forms. This may be done by a deed of gift without consideration, or by deed of gift for consideration. A conveyance by deed of gift without consideration is invalid, unless accompanied by delivery of the thing given so far as it admits of delivery. In the case of a gift for consideration, the delivery of possession is not necessary for its validity, and no question arises as to the adequacy of the consideration; but there must be an actual payment of the consideration by the donee, and a *bona fide* intention on the part of the donor to divest him *in presenti* of the property and to confer it on the donee. It is incumbent on those who set up transactions of this nature to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been strictly complied with.

[185] By the Mahomedan law, a testator may bequeath one-third of his estate to a stranger, but cannot leave a legacy to one of his heirs without the consent of the rest. A will purporting to give one-third of the testator's property to one of his sons as his executor, to be expended at the son's discretion in undefined pious uses, and conferring on such son a beneficial interest in the surplus of such third share, *held* to be an attempt to give, under colour of a religious bequest, a legacy to one of the testator's heirs, and to be invalid without the confirmation of the other heirs.

Where a son has been uniformly treated by his father and all the members of the family as legitimate, a presumption arises under the Mahomedan law that the son's mother was his father's wife.

THIS was an appeal from a decision of a Division Bench of the Calcutta High Court (*see* 5 W. R., 4), KEMP and SETON-KARR, J.J., dated the 6th January 1866, which affirmed a judgment of the Judge of Zilla Purneah, dated the 28th March, 1865, and modified another judgment of the same Judge passed in the same suit, dated the 6th April, 1865; and also, by special leave of Her Majesty in Council, from certain orders of a Full Bench of the High Court rejecting applications for review of judgment (*see* 1 B. L. R., F. B., 1).

The suit in which the appeal arose was instituted in the Zilla Court of Purneah on the 5th May 1860, by the respondent Ranee Rowshan Jehan against Rajah Enayut Hossein and others, to obtain possession of certain shares in the zamindari of Soorjapore and other property belonging to the estate of her paternal grandfather Rajah Deedar Hossein, and to which she claimed to be entitled partly in right of her father Nuzeroodeen Hossein, directly and as heir of his brother Edoo Hossein, and partly in right of her paternal grandmother Bebee Loodhun.

The facts of the case were the following :—On the 18th November 1839, Rajah Deedar Hossein, at that time the proprietor of an undivided moiety of the zamindari of Soorjapore, executed a deed of gift, in which it was set forth that, in consideration of a payment of Rs. 10,000, he gave to his eldest son, Enayut Hossein, one third of his moiety of the said zamindari. On the same date he also executed a will, in which he referred to the said deed of gift, and in which, after appointing Enayut [186] Hossein his executor, he gave the following directions for the disposal of that portion of his estate which was not included in the deed of gift :—

" I divide the remaining two-thirds now under my possession, uninterfered and unconcerned by any one else, into three portions. One portion to be laid out as the executor may think proper for my, the testator's, welfare hereafter, by charity, and pilgrimage, and keep up the family usage, namely, the expenses of the mosque, and tazeedares of the sacred martyrs, and for the comfort of the travellers, the surplus amount to be appropriated by himself, the executor. From the other two-thirds, after paying off all the debts of my creditors, giving allowances as per shares to the executor himself and my sons, daughters, and wives, the right-holders, and salary-holders, that is friends and servants, repairs of houses and Court expenses, &c., including other necessities as below detailed without diminution and increase, he shall keep every one by his good conduct, and affection, contented and satisfied. It is also necessary for all persons having rights, heirs, and friends connected with me, to obey the said executor, and consider him my representative.

None of the heirs have power to sell, or divide the landed property mentioned in the will."

The moveable property he directed to be divided into three portions, one to be retained by Enayut for general expenses, and the other two-thirds to be divided in accordance with the Mahomedan law.

The details referred to in the body of the will as to the allowances to be paid were contained in a schedule, but whilst in the body of the will provision was made for the *wives* of the testator, an allowance of Rs. 175 by the month was given in the schedule to *the wife* of the testator, and monthly allowances of Rs. 75 to each of four *female servants*.

At the time when these instruments were executed, it would appear that the zamindari of Soorjapore was under attachment, the collections being made by a surbarakar.

In May 1841, Enayut Hossein applied for mutation of names, in respect of the one-third share, which he claimed as his under his father's deed of gift. This application was resisted by Deedar Hossein, who, in a petition to the Collector, dated the [187] 9th June 1841, alleged that he had received no consideration; and that he never had any intention of parting with any part of his estate during his lifetime, and the application was in consequence rejected.

On the 19th November, a petition was presented to the Collector, purporting to proceed from Rajah Deedar Hossein, in which he admitted the deed of gift and consented to the mutation of names. This petition was dated the 14th, and the Rajah died on the 15th November 1841. The Collector declined to act upon it.

Rajah Deedar Hossein was survived by five sons, five daughters, and five wives, or (as the appellant contends) one wife and four concubines. The family belonged to the Sheea or Imameen sect of Mahomedans. On Deedar's death, disputes arose among his heirs, which were carried both to the civil and criminal courts. On the 19th November 1842, in proceedings taken by Enayut Hossein under Act XIX of 1841, an order was passed by the Judge of Purneah, that, on furnishing security, he should be put in possession of his father's estate. The Collector's order, sanctioning the substitution of Enayut's name for his father's as proprietor of the zamindari, was not obtained until the 24th April 1844.

Nuzeeroodeen, the respondent's father and the third son of Deedar Hossein, died in the year 1844, and in 1852 his widow Khoobunnissa, as guardian and protector of her infant daughter Rowshan Jehan (the present plaintiff), instituted a suit to set aside the deed of gift and the will, and to obtain possession on behalf of her daughter of a 14-anna share (the daughter's share) and on her own behalf of a two-anna share of Nuzeeroodeen's property. The defendant Enayut Hossein relied on the deed of gift and will above referred to, contending that all that Nuzeeroodeen was entitled to was the allowance payable to him under the will. He alleged that in the year 1843, an amicable settlement for carrying out the terms of the will had been agreed to by all the members of the family, whereupon the allowances provided by the will had been paid by him to Nuzeeroodeen and the other beneficiaries, written receipts being given by them in acknowledgment of such payments.

[188] Judgment in this suit was given by Mr. LOCH, at that time Judge of Purneah, on the 12th September 1855. He found as a fact that the deed and will had both been duly executed by Deedar Hossein. As to the will he held that by the Mahomedan law it was invalid without the consent of the heirs, and that their consent was not proved. As to the deed he held it to be valid, and to have the effect of transferring to Enayut Hossein one-third of Deedar's estate. He gave Khoobunnissa, as guardian of her daughter, a decree for fourteen-sixteenths of Nuzeeroodeen's share of the remaining two-thirds.

Enayut Hossein appealed from that decision ; and Khoobunnissa would have had a clear right to a cross-appeal but for what subsequently transpired.

On the 27th June 1855, while the above suit was pending, the defendant, Enayut Hossein, brought a cross-suit, in which he sought to have it declared that Khoobunnissa, on receipt of certain consideration, had agreed to compromise the suit brought by her on her daughter's behalf, and to recognize the validity of the will. This cross-suit was at first resisted by Khoobunnissa, but eventually on the 30th August 1856, petitions which purported to give the assent of Khoobunnissa and her daughter Rowshan Jehan, and in which the latter was represented as having then attained full age, were filed in Court, admitting the fact of the alleged compromise, and asking the Court to sanction it. An order was on the same day made by the Judge disposing of the case in accordance with the prayer of these petitions. Subsequently on the 10th December 1856, when Enayut Hossein's appeal in the suit brought by Khoobunnissa came on for hearing by the Sudder Court, instruments of mutual compromise, one on behalf of Enayut Hossein, the other purporting to be on behalf of Khoobunnissa and of her daughter, were presented to the Court, and an order was made that the case be decided according to the instruments.

On the 17th December 1859, Ranee Rowshan Jehan presented a petition to the Sudder Court, in which she set forth that the order of the 10th December 1856 had been fraudulently and collusively obtained, and was not binding on her, as she [189] was not then of full age, and in which she asked to have the matter reopened by way of review. On the 6th March 1860, the Sudder Court declined to dispose of the matter upon review, and referred the petitioner to a regular suit.

Rowshan Jehan accordingly brought the present suit. She alleged in her plaint, that the deed of gift and the will set up by Enayut were not genuine nor valid, and that the suit brought by her mother on her behalf had been fraudulently compromised, she being then an infant. She prayed that the said compromise might be declared to be collusive and inoperative, that the alleged will and deed of gift might be set aside, that the order of the Judge of Purneah, dated the 19th November 1842, under which Enayut Hossein had obtained possession of all his father's property, might be reversed, and that possession might be awarded to her (the plaintiff) of the shares in Deedar Hossein's estate accruing to her in right of her father Nuzeroodeen, of her father's brother Edoo Hossein and of her father's mother Bebee Loodhun.

The defendant, Enayut Hossein, filed a written statement, in which he urged that the suit brought by the plaintiff's mother as her guardian had been settled and withdrawn, so as to bar the present suit. He also contended that the deed of gift and will which the plaintiff disputed were genuine and valid, and that under these Deedar Hossein's younger children, including Nuzeroodeen and Edoo, were only entitled to allowances by way of maintenance and not to a share of the estate, and that they had assented to and accepted that provision. As to the claim in right of Bebee Loodhun, he contended that Bebee Loodhun was not a wife of Deedar Hossein with a right of inheritance, but only a *kadima* or female slave. As to the claim in right of Edoo Hossein, he contended that Edoo had survived Nuzeroodeen, in which case the plaintiff was not entitled, under the Mahomedan law, to any share of his estate.

The case was twice remanded to the Zilla Judge by the High Court, on the second occasion with specific issues for his determination (*see* W. R., 1864, p. 83). The Zilla Judge decided the first ten issues [190] which related to the

validity of the deed of gift and of the compromise, and the decree founded thereon, in the plaintiff's favour; but with regard to the other issues which related to the share to which the plaintiff was entitled in the estate of Deedar Hossein in right of her father Nuzeroodeen, her uncle Edoo Hossein, and her grandmother Bebee Loodhun, he held that it was not proved that Bebee Loodhun was a wife of Deedar Hossein with a right of inheritance, or that Nuzeroodeen had survived his brother Edoo Hossein. He consequently rejected the plaintiff's claim in respect of their shares.

From the decision of the Zilla Judge, both parties appealed. On appeal, the High Court upheld so much of the Judge's decision as declared the compromise not to be binding, but reversed his decision in respect of the shares of Edoo and Bebee Loodhun, to both of which they held the plaintiff to be entitled. The High Court next proceeded to consider the plaintiff's claim to be heard against the validity of the deed of gift. With reference to this part of the case, it appeared that the only appeal which had been brought against Mr. LOCH's decision of the 12th September 1855, in which it was held that the deed of gift was valid, but the will invalid, was that filed by Enayut Hossein, which was afterwards withdrawn in accordance with the terms of the alleged compromise. The defendant consequently urged that it was too late for the plaintiff to ask for leave to appeal in a case which had been decided ten years before; and at any rate, that, on the compromise being set aside, his own appeal against Mr. LOCH's decision should be allowed to revive. On this point the Court decided against the defendant and refused to allow him to revive his appeal; but allowed the plaintiff to appeal from that decision, on the ground that it was only by the defendant's fraudulent conduct that she had been prevented from appealing before.

The High Court pronounced against the validity of the gift, and decreed the plaintiff's appeal, dismissing that of the defendant.

Applications for a review of judgment having been refused by the High Court, leave was obtained by the present appellant, [191] Ranee Khajooroonnissa, on the death of her husband Enayut Hossein, to bring the present appeal to Her Majesty in Council.

Mr. T. H. Cowie, Q. C., and Mr. J. D. Bell for the Appellant.

Mr. Leith, Q. C., and Mr. Doyne for the Respondent.

Mr. Cowie.—On setting aside the compromise, the High Court was bound to hear the defendant's appeal against that part of the decision of the Zilla Court, dated the 12th September 1855, which declared the will to be invalid.

SIR J. COLVILLE.—We had better first hear what the respondent has to say on that point. If the High Court was right in refusing to hear the defendant, it may not be necessary to go into the question of the validity of the will.

Mr. Leith.—The defendant was bound to prosecute his appeal within a certain time. Instead of doing so he chose to file a fraudulent compromise. He deprived himself by his own fraud of his opportunity of appeal.

SIR J. COLVILLE.—Limitation applies only to the time within which an appeal is to be presented. If presented in time, is there any rule which requires it to be prosecuted within a fixed time?

SIR R. COLLIER.—Is special leave required to revive the appeal?

SIR M. SMITH.—If the defendant had a right to appeal, you cannot punish him for his fraud by depriving him of his appeal. Moreover, the plaintiff, not having herself appealed, her right of cross-appeal depended on the defendant's appeal.

Sir. J. Colville.—The compromise having been set aside for fraud, we think the parties were remitted to their original rights.

Mr. Cowie.—There remain four points to be argued : *1st*, the validity of the deed of gift ; *2nd*, the validity of the [192] will ; *3rd*, the status of Loodhun ; *4th*, the survival of Edoos. An objection was taken by the High Court, that the gift, being of a third part of the estate of the donor, was invalid under the Mahomedan law as to *musha* or confusion which denies effect to a gift of an undivided portion of a divisible thing. But where the thing given can be made certain, the law as to *musha* does not apply. See Baillie's Digest of Mahomedan Law, Hanifera, Book VIII, Chap. I, pp. 515, 516, of the 2nd edition ; see also, *ibid*, Chap. II, p. 520, where it is said that " what is required is that the thing be separated at the time of taking possession, not at the time of the gift." Here the donee could at once go to the Collector, and obtain registration of his separate interest in his individual name. There was nothing further to be done by the donor to make the gift effectual. The doctrine of *musha* was discussed in *Ameeroonissa Khatoon v. Abadonnissa Khatoon* (15 B. L. R., 67 ; S. C., L. R., 2 I. A., 87). The parties in that case were of the Suni sect, but the parties in the present case are governed by the Sheea doctrines of the Mahomedan law which are not identical with the Suni doctrines on the subject of *musha*. According to the Sheea view, the gift of a share in joint and undivided property is lawful. See Baillie's Digest of Mahomedan Law, Imameea, p. 204, and note 8.

Moreover, the deed is expressed to be for a consideration. It was in the form known to the Mahomedan law as *hibba-bil-awaz*, and resembled a sale in all its properties : Macnaghten's Principles of Mahomedan Law, Chap. V, para. 15 ; Baillie's Digest of Mahomedan Law, Hanifera, p. 123. In such transactions seizin of the donee is not essential to complete the transfer. [SIR J. COLVILLE.—There must be an executed consideration.] What we submit is, that where there is no consideration, the gift is good if seizin follows ; but that where there is consideration, the gift is good without seizin. We meet both alternatives. There is evidence of consideration having been given, and there is evidence of seizin. As the property was under attachment, actual possession could not be had. But the defendant applied for, and eventually obtained a mutation [193] of names, which was the only way in which seizin could, under the circumstances, be taken.

Next as to the will. The Zilla Judge had held the will to be invalid because it required, and had not received, the consent of the other heirs. We say, *first*, that consent was given, and, *second*, that no consent was necessary. There was evidence that Nuzeroodeen had consented, and the plaintiff was bound by her father's consent. But the Judge was mistaken in holding that the effect of the will was to give a bequest to one of the heirs, namely, to the defendant, which would require the consent of the rest. The testator leaves a third of his property to pious uses. That was within his powers, and the will is valid for that third : see Baillie's Digest of Mahomedan Law, Hanifera, Book X, Chap. I, pp. 624, 625, of 2nd edition. [SIR J. COLVILLE.—The testator might give to his son as executor for pious uses. Mr. Leith—We do not dispute a testator's power to make a *bond fide* gift to pious uses.] The restriction against a bequest to an heir is a doctrine of the Suni law. Under the Sheea law there does not seem to be any such rule : Baillie's Digest, Imameea, p. 244.

The plaintiff's claim in right of her grandmother, Bebee Loodhun, must fail, if Bebee Loodhun was not herself entitled to any share of Deedar Hossein's estate. She is not shown to have stood in any different position from that of the other three female servants mentioned in the schedule to the will, to whom a monthly allowance of Rs. 75 is to be given. If a wife at all, she appears, as held by the lower Court, to have been only a *temporary* wife, who, under the Sheea law, would not inherit: Baillie's Digest, Imameea, pp. 44, 344. Moreover, Loodhun, by accepting the allowance given her by the will, indicated her consent.

The plaintiff's claim in right of her uncle Edoo depends on whether her father, or Edoo, died first. The evidence seemed to show that Edoo died after Nuzerodeen, and in that event it is admitted that the claim fails.

Mr. Leith, Q.C., and Mr. Doyne for the Respondent. —An ordinary deed of gift requires seizin, that is, possession to [194] give it validity, but in the present case the instrument is said to be a *hibba-bil-awaz*, a deed of gift for consideration, which, by the Mahomedan law, is of the nature of an exchange or sale, and if *bond fide* requires no seizin to perfect the transfer. To make a transaction of this nature binding, there must be consideration actually given, and there must be an intention on the part of the donor to divest himself and pass the property to the donee. But here there is no good evidence of the consideration expressed in the instrument having been received. The passing of the consideration is not a mere formality. [SIR R. COLLIER.—It might be a formality and yet essential under the Mahomedan law, that it should take place at the time.] It was clear from the evidence that there was no intention on the part of Deedar Hossein to divest himself and pass the property during his lifetime. He opposed Enayut's attempts to obtain mutation of names, and possession by mutation of names was not in fact obtained till some years after his death. A gift which is not to have effect until the death of the donor is a legacy which one heir cannot take without the consent of the rest: Macnaghten's Principles of Mahomedan Law, Chap. V, "On Gifts," sec. 11. Moreover, at the date of the deed the property was under attachment, and not in the actual possession of Deedar Hossein. A gift of a thing, not in the possession of the donor, is void: *Ibid.*, sec. 3, and see Precedents of Mahomedan Law, Case VI, at p. 201. This was a mutual gift which requires mutual seizin: see Hedaya, Book XXX, Chap. 11, Hamilton's Transl., Vol. III, p. 306, where it is said:—"If a person give something to another, on condition of that other giving something to him in exchange for it, the mutual seizin of the respective returns is regarded; that is to say, the contract is nothing till the two seizins take place."

As to the will. It is argued that, although the will bears on its face a bequest to Enayut of one-third of the property not dealt with by the deed, the real intention is to create a trust for pious uses. But Enayut has a discretion to give what he pleases to these uses, and he has a beneficial interest in what remains over after these uses are satisfied. Moreover, with regard to the remaining two-thirds of the testator's property, the will creates as a perpetual trust for the benefit of [195] persons other than the heirs, and gives Enayut a power to control the shares of the heirs. This by Mahomedan law is invalid without the consent of the other heirs. [Mr. Cowie.—I only argued that the will was good for one-third.]

As to the status of Bebee Loodhun. It was for the appellant, who alleges that Bebee Loodhun was only a temporary wife, to establish that peculiar and exceptional kind of marriage. As to temporary marriages, see Baillie's Digest,

Imameea, Introduction, p. xiv, and see pp. 12, 29, 39, 41, 42. It appears from the passages cited, that, if no mention is made of time, the contract is permanent.' [SIR J. COLVILLE.—If a term is limited and the connection continues beyond that term, what is the status of the woman? SIR M. SMITH.—It would seem from what is said at p. 44 of Baillie's Digest, Imameea, that her position after the time limited would be that of a concubine.] The point that the marriage was temporary was not taken by the defendant. His allegation was that Bebee Loodhun was a female servant or slave. [SIR J. COLVILLE.—What proof did you give of her status?] She lived for eighteen years in Deedar's house, and was the acknowledged mother of a son, whom Deedar recognized to be his lawful son. A presumption is raised from these circumstances in favour of marriage requiring to be rebutted. Macnaghten's Principles of Mahomedan Law, Chap. VII, Sec. 32, and see *Khajah Hidayut Oollah v. Rai Jan Khanum* (3 Moore's I. A., 295). [SIR J. COLVILLE referred to *Mussamut Jariut-ool-butool v. Mussamut Hosseine Begum* (11 Moore's I. A., 194); SIR M. SMITH referred to *Newab Mulka Jehan Saheba v. Mahomed Ushkurice Khan* (8 Mad. Jur., 306), decided by their Lordships on the 20th March 1873.]

Mr. Cowie replied.

At the conclusion of the argument, their Lordships' Judgment was delivered by

Sir R. P. Collier (who after stating the facts continued):—The case came on appeal before the High Court, who gave [196] a very elaborate judgment in January 1866. The High Court agree with the learned Judge of the Zillah Court in his finding on all the ten issues relating to the compromise, and there being two concurrent findings upon these issues, which are questions of fact, their Lordships are by no means disposed to disturb them. Indeed, it has scarcely been argued that, giving effect to the rule on this subject, they should be disturbed.

The High Court next came to the conclusion that the compromise being set aside, owing to fraud and collusion on the part of Enayut Hossein, Enayut Hossein's right of appeal against Mr. LOCH's judgment was not revived, whereas the right of appeal on the part of the plaintiff Rowshan Jehan was revived. From that finding their Lordships differ. It appears to them that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the plaintiff is to be allowed to be heard to appeal against so much of the decision of Mr. LOCH as is against her, Enayut Hossein ought to be heard to appeal against so much of the decision as is against him.

The High Court further affirm the decision of Mr. LOCH on the subject of the will, which was in favour of the plaintiff, but they reverse his decision so far as it concerns the deed, which was against her. Further, they reverse the decision of Mr. Muspratt upon the two questions of the right of the plaintiff to succeed to Edoo Hossein, and of her right to succeed to her grandmother. The case, therefore, reduces itself to four questions,—*first*, the validity of the deed; *secondly*, the validity of the will; *thirdly*, the survivorship between Edoo and Nuzeroodeen; and *fourthly*, the plaintiff's right to succeed to her grandmother.

The policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with

certain forms. It is incumbent, [197] however, upon those who seek to set up a proceeding of this sort, to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been complied with. There is no question of the execution by Rajah Deedar Hossein of this deed giving one-third to his son Enayut on the 10th November 1839. The deed was either—to use English expressions—a deed of gift simply, or a deed of gift for a consideration. If it was simply a deed of gift without consideration, it was invalid unless accompanied by a delivery of the thing given, as far as that thing is capable of delivery, or, in other words, by what is termed in the books a seizin on the part of the donee. In their Lordships' judgment there was no delivery of this kind. Even assuming that although the estate was under attachment, a sufficient seizin in it remained to the donor which he could impart to the donee, still it appears by the evidence of Mr. Perry, which is treated as trustworthy on both sides, that in point of fact Rajah Deedar Hossein remained in receipt of the rents and profits of the property until his death. Therefore, if the deed were a mere deed of gift, there was not that delivery of possession which was necessary to give it effect by Mahomedan law. A question which was touched upon, though not much argued, viz., whether the doctrine of Mahomedan law relating to "confusion of gifts" applied, appears not to arise, as there was no delivery of possession.

But it was contended that this was a deed of gift for a consideration, and therefore that the delivery of possession was unnecessary. But it was conceded that in order to make the deed valid in this view of the case, two conditions at all events must concur, viz., an actual payment of the consideration on the part of the donee, and a *bona fide* intention on the part of the donor to divest himself *in presenti* of the property, and to confer it upon the donee. Undoubtedly, the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount it must be actually and *bona fide* paid.

[198] (His Lordship then considered the evidence bearing on the payment of the consideration, and continued):—Taking into consideration all these circumstances, their Lordships have come to the conclusion, that the transaction set up on behalf of the defendants was not a real one, that no real consideration passed, that there was no intention on the part of the Rajah to part with the property at once to his son, but that both father and son were endeavouring to evade the Mahomedan law, by representing that to be a present transfer of property which was intended only to operate after the father's death. Their Lordships, therefore, agree with the High Court in their view of the effect of the deed.

The next question arises as to the will. It was found as a fact by Mr. LOCH that the heirs had not consented to this will; and with that finding their Lordships are satisfied. But it was argued by Mr. Cowie, *first*, that the will did not require confirmation: *secondly*, that at all events so much of it as gave one third to Enayut Hossein for pious uses was not in contravention of Mahomedan law, and was therefore valid without confirmation. The effect of the will is, in the first place, to declare Enayut Hossein the executor and representative of Deedar, and to direct him to look after the zamindari, and so forth. Then follows this passage: [His Lordship read the portion set out (*ante*, p. 196) and proceeded]:—This will, in its general scope, appears to their Lordships to be in contravention of Mahomedan law. With respect to the limited conten-

tion, that it may be supported with respect to the devise of the one-third share, it appears further to their Lordships that that devise, considering the vague character of it, and that the beneficial interest is left to Enayut Hossein after he has devoted what he may deem sufficient to certain indefinite pious uses, is in reality an attempt to give, under colour of a religious bequest, an interest in one-third to Enayut Hossein, in contravention of Mahomedan law.

(After finding that there was no ground for reversing the decision of the High Court on the question of the survivorship [199] between Edoos Hossein and Nuzeeroodeen, His Lordship continued):—There remains the question of the right of the plaintiff to succeed to Bebee Loodhun, and that depends upon whether Bebee Loodhun was merely a concubine or a wife. It is an undisputed fact that Nuzeeroodeen, the son of Bebee Loodhun, was treated by his father and by all the members of the family as a legitimate son. It is not that he was on any particular occasions recognized by his father, but that he always appears to have been treated on the same footing as the other legitimate sons. This of itself appears to their Lordships to raise some presumption that his mother was his father's wife. That such a presumption arises under such circumstances appears to have been laid down in a case which has been referred to, *Khajah Hidayut Oollah v. Rai Jan Khanum* (3 Moore's I. A., 295, at p. 318), in which Dr. LUSHINGTON, who delivered the judgment of this Board, makes this observation:—"The effect of that appears to be, that where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan law, the presumption is in favour of such marriage having taken place." In this case there is no evidence that Bebee Loodhun was a woman of bad character, or that her connection was merely casual. She appears to have lived in the house at all events up to the death of the Rajah.

The same doctrine was laid down rather more strongly in a recent case which came before this Board on the 20th March 1873. In the case of *Newab Mulka Jehan Saheba v. Mahomed Ushkurree Khan* (8 Mad., Jur., 306), a case from Oudh, and a Sheea case, their Lordships say:—"This treatment of the daughter by the appellants"—that is to say, the treatment of the daughter as a member of the family—"affords a strong presumption in favour of the right of her mother to inherit from her." The question there was whether the mother, who was said to be a slave girl, inherited from her daughter, whom she survived, the same question which would have arisen in this case if Bebee [200] Loodhun had survived her son Nuzeeroodeen. Their Lordships go on to say, after noticing various acts of acknowledgment of the legitimacy of the child:—"After these acknowledgments, Mulka Jehan and the appellants who act with her ought in their Lordships' view to have been prepared with strong and conclusive evidence to rebut the presumption raised by their own acts and conduct; and in the absence of such evidence, they think the presumption must prevail."

It appears to their Lordships, therefore, that the undoubted acknowledgment by the father and by the whole family of the legitimacy of Nuzeeroodeen raises some presumption of the marriage of his mother. But it is said that that presumption is rebutted. The evidence chiefly relied upon for that purpose is the will of the Rajah, in which undoubtedly there is this expression:—"For the maintenance of four female servants monthly, 75; annually, 900," and Bebee Loodhun does appear to have been one of those female servants there mentioned. At the same time, it is to be observed, this expression occurs only

in the schedule ; whereas in a part of the will preceding that schedule there is this expression :—" The shares of the executor and of the sons, daughters, and wives of the testator and other claimants from the estate fixed annually at " so and so ; and the subsequent provision for the maintenance of every female servant appears to be an expansion of that paragraph in which they are spoken of as wives.

But further, there is the undoubted acknowledgment by Enayut Hossein himself of Beebee Loodhun being a wife, inasmuch as when Khyroonnissa, the principal wife, brings a suit against him, Enayut Hossein objects on the ground that Beebee Loodhun, one of the other wives, is not joined.

Under these circumstances, it appears to their Lordships that there is evidence, not only from the acknowledgment of Nuzeroodeen's legitimacy by the family, but from the admission of Enayut Hossein, that Beebee Loodhun was a wife, and not merely a servant. It is indeed alleged that she was what is called a temporary wife, and among the Sheea sect there appears to be a power of taking a mere temporary wife. But it is to be observed that there is no evidence of hers being what is called [201] a temporary marriage, and indeed the witnesses who seek to impugn the marriage on the part of the defendant speak of Beebee Loodhun not as a temporary wife but as a mere servant. The question, therefore, seems to be not whether she was a temporary wife in the sense attached to that term in Mahomedan treatises, but whether she was a wife or whether she was a mere servant. On the whole their Lordships concur with the finding of the High Court. The evidence preponderates that she was a wife and not as a mere servant, though no doubt a wife of an inferior order.

A question further arose as to the amount of the share which the plaintiff would be entitled to, assuming that Beebee Loodhun was a wife, and it would certainly seem that her share would only be a fifth of an eighth, that is a fortieth share ; whereas she appears to have received something more by the decree of the Court. But it is to be observed that this in a great measure is a matter of detail and possibly a clerical error or miscalculation, which might have been set right on an application to the High Court, and that in fact the High Court did invite applications for the purpose of remedying errors of this kind.

The result is, that with the exception of the slight variation of amount in the case of the claim of Mussamut Beebee Loodhun, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal with costs.

Appeal dismissed.

Agents for the Appellant : Messrs. J. H. and H. R. Henderson.

Agent for the Respondent : Mr. T. L. Wilson.

NOTES.

[I. STRICT PROOF OF ALIENATIONS DEFEATING THE MAHOMEDAN LAW OF SUCCESSION—

" The policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. It is incumbent, however, upon those who seek to set up a proceeding of this sort, to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been complied with (2 Cal. 196, 197).

I.L.R. 2 Cal. 201 KHAJOORONISSA &c. v. ROWSHAN JEHAN [1876]

See the observations of the Privy Council to a similar effect in 11 M. I. A., 517 or 546 and 547.

See also *Chaudhri Mehdi Hasan v. Mahammad Hasan* (1906) 33 I. A., 61 at 70.

Strict proof required :—(1880) 5 Bom., 238.

Strict proof of compliance with the requirements of the waqf law required :—(1880) 13 All., 261.

II. FORMALITIES OF GIFT IN MAHOMEDAN LAW—

The rule as regards delivery of possession was reaffirmed in (1905) 28 All., 439 P. O. : 33 I. A., 68.

- (a) Unequivocal manifestation on the premises of intention to transfer is sufficient (1884) 9 Bom., 146 ; (1904) 6 Bom. L. R., 983.
- (b) Transfer of possession of the house with attornment of tenants completes the gift, even if a portion of the donor's property remains on the house and the donor continues to reside in the house after a temporary absence :—(1905) 29 Bom., 468.
- (c) Shiah Will to heirs invalid if it exceeds one-third to heirs without consent of heirs after death of testator :—(1908) 30 All., 153. *
- (d) Where the gift is coupled with consideration the actual payment of the consideration must be proved, and the *bona fide* intention of the donor to divest himself *in presenti* of the property and to confer it upon the donee must also be proved :—(1905) 28 All., 439 P. C. : 33 I. A., 68.
- (e) Delivery of possession is unnecessary where the gift by the husband to the wife is in lieu of dower :—(1899) 23 Mad., 70 ; 9 M. L. J., 185.
But see (1908) 19 C. W. N., 160, where it was pointed out that the Transfer of Property Act, 1882, would govern such a case.
- (f) Where there is a real and *bona fide* intention on the part of the father or other guardian, the donor, the law will presume the subsequent holding to be on behalf of the minor :—(1875) 15 B. L. R., 67 ; 2 I. A., 87 ; 23 W. R., 208.
- (g) As to gifts where income is reserved to the donor, see 11 M. I. A., 517 at 547 and 548 ; also (1882) 9 Cal., 138.
- (h) Gifts *in futuro* are void :—(1882) 9 Cal., 138. *
- (i) Creation of life estates inconsistent with the Mahomedan law :—(1888) 13 Bom., 264.
- (j) As to gifts of shares in companies, see (1907) 35 Cal., 1 P. C.

III. EFFECT OF ACKNOWLEDGMENT OF SON AS LEGITIMATE ON THE STATUS OF THE MOTHER AS WIFE—

A Mahomedan kept two women, by one of whom he had a child who was acknowledged. The evidence of treatment being nearly equal in both cases, and not of itself sufficient to raise the presumption of marriage, the mother of the acknowledged child was presumed to be the wife while a similar presumption was not drawn in the case of the other, on the ground that full effect cannot otherwise be given to the acknowledgment :—(1881) 10 C. L. R., 293.

See also (1873) 8 Mad. Jur., 306 P. C. ; (1886) 8 All., 234 ; and (1881) 9 All., 723.]

[202] ORIGINAL CIVIL.

The 18th January, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE MACPHERSON.

Mackintosh

versus

Hunt.

Contract Act (IX of 1872), s. 74—Promissory note—Stipulation to pay interest at high rate on default in payment of note—Penalty.

The defendant and one D, on the 6th April, 1875, gave to the plaintiff, a money-lender, a promissory note, by which they jointly and severally promised to pay the plaintiff on the 6th September Rs. 400 "for value received in cash in hand paid, on signing and delivering this bond: should we neglect or fail to pay this amount on due date, then only shall it carry interest from and on due date to date of payment at the defaulting rate of 10 per cent. *per mensem*." At the date of the note, the defendant and D were in the plaintiff's debt in respect of other promissory notes, and a sum of Rs. 100 was deducted from the amount of the note of the 6th April, in respect of one of these which was given up and in respect of interest on three others. A further sum of Rs. 125 was deducted as interest in advance for the five months previous to the due date of the note, and the balance Rs. 175 was paid by cheque to D. D died before the note became due. In a suit brought to recover Rs. 400 principal, and Rs. 40 interest, on the promissory note, on default being made in payment—*Held*, this was not a case in which a certain sum was agreed to be paid on a breach of contract, and therefore s. 74* of the Contract Act did not apply. The stipulation to pay interest at the "defaulting rate" was not in the nature of a penalty. *Held*, also, that looking at the nature of the transaction, the note contained a false statement of the consideration, which amounted only to Rs. 275; and there being nothing to show that the defendant understood the real nature of the transaction, the rate of interest being exorbitant, and the consideration inadequate, the transaction was not one which ought to be enforced by a Court of Equity.

* [Sec. 74 :—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.—When any person enters into any bail-bond, recognizance, or other instrument of the same nature, or, under the provisions of any law or under the orders of the Government of India or of any Local Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty or promise to do an act in which the public are interested.]

REFERENCE to the High Court, by the first Judge of the Calcutta Court of Small Causes, under s. 7* of Act XXVI of 1864.

The following was the order of reference:—

“ The plaintiff, who is a well-known money-lender and frequent suitor in this Court, sued the defendant to recover Rs. 400 as principal, and Rs. 400 as interest, alleged to be due on a [203] promissory note, made by the defendant and one Norman Dutt, of which the following is a copy :

Stamp Paper—Rs. 2.

Calcutta, 6th April, 1875.

Rs. 400.

On the 6th September, 1875, we, jointly and severally as principals, promise to pay to Mr. H. Mackintosh, or order, the sum of Rs. four hundred, for value received in cash in hand, paid on signing and delivering this bond : should we neglect or fail to pay this amount on due date, then only shall it carry interest from and on due date to date of payment at the defaulting rate of 10 per cent. per mensem.

(Sd.) NORMAN DUTT.

„ B. HUNT.

“ The making of the promissory note was admitted by the defendant ; and the plaintiff, on his side, admitted that, at the time of the making of the note, he had deducted in advance Rs. 125, being interest at the rate of $6\frac{1}{2}$ per cent. per mensem for the five months previous to the due date of the note, viz., the 6th September, 1875. Norman Dutt, the other maker of the note, died at the latter end of April 1875.

“ It appeared in evidence that the defendant had never taken the trouble to read the note when he signed it, and that the amount of the note was paid to Norman Dutt, the other maker of the note, on the 7th April, 1875, according to a memorandum signed by him (Norman Dutt) somewhat as follows :—

	Rs.	A.	P.
Discount off (that is to say, the interest paid in advance)	125	0	0
Money payable on one old promissory note delivered up	76	9	6
Money payable as interest on three other promissory notes	23	6	6
Balance paid by a cheque on the Bank of Bengal	175	0	0
	...		
	Rs.	...	400 0 0

“ It is also in evidence that Norman Dutt owed the plaintiff money on other promissory notes.

[204] “ The defendant pleaded fraud, not fraud—in the sense of undue influence or over-reaching—but fraud in so far as the plaintiff had not paid the full amount of Rs. 400 as promised by him. I was satisfied, however, from the evidence that the plaintiff had, by special arrangement with Norman Dutt, paid the Rs. 400 as above mentioned, and accordingly overruled the plea of fraud.

* [Sec. 7:—In any cause of an amount exceeding five hundred rupees, the Judges of the said Courts of Small Causes shall reserve any question of law or equity or any question as to the admission or rejection of any evidence as to which they shall entertain any doubts, or which they shall be requested by either party to the suit to reserve, for the opinion of the High Court, and shall give judgment, contingent upon the opinion of the said High Court, on a case which they shall thereupon be entitled to state to the said Court. If only two Judges sit together and shall differ in opinion, the question on which they differ shall be so reserved.]

"The defendant also pleaded, and it was strongly urged on his behalf, that the defaulting rate of interest payable, viz., 10 *per cent. per mensem*, or 120 *per cent. per annum*, must be considered as a penalty, and that it is consequently one of those cases in which a Court of Justice will give equitable relief.

"In the first place it has been contended that s. 74 of Act IX of 1872 (Contract Act) is applicable to this case, and that consequently I need only give to the plaintiff reasonable compensation, not exceeding the rate of interest named; but I am of opinion that s. 74 of that Act only applies to cases where an actual sum is fixed between the parties to be paid as compensation in the event of a breach of the contract; in other words, where the sum so fixed would otherwise be called liquidated damages, and also no doubt to cases where an actual penal sum has been fixed. But, even if the section is applicable, it would still be necessary to decide whether I ought to give the plaintiff the full amount named by the parties themselves, or give him reasonable compensation only, and whether, in so giving him compensation, I ought to take as my guide previous decisions on somewhat similar points. I am inclined to agree with Mr. Macrae, where he says, at page 80 of his Work on the Contract Act, 1872—'But as the terms of this section leave it open to the Court in all cases to award less than the amount named, the rules on which the English Courts have proceeded in observing the distinction should serve as guides to the Courts here in exercising the discretion conferred upon them by this section'; so that whether the section is applicable or not, I think I ought to be guided by the old law in coming to a conclusion as to the amount to be allowed to the plaintiff on the promissory note.

"In this case the 10 *per cent. per mensem* interest becomes payable if the principal sum of Rs. 400 remains unpaid on the [205] 6th September, and it is payable from that date, and not from the date of the bond, and herein the circumstances of this case differ materially from those of the case of *Bichook Nath Panday v. Ram Lochun Singh* (11 B. L. R., 135), where it has been held that the increased rate of interest payable on default of payment of a lower rate from the date of the bond was in the nature of a penalty, and that the plaintiff was only entitled to recover interest at a reasonable rate. Here the high or higher rate of interest becomes payable on the happening of one event only, viz., the failure to pay the Rs. 400 on the 6th September. It is not a promise to pay a very large sum immediately on failure of the payment of a much smaller sum. If the defendant, on the 6th of October, had paid up in full, he would only have paid Rs. 400 *plus* Rs. 48 as interest. I am of opinion, therefore, that the contract to pay the high rate of interest is not in the nature of a penalty, and I am fortified in this opinion by the decision of Lord ROMILLY in *Herbert v. Salisbury and Yeovil Railway Company* (L. R., 2 Eq., 221). There the contract was to pay certain purchase-money with 4 *per cent.* interest on or before the 1st July 1858, in default of payment of the purchase-money on that date 5 *per cent.*, and again in default of payment of the purchase-money on or before the 1st January 1859, 8 *per cent.* on all moneys remaining unpaid. And His Lordship says:—'Here the parties thought fit to enter into the contract that the rate of interest was to be 4 *per cent.* up to a certain date, 5 *per cent.* for the next half year, and 8 *per cent.* for every subsequent year. I know of nothing to prevent persons entering into a contract of that description'. A decision of HOLLOWAY, J., viz., *Adanky Rama Chandra Row v. Indukuri Appalaraju Garu* (2 Mad. H. C. Rep., 451) in which the whole matter was considered at great length, supports my views, and also to some extent the case of *Omda Khanum v. Brojendro Coomar Roy Chowdhry* (12 B. L. R., 451), while I find that there are

two contrary decisions of the Bombay High Court—*Motoji Ratnaji v. Sheikh Husen* (6 Bom. H. C. Rep., A.C., 8) and *Pava Nagaji v. Govind Ramji* (10 Bom. H. C. Rep., 382). Those two latter [206] decisions are on all fours with the present case, but the former one seems not to have been considered at all, and in the latter the learned Judges, acting upon the rule *stare decisis*, refused to consider the question, whether or no the former one was rightly decided.

"For the above reasons, I am of opinion that I must follow Act XXVIII of 1855, s. 2,* and adjudge to the plaintiff the amount of interest agreed upon between the parties.

"But as the question is one of considerable importance, and one which frequently arises in this Court, I think I ought to refer it to the High Court. I, therefore, refer the following questions: *1st*, whether or no s. 74 of Act IX of 1872 is applicable to this case; *2nd*, if such section is not applicable, whether or no the defaulting rate of interest, mentioned in the promissory note, is to be considered in the nature of a penalty, and that it is consequently a case in which the Court ought to decree interest at a reasonable rate only; *3rd*, if such section is applicable, whether or not the Court ought to allow the full amount of interest agreed upon, or allow only a reasonable rate of interest.

"Contingent on the opinion of the High Court, my judgment will be for the plaintiff for Rs. 800."

The parties were not represented by Counsel in the High Court.

The Opinion of the High Court was as follows:—

Garth, C. J.—We are of opinion that the contract to pay interest at 10 *per cent. per mensem*, if the principal sum of Rs. 400 were not paid on September 6th, the due date of the promissory note, is not in the nature of a penalty. It is true that this rate of interest is in the note called a "defaulting rate"; but, notwithstanding this expression being used, the contract is in fact merely that if the sum of Rs. 400 be not paid on a certain day, it shall from that day bear interest at 10 *per cent. per mensem*, or, in other words, at 120 *per cent. per annum*. In such a provision there is nothing in the nature of a penalty more than there is in a provision, that the promissory [207] note shall bear interest from the day of its date. The case seems to us to differ wholly from that class of cases in which a certain sum is agreed to be paid on a breach of contract, and therefore s. 74 of the Contract Act (IX of 1872) does not apply.

But, taking the facts as found by the Judge, the effect of the transaction between the parties is not what the learned Judge supposes it to have been. He is not correct when he says that the plaintiff took interest at the rate of 6½ *per cent. per mensem* only for the five months up to September 6th. What happened (as found by the Judge himself) was this: on the making of the promissory note the plaintiff, the money-lender, paid or gave value to one of the makers to the extent of Rs. 275; and adding to that sum Rs. 125 as discount or interest on Rs. 275 for the five months up to the 6th of September, the note, dated the 6th of April, was given for Rs. 400 payable on September 6th.

* [Sec. 2 :—In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties; and if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable.]

It may be true that Rs. 125 as interest for five months on Rs. 400 is interest at the rate $6\frac{1}{2}$ per cent. per mensem; but the sum actually advanced, or for which value was given, was not Rs. 400, but only Rs. 275. And Rs. 125 as interest for five months on Rs. 275 is interest at the rate of nearly 10 per cent. per mensem, and is considerably more than 100 per cent. per annum.

The plaintiff having thus paid or given value for Rs. 275 only, took a promissory note, payable at the end of five months for that sum, plus Rs. 125 as interest, i.e., for Rs. 400; which last-mentioned sum was from the due date of the note to bear interest at 120 per cent. per annum. And this being the true nature of the transaction, the promissory note contains a false statement of the consideration, for in it the makers promise to pay "Rs. 400 for value received in cash in hand paid on signing and delivering this bond."

Considering that the promissory note does not state truly the transaction between the parties; that beyond the fact that he signed the note, there is nothing to show that the defendant understood the real nature of the transaction; that the rate of interest is exorbitant, and the considerations grossly inadequate, [208] we think the transaction is not one which ought to be enforced by a Court of Equity. The Calcutta Court of Small Causes is empowered to entertain equitable defences, and ought, as it appears to us, on the facts found, to have given the defendant relief.

The judgment for Rs. 800 is set aside, and judgment will be entered for the plaintiff for Rs. 400 with interest at 12 per cent. per annum from September 6th, 1875, to the date of suit, without costs.

NOTES.

[I. STATUTORY MODIFICATION—

The Indian Contract Act was amended in respect of this provision by Act VI of 1899. The section as amended stands thus:—

Sec. 74:—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

&c.

And these illustrations were added by the amending Act:—

- (d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent., at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.
- (e) A who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty and B is only entitled to reasonable compensation in case of breach.
- (f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that in default of payment of any instalment the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

I.L.R. 2 Cal. 208 IN THE MATTER OF DESPUTTY SINGH [1876]

- (g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40 with a stipulation that in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

II. PROVISION AS TO ENHANCED INTEREST—

- (a) Relief can be afforded independently of the section on equitable grounds, whether the enhancement was to be prospective or retrospective :—(1898) 26 Cal., 300.
- (b) For the principle to apply these two elements must concur :—“an unequitable bargain and ignorance of the unfair nature of the transaction on the part of the defendant.” Where the defendant thoroughly understood and consented to the bargain relief will not be afforded :—*Mackintosh v. Wingrove* (1878) 4 Cal., 137.
- (c) The main case was explained to have proceeded on “two considerations neither of which would have been sufficient without the other, namely :
- 1stly*—That the bargain made by Mackintosh with the defendant Hunt was grossly extortionate and calculated to deceive an unwary young man as to its real character.
- 2ndly*—That although the other maker of the note, Norender Dutt, might have understood the nature of the transaction, it appeared that the defendant Hunt had never even read the note, and was not aware of its true meaning :—*ibid*.
- (d) Interest from date of bond :—(1884) 6 All., 179.
- (e) After date of default, not a penalty :—(1883) 9 Cal., 689 ; (1889) 14 Bom., 200.
- (f) Whether from date of contract or of default, to be understood, according to the intention not as penalty :—(1893) 15 All., 232 F. B.
- (g) Prospective interest is not penalty unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties :—(1892) 17 Bom., 106 F. B.
- (h) Where the higher rate was originally payable under the bond, and a concession subject to condition is given but not availed of, the original rate may be enforced as it is not a case of a penalty :—(1906) 10 C. W. N., 640.
- (i) It was understood that *Balkishen Das v. Run Bahadur Singh*, 10 Cal , 305 overruled all previous cases like *Mackintosh v. Crow* (1882) 9 Cal., 689 :—(1886) 14 Cal., 248. But this case was overruled in (1892) 19 Cal., 392.]

[2 Cal. 208]

APPELLATE CIVIL.

The 28th June, 1876.

PRESENT :

MR. JUSTICE KEMP AND MR. JUSTICE BIRCH.

In the matter of the Petition of Desputty Singh (a minor)

Baijnath Shahai and others

versus

Desputty Singh.*

Creditors of alleged heir—Application for grant of probate—Succession

Act (Act X of 1865), s. 250.

A Hindu testator died, leaving B, alleged to be his adopted son, and C, who would be his heir in default of adoption. On application made by B for probate of the will after the usual notices, the creditors of C, came in and opposed the grant of probate.

* Miscellaneous Regular Appeal No. 259 of 1875, against the order of A. V. Palmer, the Officiating Judge of Zilla Shahabad, dated the 9th of August 1875.

Held, under the Succession Act, as made applicable by the Hindu Wills Act, that the creditors were not parties having any interest in the estate of the deceased, and therefore were not entitled to oppose the grant of probate.

THE facts of the case appear sufficiently in the judgment.

Mr. Kennedy and Munshi Mohamed Yooseof for the Appellants.

The Advocate-General, offg. (Mr. Paul) and Mr. Woodroffe for the Respondent.

The following cases and authorities were referred to by Counsel on both sides :—

Dabbs v. Chisman (1 Phill., 155), *Baskcomb v. Harrison* (2 Rob. Ecc., 118), *Kipping v. Ash* (1 Rob., 270), and Coote's Probate Practice, pp. 227, 228 and 231, and cases there cited.

[209] The Judgment of the Court was delivered by

Kemp, J.—On the 14th of July 1875, Baboo Desputty Singh, a minor, through the manager of his estates, Abdool Hye, applied to the District Judge for probate of the will of the late Bindessurree Pershad Singh, who it is alleged died at Arrah on the 31st of July 1871, leaving properties, moveable and immoveable, situated in the district of Shahabad. To the petition, an instrument purporting to be the will of the deceased was annexed. Mr. J. H. Thornton, Civil Surgeon of Arrah, one of the subscribing witnesses to the said instrument, verified the petition, as laid down in s. 248,* Act X of 1865. Upon this petition an order was passed, directing "advertisements to be made at the Collectorate and at the Civil Courts of the district. Notice also to be served on parties to suits before the Subordinate Judge, in which Desputty Singh was concerned. This application to come up on the first miscellaneous day after Mr. Palmer takes charge, say Saturday the 24th July." This order was passed by Mr. Geddes.

Bajinath Shahai and others, the appellants, are the creditors of Baboo Reethbhunjun Singh; and they objected to the grant of the probate, on the ground that Desputty Singh was not the heir of the late Bindessurree Singh, but that their debtor Reethbhunjun was.

It appears that notices were issued by the Subordinate Judge of the district, dated the 20th July 1875, calling upon Bajinath Shahai and others to file any objections they might have to make in the matter of the petition of Abdool Hye before the Judge of the district on or before the 22nd of July 1875. They appeared and filed their objections. The Judge, on the 9th of August, after considering the objections of Bajinath Shahai and others, passed the following order :—"That letters of administration will be granted by this Court to Moulvie Abdool Hye, petitioner, as manager and next friend to Baboo Desputty Singh, minor, on his undertaking to make a true inventory of the property and credits of the late Baboo Bindessurree Pershad Singh deceased, and to exhibit the same in this Court at or before the expiration of one year next ensuing, and to render [210] a true account thereof, and also on his

Verification of petition for probate by one witness to the Will.

*[Sec. 248 :—Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the Will (when procurable), in the manner or to the effect following :—

"I (O.D.), one of the witnesses to the last Will and Testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (as the case may be), or that the said testator acknowledged the writing annexed to the above petition to be his last Will and Testament in my presence."

filing a bond with two sureties engaging for the collection, getting in and administering the estate of the deceased Baboo Bindessurree Pershad Singh. Each party to pay their own costs."

On the case coming before us, it was contended by the learned Advocate-General for the respondent that the appellants ought not to have been made parties to these proceedings, and he asked the Court to dismiss the appeal without hearing their Counsel or entering into the merits. We were of opinion that as the appellants were made parties to the proceedings by the action of the Court and were called upon to file their objections and did file them without any objection on the part of the respondent, we ought to hear the appeal. We therefore called upon the learned Counsel Mr. Kennedy, who appeared for the appellants, to satisfy us that his client was in a position to oppose the grant of probate of the estate of the late Baboo Bindessurree Pershad Singh. After hearing his argument and that of the learned Advocate-General for the respondent, we are of opinion that the appellants ought not to have been permitted to object in the lower Court to the grant of probate.

Numerous cases in the English Courts were cited by the learned Counsel on both sides; but, in deciding this case, we have not to look to what is or was the English law on the subject—we must look to the Act itself, Act X of 1865, as the law applicable to the case—*DeSouza v. The Secretary of State* (12 B. L. R., 423, at p. 427, per MACPHERSON, J).

The application for probate having been formally made, it was lawful for the District Judge, under s. 250, Act X of 1865, to issue citations, calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration. The citation to be fixed up in some conspicuous part of the Court-house, and also in the office of the Collector of the district.

No caveats, on the part of the appellants before us, had been lodged against the grant of probate or letters of administration. The Judge, therefore, acted illegally in directing notices to be [211] served on the appellants through the Subordinate Judge of the district, inviting them to file any objections they might have to make against the grant of probate. The appellants cannot be said to be parties "having any interest in the estate of the deceased" within the meaning of s. 250 of the Act. The appellants, who are the creditors of Reethbhunjun Singh, who, in the event of Baboo Bindessurree Singh having died without executing a will, and without having adopted Baboo Desputty Singh, on whose behalf the application for probate was made, he being a minor, may be the heir of the late Baboo Bindessurree Singh, but that does not entitle them to claim as of right as interested in the estate of Baboo Bindessurree Singh to oppose the grant of probate or letters of administration.

* [Sec. 250:—In all cases it shall be lawful for the District Judge "or District Delegate," if he shall think proper—
District Judge may examine petitioner in person. to examine the petitioner in person, upon oath or solemn affirmation, and also

Require further evidence. to require further evidence of the due execution of the Will, or the right of the petitioner to the letters of administration, as the case may be, and

And issue citations to inspect proceedings. to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

Publication of citation. The citation shall be fixed up in some conspicuous part of the Court-house, and also in the office of the Collector of the District, and otherwise published or made known in such manner as the Judge "or District Delegate" issuing the same may direct.]

The order granting letters of administration to the respondent is affirmed, such order however being without prejudice to the appellants who have no present right to oppose such grant, nor precluding them from seeking any further remedy they may be advised to pursue as against their debtor Reethbhunjun Singh.

The appeal is dismissed with costs.

Birch, J.—I also am of opinion that those who, in the petition of appeal, style themselves "opposite parties," ought not to have been allowed "to come and see the proceedings before the grant of letters of administration."

Section 250 contemplates the citation of those directly interested in the estate of the deceased. Its provisions cannot, I think, be strained to include creditors of the next-of-kin to the deceased. It is admitted that the appellants are not the only creditors of Reethbhunjun, but that there are several other creditors, and, if the appellants had succeeded in their opposition to the granting of letters of administration, they would not be in any better position than other creditors of Reethbhunjun.

We have to be guided by the provisions of Act XXI of 1870 and those sections of Act X of 1865 which are by the former enactment declared to apply to wills made by Hindus after 1st September 1870. I do not think it incumbent upon us to consider what the law and practice were antecedent to the law [212] by which we have to be guided. Nor do I think it necessary to discuss in a case such as we have before us the English cases cited by Mr. *Kennedy*. I would only remark that no case which has been cited supports the learned Counsel's contention that a creditor, not of the deceased, but of his next-of-kin, is a person interested in the estate of the deceased and entitled to come in and controvert a will said to have been executed by the deceased. It has been held on the Original Side of this Court in *DeSouza v. The Secretary of State* (12 B. L. R., 423), that, since the passing of Act X of 1865, the Courts in this country must look to that Act, and it alone, for the law of British India applicable to all cases of testamentary or intestate succession; and the correctness of that ruling has never been impugned.

Then as to the argument of the learned Counsel, that his client is barred from taking any further steps against the estate, and prejudiced by having been made a party to these proceedings, I find nothing in the Act which leads me to conclude that this argument has any foundation. By s. 242,* letters of administration are conclusive as to the representative title of the person who obtains them, and creditors of the deceased must look to him for satisfaction of their debts. If the appellants have any claim against the estate of the deceased, I fail to see how they can be deprived of their remedy by an order granting letters of administration.

* [Sec. 242 :—Probate or letters of administration shall have effect over all the property and estate, moveable or immovable, of the deceased, throughout the province in which the same is granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted.]

What we now decide is, that the Judge was wrong in citing the appellants to see the proceedings, and that they have no right to oppose the granting of letters of administration. We cannot, on their appeal, go into the merits of the case. The result is, that the appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[INTEREST TO OPPOSE GRANT OF PROBATE—

With reference to this case, the Privy Council said, "Their Lordships think this was a right decision"—(1883) 10 Cal., 19 P. C.

- (a) "A purchaser from the next-of-kin is in a very different position from a creditor. If we thought that that decision (2 Cal., 208) went as far as to hold that a purchaser or an attaching creditor could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled by a Full Bench, because we should disagree from such a ruling"—(1878) 4 Cal., 360.
- (b) Attaching creditor of next-of-kin was held to have sufficient interest in (1880) 6 Cal., 429; (1880) 6 Cal., 460. But *see* the Privy Council decision in (1883) 10 Cal., 19.
- (c) Upon the above case of 4 Cal., 360, the Privy Council remarked, "Assuming that a purchaser can oppose the grant of a probate, or apply to have it revoked (which their Lordships do not decide) they entertain grave doubts whether an attaching creditor can do so, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors"—(1883) 10 Cal., 19, at 28.
- (d) While the mere fact of being a legatee under the will or a creditor of the testator does not give sufficient interest, proof of a former will of the testator in which the defendant is interested is a sufficient interest to contest the will set up:—(1894) 17 Mad., 373.

Cf.—"The Court cannot revoke, at the application of a creditor, whatever may be the merits of the case, because such creditor cannot demand a grant to be made to himself of immediate right," *In the goods of Bergman* (1842) 2 Notes of Cases 23—Williams on Executors, Vol. I (10th Ed., 457.)]

[213] APPELLATE CIVIL.

The 7th June, 1876.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE MITTER.

Luchmi Dai Koori.....Plaintiff

versus

Asman Sing and others.....Defendants."

Hindu law—Mitakshara—Purchaser at sale in execution of decree of joint family property—Usurious rate of interest—Form of decree against mortgaged property.

In a suit by a Hindu, subject to the Mitakshara law, against certain auction-purchasers at a sale in execution of a decree against the father, to recover a portion of the ancestral estate by cancellation of the sale, it appeared that the property which was mortgaged by the bond upon which the decree was passed was not put up for sale. The decree provided "that the plaintiff recover the amount with costs and interest, and that the decree be executed

* Regular Appeal No. 104 of 1875, against a decree of Baboo Muthuranath Goopla, First Subordinate Judge of Zilla Bhagulpore, dated the 18th of January 1875.

against the property specified in the bond," and it also allowed interest at about 50 per cent., the rate in the bond, to the decree-holders. It was contended on behalf of the plaintiff that, upon a proper construction of the Privy Council ruling in *Muddun Thakoor v. Kantoo Lall* (14 B. L. R., 187), the decree under which the property had been sold was an improper one. *Held*, that, under the Privy Council Ruling, the purchaser is not bound to look beyond the decree. *Held*, also, that an usurious rate of interest cannot be treated, within the principles of the above case, as showing that the decree was for a debt which the son was not bound to discharge.

Held, further, that where a decree is against the mortgagor generally, coupled with a declaration of the lien, the decree-holder may proceed either against the person and his property, or against the mortgaged property, though whether such a course will be allowed in any particular case is a matter for the discretion of the Court executing the decree.

SUIT to recover possession of a moiety of a certain estate by cancellation of an auction sale, held on the 12th of February 1866.

The material facts alleged in the plaint were as follows:—That the plaintiff, with the defendant Govind Dyal Sing, who was his father, constituted a joint Hindu family living under the Mitakshara law; that the property, which was the subject-matter of the suit, was ancestral property, to which [214] Govind Dyal Sing succeeded in 1846; that the estate was totally unencumbered at that time, and that the income "was not only sufficient for family expenditure, but probably sufficient to ensure a saving;" that the plaintiff was born in the year 1858, when he became entitled to a share in the joint estate; that the defendant Govind Dyal Sing, without any legal necessity, executed a bond in favour of certain bankers of the names of Dungur Mal and Sheo Lall, for Rs. 2,800, mortgaging certain villages other than those sued for; that, subsequently, the mortgagees obtained a decree for the sale of the mortgaged properties, but instead of executing the decree by sale of those properties, they put up for sale the right and interest of the defendant Govind Dyal Sing in the properties for the recovery of a moiety of which the present suit was brought, and at that sale the defendant Asman Sing was the purchaser.

The defendants, in their written statement, stated that the debt in respect of which the property was put up for sale was contracted by the plaintiff's father for the purpose of purchasing, for the benefit of the joint family, a certain share in an estate belonging to one Roghuber Dyal Sing, another member of the family; and that, consequently, the plaintiff was not entitled to question the validity of their purchase in execution of decree for such debt.

That decree was worded in the following terms: "that the claim be decreed; that the plaintiff recover the amount with costs and interest, and that the decree be executed against the property specified in the bond." The interest allowed upon the bond amounted to Rs. 1,630 for a period less than a year in respect of the sum of Rs. 2,800, giving a rate of more than 50 per cent. per annum.

The Subordinate Judge, without in any way going into the facts of the case, held, upon the strength of the Privy Council Ruling in *Muddun Thakoor v. Kantoo Lall* (14 B. L. R., 187), that the decree under which the defendants purchased the property was conclusive, and, as *bona fide* purchasers for valuable consideration, [215] they were not bound to enquire whether the original debt was for a valid necessity. He, accordingly, dismissed the suit.

The plaintiff appealed to the High Court.

Mr. Ameer Ali (Baboo Mohesh Chunder Chowdry with him) for the Appellant.

The Advocate-General, Officiating (Mr. Paul), (Messrs. Twidale and Sandel and Munshi Mohammed Yusooff with him) for the Respondents.

Mr. Ameer Ali.—The Privy Council Ruling in *Muddun Thakoor v. Kantoo Lall* (14 B. L. R., 187), does not lay down any such hard and fast rule as the Subordinate Judge supposes. Prior to this decision, the Courts had almost invariably held that the burden of proof lay primarily with the purchaser—*Mahabeer Persad v. Ramdoyal Singh* (12 B. L. R., 90) and *Laljeet Singh v. Rajcoomar Singh* (12 B. L. R., 373). The Privy Council Ruling does not do more than simply change the onus and transfer it in the first place to the son. If the plaintiff makes out a *prima facie* case, and proves sufficiently that the debt for which the property was sold was not for a valid purpose, the same liabilities would attach to the purchasers as before. Every member of a Hindu joint family has an inherent right to question the validity of acts committed by the managing member so as to bind the joint estate—*Hunooman Persaud Panday v. Mussamut Babooee Munraj Koonweree* (6 Moore's I. A., 393). The Privy Council cannot be supposed to mean that whenever such property has passed into the hands of auction-purchasers, such members should be for ever precluded from questioning the validity of not only the original acts, but also of the decree and sale under it. No doubt, if the Judicial Committee had stopped at the words, "a purchaser under an execution is surely not bound to go beyond the decree, &c." (14 B. L. R., 199), such construction might have been placed on their ruling; but their Lordships go on and say, "the purchaser under that execution [216] was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was properly liable to satisfy the decree, if the decree had been given properly against them" (14 B. L. R., 200). Some meaning must be attached to those words, and the only reasonable construction that can be given to them is, that, when ancestral property is put up for sale in execution of a decree against the father, the purchaser is not bound to look to the character of the debt, but he is not freed from the burden of examining into the character of the decree, to see whether it is a proper or improper one; and, on the other hand, though the son is debarred from questioning the validity of the acts leading up to the decree, he retains his right to question the propriety of the decree and the subsequent proceedings under it. If this is the correct view, then, upon the face of the decree, it appears the decree-holders were bound to proceed first against the mortgaged properties; and they would have only been entitled to proceed against any other property of the judgment-debtor, in case there happened to be a deficiency. A decree-holder, who takes a decree as against the hypothecated property, should, on equitable principles, be made to exhaust it. The facts proved show that the debt was an immoral one. The following cases were also cited:—*Tooke v. Hartley* (2 Bro. Ch. C., 125), *Perry v. Barker* (8 Ves., 527), *Budree Lall v. Kantee Lall* (23 W. R., 260), and *Cheytt Narain Sing v. Bimwari Singh* (23 W. R., 395, at p. 398).

Baboo Mohesh Chunder Chowdry on the same side.—Upon the face of the decree it appears that interest over 50 per cent. per annum was claimed by and allowed to the decree-holder. It is usurious; and, as usury is prohibited by the Hindu law, the decree is an improper one; Cowell's Lectures on Hindu Law for 1871, pp. 307, 311.

The *Advocate-General* for the Respondents.—The plaintiff is excluded by the Privy Council Ruling from questioning the validity of his father's acts when once a decree has been passed [217] and the property sold under it. With reference to the propriety of the decree itself, the bond in this case hypothecates not only certain properties, but also makes the person of the debtor responsible for its payment. The decree is in the form usual in the mofussil, under which a decree-holder proceeds either against the mortgaged property or the debtor personally. The decree-holders in this case were, therefore, not bound to exhaust the hypothecated properties. The evidence shows the debt was contracted for a valid purpose—*Mudden Thakoor v. Kantoo Lall* (14 B. L. R., 187), *Mussamat Koldeep Kour v. Runjeet Singh* (24 W. R., 231), and *Gridhari Lall Sahoo v. Mussamat Gowrunbutty* (15 B. L. R., 264).

Mr. Ameer Ali in reply.

The Judgment of the Court was delivered by

Markby, J. (who, after stating the facts, continued) :—The Subordinate Judge took evidence in the case, but eventually without in any way going into the evidence held upon the strength of a decision of the Privy Council in the case of *Mudden Thakoor v. Kantoo Lall* (14 B. L. R., 187), that the decree under which the defendant purchased this property was conclusive in the matter, and that the defendant was not in any way bound to inquire further when this decree was existing.

Against this judgment the plaintiff appeals, and he contends, in the first place, that the Privy Council case relied on does not make the decree conclusive in the way the Subordinate Judge has held it to be; secondly, he contends that upon the evidence he has made out his case that this was a debt for which his interest in the property could not in any way be made liable; and thirdly, he contends that, under the terms of the decree itself, the property which should have been first sold in satisfaction of the decree was the property which had been mortgaged, and that, therefore, applying the Privy Council decision in all its strictness, the purchaser had notice upon the face of the decree that this property could not be sold.

[218] Now, with regard to the first point, we think that the decision of the Subordinate Judge is right. The case that we have to deal with here is, for all material purposes, precisely the same as that which was dealt with by the Privy Council—in what is called the “second appeal” in the case referred to—the appeal of *Mudden Mohun Thakoor*, whose position was precisely that of the present defendants. The Privy Council say, speaking of the purchaser in that case:—“He found that a suit had been brought against the two fathers; that a Court of Justice had given a decree against them in favour of a creditor; that the Court had given an order for this particular property to be put up for sale under the execution; and, therefore, it appears to their Lordships that he was perfectly justified within the principle of the case of *Hunooman Pershad Panday v. Mussamat Babooee Munraj Koonweree* (6 Moore's I. A., 393) in purchasing the property, and paying the purchase-money *bona fide* for the purchase of the estate.”

Here also there had been a decree of a Court of Justice against the father for this money, and an order of the Court that this property should be put up for sale.

Then their Lordships quote a well-known passage from the case referred to (6 Moore's I. A., 423), and then they say as follows:—“The same rule has been applied in the case of a purchaser of joint ancestral property. A purchaser under

an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that, if the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, was liable for the payment of the father's debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was property liable to satisfy the decree, if the decree had been given properly against them" (14 B. L. R., 199, 200).

[219] Now it is contended upon those last words, that the intention of the Privy Council was that a purchaser at an execution sale should not only see that there was a decree, but that a decree had been rightly given against the judgment-debtor. That would be really unsaying all that the Privy Council had just before said upon the matter. What we think the Privy Council mean by those words is, that a party is not bound to look beyond the decree to see that that was a right decree, for they had said already just the contrary that he was not bound to do so, but he was bound to look to the decree to see that in point of form it was a proper decree. Then that being so, no objection can be taken in point of form to this decree, except the one which was taken by Baboo Mohesh Chunder Chowdry with which we have to deal now.

He contends that, even giving the Privy Council decision that interpretation, the purchaser was not bound in any way to go behind the decree to see what occurred prior thereto, still he was bound to look to the decree itself and as it stands; there was notice to him on the face of the decree that this was a debt which, under the Mitakshara law, the son was not liable to discharge, and for this reason, because it appears upon the face of the decree, that the interest, which was allowed upon this bond, amounts to somewhere about Rs. 1,600 for a period less than a year in respect of a principal of Rs. 2,800, giving a rate of interest somewhere over 50 per cent.

But, even assuming that the Hindu law contains a prohibition against the taking of interest at so high a rate, and that by the Hindu law interest at that rate could not under any circumstances be allowed, still we think that that is not a circumstance which within the principles laid down by the Privy Council in the case quoted above, can be treated as showing that this was a decree for a debt which the son was not bound to discharge. For that purpose, we must look into what the cases under the Mitakshara law are in which he is not bound to discharge the father's debt. That is expressed by the Privy Council in these words:—

"It is necessary, therefore, to see what was the nature of the debt for the payment of which it was necessary to raise money [220] by the sale of the property in question" (14 B. L. R., 197). Now all we know, and all we can know, is what appears on the face of the decree itself. Their Lordships go on to say:—"If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it; and he might possibly object to those estates which have come to the father as ancestral property being made liable to the debt. That was not the case here. It was not shown that the bond upon which the decree was obtained was given for an immoral purpose; it was a bond given apparently for an advance of money upon which an action was brought" (14 B. L. R., 197).

Can we say here upon the face of the decree, that, so far as it orders interest to be paid, it is a decree for an immoral purpose? One might almost say that such a question answers itself. It may be that, under Hindu law, there were some restrictions against the allowance of interest; but it is well known that those restrictions are no longer enforced by our Courts. There is no ground whatever for saying that, what our Courts allow in the shape of interest is money directed to be paid for immoral purposes. Therefore, upon that ground, it appears to us impossible to say, that, on the face of the decree it was one for a debt which the son was not bound to discharge.

This view of the case renders it unnecessary to consider the facts of this case, but, having heard the case very ably argued on behalf of the appellant, we think, even upon the facts of the case, that this was a debt which the son was bound to discharge. * * * * *

Therefore, upon the evidence, if one was at liberty to go into the evidence, we should hold that the debt was one which, under the Mitakshara law, the son was bound to discharge.

Then the other question remains, namely, as to the form of the decree. Now we had the decree read to us, and we consider this to be not such a decree as we know is sometimes made, namely, a decree restricting the parties in the first instance to the sale of the mortgaged property. But it is a decree against the mortgagor generally coupled with what is [221] called a declaration of the lien—a declaration which it is exceedingly common to insert in decrees against mortgagors upon a bond of this nature. The bond also, as has been pointed out by Mr. Advocate-General, was not only a bond pledging the property, but a bond which made the party personally liable for the money. Now, upon a decree of that kind, we have no hesitation in holding that a person may in law proceed either against the person or against the mortgaged property specified in the decree. In saying that we do not at all mean to say that that is a course which in all cases ought to be allowed. There are undoubtedly cases in which that would operate greatly to the injury of the mortgagor. And we desire to say nothing which would in any way interfere with the discretion of the Court executing the decree to take such precaution as might be necessary against any injury of that kind. But we think that in the present suit no inquiry upon such a subject as that can take place. I have already quoted the passage from the Privy Council judgment, which points out the duty of a purchaser at an execution sale in such a case as this. We think that, under the law as there laid down, the purchaser had a right to assume that the property, which was sold at this sale, was liable to be sold under this decree, and that any questions which the judgment-debtor might have raised or did raise upon the order by which the property was brought to sale, were disposed of at the time when the sale was ordered to take place. Therefore whatever may be the judgment-debtor's right under such a decree as this, that question cannot be raised now as against the person who has purchased at a sale under a decree of Court. Therefore that ground also fails.

The result is that the regular appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[1. INTEREST ACQUIRED BY THE EXECUTION PURCHASER—

Frame of the suit and nature of the decree, etc., determine the question as to what interest passed :—(1878) 1 Mad., 358 F.B.

Son's interest being affected even when the son is an adult :—(1882) 9 Cal., 495. See also (1881) 8 Cal., 517.

II. MORTGAGE DECREE—

Where there is a decree against the mortgagor generally coupled with what may be termed a declaration of lien, other properties may be proceeded against :—(1905) 28 All., 295.]

[222] APPELLATE CIVIL.

The 19th December, 1876.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE AINSLIE.

Brammoye Dassee on behalf of Brojo Nath Singh and another.....Plaintiffs
versus

Kristo Mohun Mookerjee.....Defendant.*

Res Judicata—Act VIII of 1859, ss. 2 & 170—Hindu Widow—Reversioner.

A, a Hindu widow, brought a suit to recover possession of her husband's share of certain joint property. After partially examining some of her witnesses, she cited the defendant as a witness, and on his failure to attend, her suit was dismissed. After the death of the widow, her daughter sued the same defendant on behalf of her two minor sons, as being entitled in reversion to their grandfather's share, to recover the share which was the subject of the former suit : the defendant was summoned as a witness, but failed to attend. *Held*, that the suit was not barred under s. 2, Act VIII of 1859, as being a *res judicata*, until it was shown that the former decree had been obtained after a fair trial of the right, so as to bind not only the widow, but the reversioners. The defendant having failed to attend and give evidence on this point, the Court was justified in giving the plaintiff a decree under s. 170,† Act VIII of 1859.

THE facts of this case were shortly these :—A certain property, which originally belonged to three brothers, forming a Hindu joint family, was sold in execution of a decree against two of them, and was purchased by the defendant, who obtained possession. The widow of the third brother thereupon instituted a suit to recover her husband's share in the joint estate. The plaintiff in that suit, after having partially examined one of her witnesses, declined to proceed further with their examination, and cited the defendant as a witness, and on his failure to attend, her suit was dismissed. No appeal was preferred from that order, and the widow died some time after, leaving a daughter, who was the plaintiff in the present suit, and who sued now on behalf of her minor sons, as reversioners to their grandfather's share, to recover the one-third share which was the [223] subject-matter of the former suit. The defendant, among other grounds, pleaded that the suit was barred under s. 2 of Act VIII of 1859. He was cited in this case also as witness on behalf of the plaintiff, but failed to attend. The Munsif decreed the claim, under s. 170 of Act VIII, 1859 holding that the cause of action in the former suit

* Special Appeal, No. 217 of 1876, against a decree of J. Tweedie, Esq., Officiating Judge of Zilla West Burdwan, dated the 13th of November 1875, reversing a decree of Babu Gobind Chund Ghose, Munsif of Bissenpore, dated the 21st of July 1875.

† [Sec. 170 :—If any person, being a party to the suit, who shall be ordered to attend to give evidence or produce a document, shall, without lawful excuse, fail to comply with such order, or attending or being present in Court, shall, without lawful excuse, refuse to give evidence, or to produce any document in his custody or possession named in such summons as aforesaid, upon being required

Consequence of non-attendance or refusal of a party to give evidence.

was not heard and determined, so as to operate as a bar to the present action. On appeal, the Judge reversed the Munsif's order, holding that the former action was a *res judicata*.

The plaintiff preferred a special appeal to the High Court.

Baboo *Nilmadhub Sen* for the Appellants.

Baboo *Bhobany Churn Dutt* for the Respondent.

The Judgment of the Court was delivered by

Markby, J.—In this case we think the judgment of the first Court was a right judgment, and ought not to have been disturbed by the lower Appellate Court.

It appears that there were three brothers entitled to a certain property. A decree had been obtained against two of the brothers, Shib Prosad and Bhola Nath. Their rights and interests in the property were sold, and the defendant got into possession. The widow of one of the brothers then brought a suit for declaration of her title to one-third share of the property. An issue was raised whether that share was the right and interest of the plaintiff as alleged by her, or of Shib Prosad and Bhola Nath as alleged by the defendant. There were other parties to that suit, but that does not seem to be material. After the death of the widow, the heir of her husband brought the present suit for possession. The decree in the former suit was set up as a bar to the present suit; and an issue was raised whether or no that decree was a bar to the present suit.

The Munsif, who tried the suit, seemed to have had some doubt whether, in point of law, the former decree was a bar to this suit. He also held that there was no proper trial upon the issues raised in the former suit. He then went on to say [224] that the plaintiff, in the present suit, had relied mainly upon the evidence of the defendant; and, inasmuch as the defendant having been summoned, did not choose to appear in Court, he gave the plaintiff a decree under s. 170 of the Civil Procedure Code.

The District Judge entirely concurs with the Munsif in thinking that this is a proper case to be dealt with under that section; but thinks that section could not be applied to the present case, because in this case the plaintiff cannot show a legal right. What he means by that apparently is, that the legal right which the plaintiff sets up in this case is wholly barred by the decision in the former suit. But the District Judge seems to have overlooked this,—that there was in the present case not an absolute bar such as there would have been, if this were the case of a decree against the person through whom the plaintiff claims. The rule that a decree against the widow binds the reversioner is subject to this qualification, that there has been a fair trial of the right in the former suit. That is laid down in what is commonly called the *Shivagunga* case (9 Moore's I. A., 539) and in the decision of this Court to the same effect, with which I entirely concur, in the case of *Mohina Chunder Roy Chowdhry v. Ram Kishore Acharjee Chowdhry* (15 B. L. R., 142; *vide* p. 159). It was there pointed out that the Privy Council, in a more recent case (*Nogender Chunder Ghose v. Sreemutty Kamince Dossee*, 11 Moore's I. A., 241), have said that, while they adhere to the rule that the widow represents the estate of the reversioner for some purposes, it is her duty not only to represent the estate, but to protect it also.

by the Court so to do, the Court may either pass judgment against the party so failing or refusing or make such other order in relation to the suit as the Court may deem proper in the circumstances of the case.]

Now, in this case, it is obvious that there were some grounds for looking closely to see what really took place in the former suit, because we find that the former suit was disposed of in a manner which, on the face of it, seems to be not satisfactory.

The plaintiff in that suit, after having brought her suit, and after having partially examined one witness, declined to examine any of her other witnesses. She had also cited the defendant, [223] the same person who was cited to appear in this case. It does not, however, appear whether she made any real attempt to get the defendant into Court, or whether the summons was served upon him. Anyhow he never came into Court, therefore there was good ground for inquiring whether there was a fair trial of the question between the parties in the former suit, and whether the plaintiff performed her duty in protecting, not only her own interest, but the interests of the person who was to take after her death.

Upon that question the evidence of the defendant is most important. Therefore the Court has a perfect right to say that the decree in the former is not a bar to this suit, until there had been some inquiry as to how it was obtained. And the defendant refusing to come in to give his evidence upon that point, the Court would be justified in dealing with the case under s. 170 of Act VIII of 1859. We may assume for the purposes of this judgment that the decree in the former suit would have been a bar to the present suit, if it had been properly obtained : but that would not in any way prevent the Court from inquiring into the question whether it was so or not. Having regard to the circumstances which I have mentioned, the Munsif was right in dealing with the case under s. 170. We think, therefore, that the judgment of the first Court was right and ought to be restored, and that of the lower Appellate Court reversed. The plaintiff will get the costs in this Court and in the lower Appellate Court.

Appeal allowed.

NOTES.

[RES JUDICATA BY DECREE AGAINST WIDOW --

Where a consent decree had been obtained on an award, the reversioner was held not bound :—(1903) 5 Bom. L. R., 885.

Nor where there is fraud or collusion :—(1886) 11 Bom., 119.

• An *ex parte* decree may still be one fairly and properly obtained, for a widow is certainly not bound to incur expense in defending the suit unless she had reason to believe there was a good defence. — (1907) 17 M. L. J., 160.

Dismissal for default, *res judicata* :—See (1885) 12 Cal., 563.]

[2 Cal. 225]

FULL BENCH.

The 20th February, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE KEMP,
MR. JUSTICE MACPHERSON, MR. JUSTICE MARKBY AND
MR. JUSTICE AINSLIE.

The Empress of India

versus

Diljour, Misser.*

*Conviction of offence committed before the Penal Code came into operation—
Regulation IV of 1797—Act XVII of 1862—Act I of 1868
(General Clauses Consolidation Act), s.6.*

The prisoner was found guilty and sentenced under Regulation IV of 1797 to transportation for life for a murder committed in 1861, before the Penal [226] Code came into operation and the case was sent up to the High Court to confirm the sentence. Regulation IV of 1797 was repealed by Act XVII of 1862, and that Act was wholly repealed by Acts VIII of 1868 and X of 1872. *Held*, on a reference to a Full Bench, that the conviction was illegal, s. 6 of Act I of 1868, which provides that the repeal of any Act or Regulation shall not affect any offence committed before the repealing Act shall have come into operation, not being applicable.

The prisoner was charged with murder, alleged to have been committed on 24th May 1861, before the Penal Code came into force, and he had evaded arrest up to the time of his apprehension. The prisoner was, on 7th August 1876, found guilty by Mr. A. V. Palmer, Sessions Judge of Shahabad, of culpable homicide not amounting to murder, and sentenced to transportation for life. The case was referred by the Judge under Regulation IV of 1797, s. 3, for the orders of the High Court, and on its coming before MARKBY and AINSLIE, JJ., the following note was made thereon by those Judges :—"Regulation IV of 1797 was repealed by Act XVII of 1862 with some reservations, but as appears by a case † just decided, [227] those reservations have been

* Criminal Reference No. 176 of 1876, from an order of A. V. Palmer, Esq., Sessions Judge of Shahabad, dated the 7th August 1876.

† *R. v. Lal Shaha* ; *Criminal appeal, No. 438 of 1876* :—In this case the prisoner was convicted in May 1876 of robbery committed in 1857, under s. 3, Regulation LIII of 1803, and s. 3, Regulation XVI of 1825, and was sentenced, under s. 395 of the Penal Code, to seven years' rigorous imprisonment. His appeal came before MARKBY, AINSLIE and MITTER, JJ., on 17th August 1876, when the following Judgment was delivered :—

Markby, J.—In this case the prisoner has been tried for robbery by open violence, and sentenced to seven years' rigorous imprisonment, under Regulation LIII of 1803, s. 3, and Regulation XVI of 1825, s. 3. He has appealed to this Court, and his first ground of appeal is, that those Regulations having been repealed, the conviction is illegal. These Regulations were repealed by Act XVII of 1862 with a certain saving as to past offences. Act XVII of 1862 was repealed by Act VIII of 1868, except ss. 3, 4, 5 and 6. These sections were repealed by the Code of Criminal Procedure of 1872. It would, therefore, seem that this ground of the prisoner's appeal is well founded. From another case of a somewhat similar character, which is now before us, we gather that there is an opinion prevalent in the Courts of the country that the old criminal laws antecedent to the Penal Code have not been swept away to the extent to which they appear to us to have been on a perusal of the Statutes above referred to. We regret that we have had no assistance on behalf of the Crown in the investigation of this matter ; but as far as we are able to judge upon the information before us, this conviction appears to be illegal, and we order it to be set aside, and the prisoner discharged.

also repealed, so that the Sessions Judge was not empowered to make the reference he has done. Nor are we aware of any regulation in existence under which the prisoner could be punished for culpable homicide committed on the 24th of May 1861. Unless, therefore, some cause be shown to the contrary, the conviction must be set aside as illegal."

Notice was ordered to be given to the Government Pleader and to the prisoner, and the case subsequently came before MARKBY, AINSLIE and MITTER, JJ., who referred it to a Full Bench with the following remarks :—

* "In a case which came before this Court on appeal a short time ago, it was held by us that Act XVII of 1862 was totally repealed by Acts VIII of 1868 and X of 1872, and that therefore no conviction for an offence committed prior to 1862 could be maintained. That case was not argued, and we were therefore only able to express our opinion with reference to such research as we could ourselves make into the matter. Very shortly afterwards the present case was referred to us under Regulation IV of 1797, s. 3, to confirm a sentence passed by the Sessions Judge of Shahabad, for an offence committed on the 24th May 1861. We, accordingly, gave notice that we should again consider this question, and the Junior Government Pleader has appeared to argue it. He maintains that, notwithstanding the repeal of Act XVII of 1862, the prisoner may be still tried and punished, because of the proviso in s. 6 of the General Clauses Act (I of 1868).^{*} We find considerable difficulty in coming to a conclusion as to the operation of this section in the present case, and as the question is one of general importance, it should, we think, be heard by a Full Bench."

No Counsel appeared on either side before the Full Bench.

The Opinion of the Full Bench was delivered by

Garth, C. J.—In this case the prisoner has been convicted of culpable homicide not amounting to murder committed on the 24th May 1861, and sentenced to transportation for life. Act XVII of 1862, under which the prisoner has been tried [228] and convicted for this offence, has been totally repealed by Acts, VIII of 1868 and X of 1872. It has, however, been contended that, notwithstanding this total repeal of Act XVII of 1862, the prisoner may still be tried and convicted under that Act by virtue of the provisions of s. 6 of the General Clauses Act (I of 1868). We have considered this clause, and upon the whole we think that it does not apply to the present case. The conviction, therefore, must be set aside, and the prisoner discharged.

NOTES.

[Followed in *Empress of India v. Mulna*, (1878) 1 All., 599.]

* [Sec. 6 : The repeal of any Statute, Act or Regulation, shall not affect anything done or any offence committed, or any fine or penalty incurred or any proceedings commenced before the repealing Act shall have come into operation.]

Matters done under an enactment before its repeal to be unaffected.

[2 Cal. 228]
ORIGINAL CIVIL.

The 27th November, 1876.

PRESENT :

MR. JUSTICE PONTIFEX.

Moran and others.....Plaintiffs.

versus

Mittu Bibee and others.....Defendants.

Appeal to Privy Council—Act VI of 1874, s. 5—Substantial question of Law.

The substantial question of law which, by s. 5, Act VI of 1874, the appeal must involve, in order to give an appeal to the Privy Council in a case where the decree appealed from affirms the decision of the Court below, is not limited to a question of law arising out of the facts as found by the Courts from whose decisions it is desired to appeal. A question of law arising on the evidence taken in the case is, without reference to the findings of the lower Courts, sufficient to found an appeal.

APPLICATION on notice for a certificate under Act VI of 1874 for leave to appeal to Her Majesty in Council from the judgments and decrees made in the suit by the appeal Court (GARTH, C.J., and MACPHERSON, J.) on the 15th September, and by the Original Court (PHEAR, J.) on 6th March 1876. The judgment of the Original Court was in favour of the defendants, and that decision was upheld by the Appeal Court, who dismissed the appeal. The facts of the case, together with the judgments of both Courts, have been already reported (I. L. R., 2 Cal., 58).

[229] The petition for leave to appeal, after stating the facts, and that the case came on for hearing before PHEAR, J., and was dismissed by him, continued :—

“ Upon such hearing it was (*inter alia*) contended in argument on behalf of your petitioners, in support of their claim to priority over the Mussamut defendants in respect of your petitioners' said advances, that the principles upon which advances and outlay made by a consignee or manager of a West India Estate have been held entitled to a priority over other charges upon the property, were applicable to the said advances made by your petitioners. Also, that such last mentioned advances were of the nature of salvage; and further that they were analogous to advances made on the security of bottomry and respondentia bonds by hypothecation of ships and their cargoes, and that the legal principle governing these latter securities, viz., that the latest in date is first payable, was applicable to the said advances made by your petitioners. It was also further contended on behalf of your petitioners, that the Mussamut defendants had acquiesced in your petitioners making such advances upon the terms of the same being entitled to priority over their own mortgage, and that they were estopped under the circumstances of the case, and by their own conduct, from denying your petitioner's claim to such priority.

“ That in and by his judgment upon which the said decree is founded and based, the said learned Judge found and held (*inter alia*) :—

(a) That your petitioners made advances to the said J. McRae, as such manager as aforesaid, during the year 1873, on account of the outlay of the said Arrowah Concern, to the amount of Rs. 88,557, upon the security of

assignments of 360 maunds of indigo, portion of the crop of that season, the subject of the mortgage of the Mussamut defendants of the 1st February 1873; and that such advances, or a portion of them, were applied to the purpose of manufacturing the indigo, which was the subject of the suit, that is to say, the said 360 maunds of indigo.

(b) That the suggested analogy to the several cases of advances or outlay by the consignee or manager of a West [230] India Estate, of salvage payments, and of advances on bottomry and respondentia bonds, could not be maintained.

(c) That it was not proved that the said J. McRae had authority from the Mussamut defendants to give your petitioners a charge on the said indigo having priority over the said defendants' said mortgage; that the alleged arrangement and agreement that the said J. McRae should borrow such further sums as might be necessary for carrying on the said concern from your petitioners, and should grant your petitioners a first mortgage or charge upon so much of the season's crop as should be necessary to secure your petitioners' advance, and that the Mussamut defendants should waive their priority in favour of your petitioners, if in fact made, were inadmissible in evidence by force of ss. 91 and 92 of the Indian Evidence Act, as contradicting, and materially altering, the contract made by the said mortgage of the first day of February 1870; that the Mussamut defendants had not acquiesced in your petitioners making their said advances upon the terms of the same being entitled to priority over the said mortgage, and that the said defendants were not estopped from denying your petitioners' claim to such priority.

"The said learned Judge, at the said hearing and trial and also in his said judgment, ruled and held that the said assignments given to your petitioners as security for their said advances were insufficiently stamped, and were therefore inadmissible in evidence, and the same were consequently not adduced in evidence at the said hearing and trial; but the said learned Judge, in his said judgment, held and stated that the said assignments could not, upon the case made by your petitioners, have the effect of passing to your petitioners an interest in the indigo detrimental to the Mussamut defendants' prior rights under their said mortgage of the first day of February 1873."

After stating that the petitioners appealed from the judgment of PHEAR, J., that the appeal was dismissed, and that they were desirous of appealing to Her Majesty in Council, the petition set forth, *inter alia*, the following grounds of appeal:—

1. "That the said learned Judges held erroneously, that evidence was inadmissible of an oral agreement and certain [231] other communications with reference thereto between the said John McRae and the said Monohur Doss, that advances should be taken from the petitioners on account of the outlay of the Arrowah Indigo Concern, to be secured by a first charge upon the indigo of the season of 1872-73, to be manufactured at the said concern, such charge to have priority over the mortgage of the said indigo to the Mussamut defendants, dated the 1st day of February 1873.

2. That the said learned Judges ought to have held that the said John McRae was authorized by the said Mussamut defendants to raise the money necessary to complete the indigo season of 1872-73 of the said concern as a first charge on the indigo manufactured at the said concern in that season, in priority to the said defendants' mortgage; and that the said John McRae raised the money sought to be recovered in this suit from the petitioners in pursuance of such authority.

3. That the said learned Judges ought to have held that the said Mussamut defendants knew of the said John McRae's action in raising the said money as a first charge with such priority as aforesaid, and acquiesced therein.

4. That the said learned Judges ought to have held that the said Mussamut defendants were estopped, under the circumstances of the case, and by their own conduct, from denying your petitioners' claim to such priority.

5. That the said learned Judges ought to have held that, under all the circumstances of the case, the petitioners were entitled in equity to be recouped their advances on account of the said concern out of the said indigo in priority to the said Mussamut defendants, whereas they have not so held.

6. That the said learned Judges ought to have held that the petitioners were entitled to be recouped the sum of Rs. 5,000 (part of the money sought to be recovered in this suit), which was obtained from the petitioners, and paid to the said Mussamut defendants, out of the said indigo, in priority to the said Mussamut defendants."

The petition prayed for a certificate that the amount or value of the subject-matter of the suit, and also the amount or value of the matter in dispute in the appeal to Her Majesty in [232] Council, were respectively upwards of Rs. 10,000, and that such appeal involved substantial questions of law.

Mr. *Evans*, for the plaintiffs, applied for a certificate to that effect under Act VI of 1874.

Mr. *Bonnerjee*, for the defendants, admitted, that if it were assumed that the facts were not correctly found by the Court, there were substantial questions of law involved in the case: but he contended that it ought not to be assumed that the facts were inaccurately found, and that according to the true construction of the Act "the substantial questions of law" must arise from the facts as found. [PONTIFEX, J.—Your contention amounts to this, that the appeal to the Privy Council, when the Appellate Court agrees with the Court of First Instance as to the facts, is in the same position as a special appeal to this Court.] Yes. My contention is, that "substantial questions of law" must be involved in the facts as found, and that the Legislature did not intend to allow an appeal in cases where, if the facts were differently found, questions of law might arise.

Pontifex, J.—I think, in this case there is a substantial question of law within the meaning of the 5th section of Act VI of 1874. If it had been intended to restrict appeals to questions of law arising only out of the facts concurrently found by the Courts below, it would have been expressly so stated in the Act. The application must be granted. Costs to follow costs of appeal to the Privy Council.

Attorneys for the Plaintiffs: Messrs. *Berners, Sanderson and Upton*.

Attorney for the Defendants: *Bahoo Nemy Churn Bose*.

NOTES.

[LEAVE TO APPEAL TO THE PRIVY COUNCIL—"INVOLVE SOME SUBSTANTIAL QUESTION OF LAW."]

This case was followed in (1884) 16 Cal., 292 and (1895) 20 Bom., 699 but in (1900) 23 All., 94 it was held that where there would be no question of law involved unless concurrent findings are set aside, no question of law can be said to be involved having regard to the usage of Privy Council Practice not to interfere with concurrent findings.]

[233] PRIVY COUNCIL.

The 30th June, 1st and 24th July, and 25th November, 1876.

PRESENT:

SIR B. PEACOCK, SIR M. E. SMITH, AND SIR R. P. COLLIER.

Ram Coomar Coondoo and another.....Plaintiffs

versus

Chunder Canto MookerjeeDefendant.

[4 I. A. 23]

On Appeal from the High Court of Judicature at Fort William Bengal.

Chemperty and Maintenance—Agreements contrary to Public Policy—Action for improperly putting the law in motion—Malice—Want of reasonable and Probable cause— Application under s. 73, Act VIII of 1859—Costs.

The English laws of maintenance and champerty are not of force as specific laws in India either in the mofussil or in the Presidency towns. The ground on which contracts of the nature of champerty and maintenance should be held by the Indian Courts to be invalid is that they are contrary to public Policy.

An agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, is not necessarily opposed to public policy, since cases may easily be supposed in which it would be in furtherance of right and justice, that a suitor who had a just title to property, and no means to support it, should be assisted in this way. But agreements purporting to be made to meet such cases, when found to be extortionate and unconscionable, so as to be inequitable, or to be entered into for improper objects, as for the purpose of gambling in litigation, or of injuring others by encouraging unrighteous suits, are contrary to public policy, and ought not to have effect given to them.

Since by the law of India a champertous agreement does not constitute a punishable offence, an action in that country, founded on alleged champerty, to recover losses and costs incurred in litigation, cannot be sustained on the ground that a remedy by action accrues where an indictable offence has been committed.

No action will lie for improperly putting the law in motion in the name of a third party, unless it is alleged and proved that it has been done maliciously and without reasonable or probable cause. In the absence of such proof, an action for losses and costs incurred in defending a suit will not lie against a person who is alleged to have been a mover in that suit, and to have had an interest in it, but who had not been made a party to the record; since such a state of things creates no legal privity from which a promise can be implied on which an action on contract can be founded, nor does it, *ex hypothesi* constitute a legal wrong.

[234] Where it appears that the plaintiff in a suit is in fact suing on behalf of another person who is not a party to the record, the ordinary practice is to require security for costs, and to stay the proceedings till it is given.

The rejection by the Court of an application under Act VIII of 1859, s. 79, to have a stranger, who has an interest in the suit, made a co-plaintiff on the record, cannot give a ground for an action against such stranger for costs incurred in the suit, which would not otherwise lie.

The cases in which persons other than parties to the suit have been held liable to costs in England, relate to applications either in the cause itself, or to the disciplinary and summary jurisdiction of the Courts. They give no support to the contention that an independent action will, under such circumstances, lie.

THIS was an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, in its Appellate Jurisdiction, dated the 28th May, 1874, reversing a decree of the said Court, in its Ordinary Original Civil Jurisdiction, dated the 30th March, 1874, and dismissing a suit instituted by Ram Coomar Coondoo and Kali Coomar Coondoo, as plaintiffs, against Chunder Canto Mookerjee as defendant (see 13 B. L. R., 530).

By this suit the Coondos sought to recover from the defendant, as damages the costs and expenses which they had incurred in defending certain suits brought against them by one McQueen and his wife, on the ground that the litigation had been instigated and maintained by Mookerjee for his own benefit, and at his own expense, and without reasonable or probable cause.

The facts of the case are as follows :—

McQueen, in right of his wife, claimed to be entitled to certain lands and premises in Howrah, of which the Coondos were in possession. Neither he nor his wife having the means wherewith to defray the expenses of litigation, they, on the 17th July, 1867, entered into a written agreement with Chunder Canto Mookerjee. This agreement recites the title of the McQueens to the property in question: their having no funds to enable them to take legal proceedings for its recovery; their having applied to Mookerjee for assistance, and his having agreed to assist them. They then appoint Mookerjee to be [23:] their attorney, agent, and mooktear to institute and prosecute the necessary proceedings for the recovery of their property; while he, on his part, covenants to conduct the litigation and to provide the necessary funds, and also, during the pendency of the proceedings, to make a monthly allowance of Rs. 150 to the McQueens for their support, it being agreed that he should repay himself all advances with interest at twelve per cent. out of the property when recovered, and also retain for himself, in consideration of his trouble and risk, "one equal third share of and in the clear net profits" of the litigation. The McQueens, on the other hand, covenant not to interfere with Mookerjee in the prosecution of the suits which he may think it necessary to institute, but to tender him all the assistance they can, and they declare that the power-of-attorney granted to him shall be irrevocable so long as he continues to conduct, and provide funds for carrying on, the legal proceedings and to pay the said monthly allowance. It was, however, provided that if McQueen gave his whole time and attention to the conduct of the litigation he might do so, but under the control of Mookerjee; and that the McQueens might revoke the power-of-attorney on repayment to Mookerjee of all his advances with interest at 12 per cent., and a further sum of Rs. 2,000 by way of liquidated damages; and further that, if Mookerjee should, at any time, fail to make the necessary advances, or to pay the stipulated monthly allowance, the agreement should be void, and Mookerjee should no longer be entitled to recover any money which he might have advanced or paid. Power was likewise reserved to the McQueens to compromise if the sum offered should cover the entire sum due to Mookerjee in respect of payments made by him with interest thereon, but, not otherwise, unless with his consent.

In pursuance of this agreement, in August, 1867, a suit was commenced in the name of the McQueens against the Coondos, in the Court of the Principal Sudder Amen of Hooghly, for the recovery of the said lands, which suit was afterwards transferred to the Court of the Zillah Judge. While the suit was pending in the Zillah Court, the Coondos having come to know of the agreement

of the 17th July, applied to the Judge, under s. 73, [236] Act VIII of 1859,* to have Mookerjee made a party to the suit, which, however, the Judge refused to do, on the ground that the agreement gave him no present interest. In April 1868, the suit was heard in the Hooghly Court, and dismissed with costs. The McQueens appealed to the High Court, and the Coondoo's filed a cross appeal, setting forth, among other objections to the proceedings in the Judge's Court, that he had not made Mookerjee a party to the suit. On the 15th April, 1869, the High Court reversed the decree of the Judge of Hooghly, and gave judgment in favour of the McQueens. No reference was made in the judgment of the High Court to the question as to whether Mookerjee ought to have been made a party to the suit, and the point does not seem to have been insisted on when the case was argued before the High Court.

On the 11th May, 1869, the Coondoo's petitioned for leave to appeal to Her Majesty in Council. Concealing the fact of this petition having been filed, Mookerjee applied for and obtained an order for execution from the Hooghly Court, under which the McQueens were put in possession of the property in litigation. These proceedings having been brought to the notice of the High Court, it was ordered that the Coondoo's should be restored to possession, unless the McQueens gave security for costs in the event of the decree of the High Court being reversed on appeal, and for the rents which might be received by them during the pendency of the appeal. Thereupon, a security bond for a sum of Rs. 12,000 was given by Mookerjee. The McQueens, accordingly, remained in possession, and they recovered from the Coondoo's, by attachment of other property, a sum of Rs. 4,739, being the cost incurred in the Hooghly Court and in the High Court.

On the 3rd September 1870, a second suit was instituted in the name of the McQueens to recover from the Coondoo's mesne profits in respect of the disputed premises. On the 21st of the same month, the McQueens sold to Mookerjee absolutely all their interest in the pending suit and appeal for a sum of Rs. 22,000, out of which Rs. 12,500 was to be deducted for payments already made to them. In March, 1872, the Judge of the Hooghly Court gave a decree for Rs. 5,094, in the suit for mesne profits.

[237] On the 25th June, 1872, the decree of the High Court, of the 15th April, 1869, was reversed by the Privy Council, with costs in the Court below and the costs of the appeal; and, subsequently, the judgment in the suit for mesne profits was set aside on review, and the suit dismissed with costs.

On the 14th September, 1872, the Coondoo's were restored to possession of the premises in Howrah, but failing to find any property of the McQueens against which to execute their decree for costs, they, on the 9th June, 1873, instituted the present suit.

Their plaint sets forth in full the agreement of the 17th July, 1867, and recites the proceedings hereinbefore referred to. It then proceeds:—

“The plaintiffs charge that, by reason of the wrongful and injurious acts of the defendant hereinbefore alleged, and by reason of his entering upon and obtaining a lease of, and ultimately purchasing the aforesaid lands and premises pending the suit so maliciously

*[Sec. 73 :—If it appear to the Court, at any hearing of a suit, that all the persons who may be entitled to or who claim some share or interest in the subject matter of the suit, and who may be likely to be affected by the result, have not been made parties to the suit, the Court may adjourn the hearing of the suit to a future day to be fixed by the Court, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be. In such case the Court shall issue a notice to such persons in the manner provided in this Act for the service of a summons on a defendant.]

instituted and maintained by him, in the names of the said John McQueen and Mary Anne, his wife, in pursuance of the unlawful and champertous agreement entered into by him with them as aforesaid, he the said defendant has made himself liable for all the costs incurred by the plaintiffs in and about the defending of the said suit, and also for all the rents, issues, and profits which the plaintiffs would have received from, or in respect of, their said property, but for the aforesaid wrongful and injurious acts of the defendant, together with interest thereon at the rate of twelve per cent. per annum; and the plaintiffs submit that in case this Honourable Court should not see fit to award to the plaintiffs as damages a sum equal to the whole of the rents, issues, and profits of which they have lost, or been deprived of by the wrongful and injurious acts of the defendant, then they are, at least, entitled to recover so much of the said rents, issues, and profits as came into the hands of the defendant, or which, but for his wilful act or default, might have come; and the plaintiffs further submit that, from and after the date of the said defendant's contract with the said John McQueen and his said wife, for the absolute sale to him of the said premises, the said defendant ought, if liable for no other costs, to be held liable for such costs and for the rents, issues, and profits secured by him thereafter.

"The said litigation was instigated and carried on and conducted by the defendant at his own expense, and with a view to his own benefit, and the defendant was the real mover in the said proceedings, and [238] unlawfully and maliciously used the procedure and process of the Courts to the damage and injury of the plaintiffs

"The plaintiffs' cause of action was a continuous one, and arose on the termination of the litigation hereinbefore described."

The defendant, in his written statement, admitted the execution of the agreement, and that he had supplied funds in accordance with its terms, and that he had given a bond as security for the costs in the appeal to the Privy Council; but he contended that he had acted in good faith, and that the plaintiffs should be called on to elect either to enforce the bond which he had given or to abandon it. He also contended that the plaintiffs having submitted to the rejection, by the Judge of Hooghly, of their application to have been made a party to the original suit, were estopped from bringing this action. He denied that the plaint disclosed any cause of action, or that he was liable in respect of the wrongs therein alleged, and he pleaded that the claim was barred by limitation.

The cause was heard by Mr. Justice MACPHERSON, who, on the 30th March, 1874, gave judgment in favour of the plaintiffs (13 B. L. R., 532).

From this decision the defendant appealed, and on the 28th May, 1874, the Chief Justice, SIR RICHARD COUCH, sitting with Mr. Justice PONTIFEX as an Appellate Court, reversed the decision of the Court below, and the plaintiffs appealed to Her Majesty in Council.

Mr. *Leith*, Q. C., and Mr. *Doyne* for the Appellants.—We do not contend in opposition to the finding of the Courts below that the original suit against us was instituted or prosecuted without reasonable or probable cause. We say that the agreement entered into by the McQueens and the present respondent was champertous. The Appeal Court has held that champerty not being in India an indictable offence, does not afford ground for an action. That is an erroneous view. Champerty is a wrong, and is, therefore, a ground of action to one who has suffered damage thereby. It is immaterial that the wrong is not a criminal offence. The cases of *Fischer v. [239] Kamala Naicker* (8 Moore's I. A., 170), *Grose v. Amritamay Dasi* (4 B. L. R., O. C., 1), *Mulla Jaffarji Tyeb Ali Saib v. Yacali Kadar Bi* (7 Mad. H. C. Rep., 128), and *Tara Soonduree Chowdhraim v. The Collector of Mymensingh* (13 B. L. R., 495;

S. C.* 20 W. R., 446) show that speculative bargains for the purchase of interests under litigation are void as being immoral and opposed to public policy. Immoral agreements of this character carried out to the injury of third persons, give such persons a right of action: see *Pechell v. Watson* (8 M. & W., 691), *Hilton v. Woods* (L. R., 4 Eq., 432), and *In re Jones* (L. R., 6 Ch., 497). Apart from the liability in respect of wrong, it is equitable that we should be repaid the expenses which we have incurred through the respondent having promoted the suit against us. The McQueens had denuded themselves of all real interest in the property and in the suit in his favour. As assignee of their interests, he should have come forward and had himself substituted as plaintiff on the record. In *Bama Soondurce Dossee v. Annundo Lall Doss* (Bourke's Rep., O. C., 44; Appeals from O. C., 96), it had been held by the High Court that those interested in, and who maintain, suits may be compelled to recoup defendants their costs. [SIR M. SMITH.—But the Chief Justice says, there is no room for equity here. You should have had the respondent made a party to the suit, or you should have applied in the suit to have security. The respondent's liability should have been insisted on in the other suit, not in this.] The appellants did apply in the original suit to the Civil Judge to have the respondent made a co-plaintiff, but the application was refused. We appealed in respect of that refusal, but the point did not receive the attention of the Appellate Court. Indeed, it seems doubtful whether, under the provisions of s. 73, Act VIII of 1859, the respondent could have been forced to become a party to the suit. The section allows persons who think their rights affected to put themselves before the Court but does not seem to apply to proceedings *in invitum* to bring a person against his will upon the record, so as to make him answerable for costs. [240] The decisions on the construction of the section have not been uniform. See *Joygobind Dass v. Gourceproshad Shaha* (7 W. R., 202), *Saroda Pershad Mitter v. Kylash Chunder Banerjee* (7 W. R., 315), *Kaler Pershad Singh v. Joyurain Roy* (11 W. R., 361), *Bidnath Sahoo v. Gopee Sahoo* (14 W. R., 90). In this last case, MARKBY, J., observed, that the action of the Court under s. 73 was a matter of discretion, and, therefore, not a matter of appeal. If that was a correct view, the order of the Judge refusing to make the respondent a party to the record was final. In *Judoo-putte Chatterjee v. Chunder Kant Bhattacharjee* (9 W. R., 309), it was expressly held that a Court was not competent to order the name of the purchaser of the rights of a plaintiff in a suit to be substituted for that of the plaintiff. [SIR M. SMITH.—Would not there be a general equity either to put him on the record, or to restrain proceedings until security was given?] The last section of the Civil Procedure Code declares that the procedure of the Civil Courts is to be regulated by that Act, and by no other law. If we had no power to bring the respondent before the Court under s. 73, there could be no other authority for doing so. [SIR M. SMITH.—If there was a right otherwise, s. 73 would not take it away. SIR R. COLLIER.—If the bargain was champertous, and the respondent took nothing under it, he would not be entitled to be made a plaintiff.] In an action in ejectment the Courts in England may order a person not a party to the record to pay costs—*Evans v. Rees* (2 Q. B., 334). [SIR R. COLLIER.—That case applies to actions in ejectment only, and has reference to the fictitious nature of the proceedings. In *Hayward v. Giffard* (4 M. & W., 194), it is laid down as a general rule by Lord ABINGER that Courts of Justice have no power except over parties to the record.]

Mr. Cowie, Q. C., and Mr. F. H. Bowring for the Respondent.—It has been held by both Courts below that the litigation in which the appellants had incurred the costs which they claim [241] in this action, had not been

instituted or prosecuted without reasonable or probable cause. Under such circumstances an action would not lie for improperly putting the law in motion. To succeed in the present action the appellants had, therefore, to make out one of two propositions: *First*, that there was a champertous agreement constituting an offence under the law applicable in India, resulting in special damage to the appellants, and so giving them a right of action; or *second*, that the interest of the present respondent in the original suit was that of a real plaintiff, and that he could not be brought on the record, or otherwise reached, under the provisions of the Civil Procedure Code.

Taking the second proposition first, we are to see whether the respondent had an interest when the McQueens first instituted their suit. If he had, then the case founded on maintenance is at an end. [SIR M. SMITH.—Not if the consideration for that interest was champertous. The effect of the agreement is the real point.] If his interest was champertous, could he be made a party to the suit? According to the true construction of the agreement the respondent had assigned to him an interest of the nature of a mortgage of two-thirds of the property claimed by the McQueens, with the object that he should carry on the suit. There was, therefore, a partial assignment before suit brought, which was not disclosed by the assignors at the time the suit was brought, but which, while the cause was pending, came to the knowledge of the defendants. With that knowledge the defendants were in a position to take such steps as might secure them from loss. They applied to the Judge under s. 73 of the Procedure Code that the respondent might be made a party to the suit. The Judge refused on the ground that the respondent had no interest. In this we think he was wrong, for we construe the agreement as a partial assignment. Against the Judge's decision on this point the defendants brought a cross-appeal to the High Court, but they did not prosecute that cross-appeal. At the hearing in the High Court, there was a re-settlement of issues, the parties suggesting the issues which they desired to be tried, but no mention was made of adding the respondent as a party. That matter was allowed to drop, [242] and the High Court, in its judgment, did not refer to it. It has been contended for the appellants that if the appeal on this point had been insisted on, the High Court could not have interfered with the discretion exercised by the Civil Judge, and that the Courts in India are so tied up by the Procedure Code that they cannot add a party unless he comes forward voluntarily as an intervenor. The cases cited do not bear out that contention, and apart from legislation, every Court has a discretion to say whether or not the real parties are before it, and any order made in exercise of that discretion would be subject to appeal, since it affects the merits of the suit.

As to the alternative proposition, there was no authority either in England or in India for holding that an action would lie against a man merely on the ground that he was the real owner and substantially the plaintiff in an unsuccessful suit in which the defendant has been put to cost and expense. The existence of champerty and maintenance is not sufficient to support such an action, the ground of which must be the malicious abuse of civil process without probable cause. The element of champerty in such a suit is immaterial. Looking at the English Statutes on the subject, it might be doubted whether such an agreement as was made the ground of the present suit was contemplated by these enactments.

The Statutes 3 Ed. I, c. 25 and 28 (Revised Edition of Statutes, Vol. I, 22), 13 Ed. I, c. 49 (Revised Edition of Statutes, Vol. I, 72), 28 Ed. I, c. 11 (Revised Edition of Statutes, Vol. I, 105) were only declaratory of the common law which had been neglected or abused. The Statute 33 Ed. I (Revised

Edition of Statutes, Vol. I, 111) puts the action for champerty or maintenance on the ground of malice. The offence is maliciously to maintain or to bargain for part of the subject of a suit. So likewise the Statutes 20 Ed. III, c. 4 (Revised Edition of Statutes, Vol. I, 172), and 32 Henry VIII., c. 9 (Revised Edition of Statutes, Vol. I, 481) imply something *malum in se*, a transaction corrupt or illegal. See the observations in Co. Litt., 368b and 369a; Hargrave's Note on Co. Litt., 161a; Comyn's Dig. Tit. Maintenance, A. 5, citing Second Inst., 208; Hawkin's Pleas of the Crown, 8th ed., Vol. I, [243] pp. 454-463; and see the Year Book, 11 Henry VI, folio 11. There is not a case in the books since 11 Henry VI., to show that an action will lie in respect of the abuse of civil process in the absence of these elements, which must be averred in the ordinary action for malicious prosecution, see *Cotterell v. Jones* (11 C. B., 713). In the case of *Pechell v. Watson* (8 M. & W., 691), which has been referred to as a contrary authority, there were two counts, one of which charged the advising to commence an action without reasonable and probable cause, and the other of which charged that the defendants contriving, &c., wrongfully, unjustly, maliciously, and unlawfully upheld and maintained the said action. In *Flight v. Leman* (4 Q. B., N. S., 883) the plaintiff failed through not having averred want of reasonable or probable cause. The cases of *Savile v. Roberts* (1 Ld. Raym., 374; S. C., 1 Salk., 13), *Gregory v. The Duke of Brunswick* (6 M. & G., 205), and *Finlon v. Parker* (11 M. & W., 675) show that malice must be established. As to the manner in which Courts of Equity in England deal with the subject of maintenance, see *Knight v. Bowyer* (2 De G. & J., 421, at p. 444). [SIR B. PEACOCK cited *Wood v. Griffith* (1 Swans., 43, at p. 56.) English law does not apply to the mofussil, and because the parties to the present suit are subject to the original jurisdiction of the High Court, it does not follow that the English law as to champerty and maintenance could be applied in respect of an agreement relating to lands in the mofussil, and to proceedings arising in a mofussil Court. It might further be doubted whether the English Statute and Common Law, with regard to maintenance form part of the law to be administered by the Charter Courts in Presidency Towns. Were they part of the law introduced by the Charter of 13 Geo. I? The test was their applicability to the circumstances of the people—*Major of Lyons v. The East India Company* (1 Moore's I. A., 175). This was a case between Hindus, and to be governed by Hindu law. *Grose v. Amurtomayi Dasi* (4 B. L. R., O. C., 1), *Pitchakulti Chetty v. Kamala Nayakkan* (1 Mad. H.C. Rep., 153), [244] *Ramrar Khanderav v. Govind Pandshet* (6 Bom. H. C. Rep., A. C., 63), *Damodhar Madharji v. Kahandas Narandas* (8 Bom. H. C. Rep., O. C., 1) show that the English law of champerty and maintenance are not in force in India. Where Courts in England have held persons not parties to the record to be liable for costs as in *Dunsey v. Angove* (2 Ves. Jr., 304, at p. 313), *Cockle v. Whiting* (1 Russ. & My., 43), *In re Jones* (L. R., 6 Ch. Ap., 497), and *Hilton v. Woods* (L. R., 4 Eq., 432), the liability has been declared, on summary proceedings taken, in the suit in which the costs were incurred, and not in a separate action. In these cases the Courts exercised a disciplinary jurisdiction to punish irregularity on the part of solicitors and contempt. The interference in the case of *Bama Soonduree Dossee v. Anundo Lal Doss* (Bourke's Rep., O. C., 44; and Appeals from O. C., 96) was put by PEACOCK, C. J., on the latter ground.

MR. LEITH, Q. C., in reply.—The English Statutes on the subject of champerty and maintenance are to be applied by the High Court in its original jurisdiction if they formed part of the law introduced into India by the Charter of 13 Geo. I. There was nothing in the condition or circumstances of the people of India to exclude them, since they were based on general principles

of universal application. Apart from the Statutes an action would lie at Common Law on the ground that a champertous agreement is contrary to public policy. This principle has been recognized by the Courts of Equity in England—*Harrington v. Long* (2 My. & K., 590). To support the action it is not necessary to give proof of special malice. It is enough to show that the defendant has wrongfully made himself party to a suit, the necessary result of which is to put the plaintiff to expense.

The following cases were cited as showing that the English law as to champerty and maintenance was recognized and followed by the Indian Courts. *Mulla Jaffarji Tyeb Ali Sarh v. Yacali Kadar Bi* (7 Mad. H. C. Rep., 128), *Ramgholam Singh v. Keerut Singh* (4 Sel. Rep., 12), *Brijnarain Singh v. Tekhnarain Singh* (6 Sel. Rep., 131), [215] *Zuhooroomissa Khannum v. Raseek Lal Mitter* (6 Sel. Rep., 298), *Syud Keramut Ali v. Sunbhoonath Mitter* (S. D. A., 1847, p. 423), *Maharajah Mahessur Buksh Singh v. The Government* (S. D. A., 1848, p. 659), *Andrews v. Maharajah Sreesh Chunder Rane* (S. D. A., 1849, p. 340), *Kishen Lal Bhoomik v. Pearee Soondree* (S. D. A., 1852, p. 394), *Panchcowree Mahtoon v. Kalechchurn* (9 W. R., 490), *Shaukh Abed Hossein v. Lalla Ram Sarun* (13 W. R., 426), *Grose v. Anurtoomaji Das* (1 B. L. R., O. C., 1), *Jugessur Coomur v. Prosonno Coomur Ghose* (1 Ind. Jur., N. S., 282).

Even if the rest of the plaintiffs' claim were to be disallowed, they were at all events entitled to the expenses incurred in the appeal to the Privy Council subsequent to the purchase by the respondent of the whole rights and interest of the McQueens in the subject of litigation. After that time he was the real appellant, and must be held answerable.

Their Lordships took time to consider their **Judgment** which was delivered as follows by

Sir M. E. Smith.—This suit was instituted by the appellants, who were the successful defendants in two former suits brought by one McQueen and his wife against them, to recover from the defendant, Chunder Canto Mookerjee, who was neither an original nor added party in those suits, the amount of the costs incurred by them in that litigation, and which McQueen and his wife, by reason of their poverty, were unable to pay.

The principal suit of the McQueens (the other being for mesne profits only) was brought in the Hooghly Court to recover from the present plaintiffs some lands in Howrah, which their father had purchased of one Bebee Bunnoo. Mrs. McQueen was the illegitimate daughter of one McDonald and Bebee Bunnoo, and she claimed the property as her father's, and as being entitled to it after her mother's death, under his will. The defence of the now plaintiffs in that suit [246] was that Bebee Bunnoo was either the real owner, or had been allowed by McDonald to deal with the property as owner, and that their father was a purchaser from her without notice of any other title. It appears that they and their father had held possession of the property for 24 years after the purchase, and had greatly improved it.

The Zillah Judge held the suit to be barred by limitation, and dismissed it. The High Court (finding that Bebee Bunnoo had died within twelve years of the suit) reversed his judgment, and having retained the case, and tried it on the merits, passed a decree in favour of the then plaintiffs, the McQueens.

On an appeal to Her Majesty, the decree of the High Court was reversed, and it was ordered that the suits should be dismissed, and that the then

defendants (the now plaintiffs) should have their costs in India and of their appeal to Her Majesty. These costs amounted to a large sum, and the McQueens were unable to pay them.

The connection of the defendant Mookerjee with the above litigation, and the facts relied on to support the present action, will now be referred to. A special agreement was entered into between the McQueens and Mookerjee, which recited an apparently good title of the former to the property. By this agreement Mookerjee was appointed the attorney and mooktear of the McQueens to conduct the litigation against the present plaintiffs. On the one side he undertook to manage the suit, to make all necessary advances for the purpose, and further to make an allowance of 150 rupees per mensem to the McQueens, for their support during the pendency of the proceedings. On the other side they agreed in effect that Mookerjee should have the management of the suit, they, however, assisting him, unless it happened that McQueen could give his whole attention to the litigation, in which case he was to have the conduct of it, "but under the control of Mookerjee." It was stipulated that all the advances should be repaid with interest at 12 per cent., and that, as remuneration for his trouble and risk, Mookerjee should have a third part of "the clear net profits" of the suit; and, by way of security, it was agreed that he should receive all moneys, [247] and take possession of all lands recovered, and after satisfying his own claims pay over the balance to the McQueens.

This power-of-attorney was made irrevocable, unless upon the terms that the McQueens should repay all the moneys advanced with interest at 12 per cent., and a further sum of 2,000 rupees as liquidated damages. McQueen certainly did not give his whole attention to the suit; and (although he occasionally saw the pleaders) they were really managed by Mookerjee.

It appears that after the present plaintiffs had obtained leave to appeal from the judgment of the High Court in the original suit, the McQueens obtained possession of the property. The Court having ordered the possession to be restored, unless the McQueens gave security to the amount of 12,000 rupees to repay what would be due in case the decree should be reversed, the present defendant gave a bond to the above amount as such security.

- Pending the appeal to Her Majesty, Mookerjee purchased of the McQueens all their interest in the principal suit, and the suit for mesne profits, for 22,000 rupees, out of which he was to deduct 12,500 rupees for the advances he had made to them, and from this time he appears to have conducted the appeal in his own interest.

It should be stated that, in the former suit, the now plaintiffs—upon the agreement between Mookerjee and the McQueens coming to their knowledge—applied to the Judge to have Mookerjee made a party to the suit under the 73rd section of Act VIII of 1859, in order that, if successful, they might make him responsible for costs. The Judge refused the application. Upon the appeal to the High Court by the McQueens, the present plaintiffs raised this point in their memorandum of cross-appeal, but no notice appears to have been taken of it in the judgment of that Court.

The plaint in the present action alleges that the plaintiffs being in lawful possession as owners of the property in question, the defendant, knowing this was so, maliciously conspired with the McQueens to bring a suit in their names to take the possession from them, and in furtherance of this conspiracy

entered [248] into the agreement already described, which is set out at length. It then alleges that the agreement contains false and fraudulent recitals of a pretended title in the McQueens, and that it "savours of champerty and maintenance, and is otherwise wholly illegal and contrary to public policy," and was entered into "for the purpose of barratrously maintaining an unjust and oppressive suit against the plaintiffs," in the names of persons who had no right and were without means to pay the costs. It then avers that the former suit was brought "maliciously and without reasonable and probable cause," and after describing the proceedings in the suit, and the facts showing the defendant's connection with them, alleges that "the litigation was instigated and carried on by defendant at his own expense, and with a view to his own benefit, and that he was the real mover, and unlawfully used the procedure of the Court for his own benefit."

If all these allegations in the plaint, or so many of them as aver that the suit was brought or instigated by the defendant, maliciously and without probable cause, had been proved, this action would, undoubtedly, have been sustained, upon the principle that the prosecution of legal proceedings which are instigated by malice, and are at the same time groundless, is a wrong to the person who suffers damage in consequence of them.

This principle is thus stated by Mr. Justice WILLIAMS in *Cotterell v. Jones* (11 C. B., 713):—

"It is clear no action will lie for improperly putting the law in motion in the name of a third person, unless it is alleged and proved that it is done maliciously and without reasonable or probable cause; but if there be malice and want of reasonable or probable cause, no doubt the action will lie, provided there be also legal damage."

In the present case, however, both the Courts below have found that neither malice nor the absence of probable cause has been proved. Their Lordships entirely agree with the Courts in India on this point, and it appears to them that the facts present a case having a wholly different aspect.

[249] With regard to the motives of the defendant it is not pretended that he entertained any ill-feeling or malice in any sense towards the plaintiffs. The terms of the agreement, and his large expenditure, show that he was prompted in what he did by his having formed a favourable and sanguine opinion of the title of the McQueens, and by the hope of a profitable return for his advances. Nor can the suit be said to have been wanting in probable cause, when the two learned Judges of the High Court who heard it on appeal decided in favour of the then plaintiffs. Indeed, it was properly admitted at their Lordships' bar that the case must be considered as if the allegations of malice and want of probable cause were struck out of the plaint.

These allegations being eliminated, the question is whether the action can be maintained upon either of the two grounds argued at the bar, which, stating them generally, are:—

1. That the agreement and acts of the defendant amounted to champerty, or were otherwise illegal as being against public policy, and that the plaintiffs have suffered special damage from them.

2. That the defendant was the real actor in the former suits, and had an interest in them, and was, therefore, responsible for the costs of them.

The question whether the law of maintenance and champerty, or any rules analogous to that law, as it exists in England, have been introduced into and form part of the law of India, has been for a long period in controversy in the Indian Courts. A beadroll of decisions from 1825 to the present time was cited at the bar, and it certainly appears from them that the views of the Courts have not been uniform, and that great diversity of opinion has prevailed.

The earliest case referred to occurred in the year 1825. A pauper plaintiff, in his petition of appeal to the Sudder Court, disclosed the fact that he had agreed to give half the estate in litigation to a third person in consideration of advances made to prosecute the appeal. The Court, after directing a search in the records for precedents of such a transaction, and none having been found, declared that "the transaction savoured strongly of gambling," and also that the contract to [230] give half of a large estate for a comparatively small advance was "by no means fair," and ordered that unless the agreement was cancelled the appeal should not be entertained—*Iiam Gholam Singh v. Keerut Sing* (4 Sel. Rep., 12).

In 1836 the Sudder Court refused to enforce against a successful litigant an agreement he had made to give two annas of the estate if recovered in consideration of advances made to carry on the suit. They held first, that the estate being family property could not be thus disposed of; but they also held on the authority of the decision in 1825 that the transaction was of an illegal character as a species of gambling, and could not be sanctioned in a Court of Justice—*Brijnerain Sing v. Tekhnerain Sing* (6 Sel. Rep., 131).

In 1840 a similar agreement to that in the last case came before the Court: one Judge thought it was not proved, but the other, Mr. TUCKER, held, following the two former decisions, that "the agreement was illegal, thus (as he said) establishing the point for future guidance in all similar cases"—*Zuhooroonnissa Khanum v. Ruseek Lal Mitter* (6 Sel. Rep., 298).

In a short note of a similar case in 1849, the Court is reported to have said: "As the precedents of the Court have held that champerty is illegal, we cannot enforce any condition (of the kind) in favour of the plaintiffs"—*Andrews v. Maharajah Sreesh Chunder Kae* (S. D. A., 1849, p. 340).

In the next case the current of opinion underwent a marked change.

In 1852 a case was brought before a full Sudder Court, consisting of five Judges, in which the Principal Sudder Ameen had dismissed a suit because the plaintiff had obtained the funds to prosecute it by means of an agreement which he deemed to be champertous. This decision of the Principal Sudder Ameen was, in any view of the law, erroneous; but the Judges took occasion to express their opinion on the general question. Sir R. BARLOW says: "There is no distinct law in our Code which lays it down to be illegal for one party to receive and another to give funds for the purpose of carrying [251] on a suit on promise of certain consideration in the form of a share of the property sued for, if decreed to the plaintiffs." Mr. WELBY JACKSON, whilst he thought the precedents of the Court (referring to the cases already mentioned) had held champerty to be illegal, says: "But the matter having been now brought up generally for consideration before the whole Court, I have no hesitation in declaring my opinion that an arrangement of the nature of champerty is not of itself illegal or void." Again he says: "I know of no law against such an arrangement, and there is certainly no reason why it should be declared illegal. Such arrangements must stand or fall according to the

peculiar nature of their conditions. They are liable to question like any others where a suit is brought to enforce or avoid them." The other three Judges construe the former precedents (with one exception) as holding only "that, as between a plaintiff and a party advancing funds to him to carry on his case, the Courts will not recognize and enforce agreements which appear to be exorbitant and to partake of the nature of gambling contracts"—*Kishen Lal Bhoomik v. Pearce Soondree* (S. D. A., 1852, p. 394).

This case appears to have been generally regarded as a leading decision. Mr. Justice GLOVER so treats it in a case which came before the High Court so late as 1868, and refers to it as deciding that champerty *per se* was not illegal—*Panchcourcee Mahtoon v. Kalee Churn* (9 W. R., 490). In this same case, however, Mr. Justice MACPHERSON said he did not feel it necessary to decide the question; and in consequence of the opinions expressed by him and other learned Judges in India in recent cases, it will be necessary to advert shortly to some of the subsequent decisions.

In *Grose v. Amitamayi Dasi* (4 B. L. R., O. C., 1), which was the case of a contract of a champertous character made by a Hindu widow, Mr. Justice PHEAR, after a full review of the English and Indian cases, expressed an opinion that the law which renders champerty and maintenance illegal in England is in force at least within the Presidency towns; and further that agreements [252] of that character were against the interests of society in India, and, therefore, on grounds of public policy void. Upon an appeal to the full Court, the Chief Justice (Sir BARNES PEACOCK) did not adopt this ground of decision. He expressed his opinion thus: "That the deed was not binding on the reversionary heirs, if not upon the ground of champerty, upon the ground that it was an unconscionable bargain, and a speculative, if not gambling contract." Mr. Justice MACPHERSON agreed with Mr. Justice PHEAR in thinking that the agreement was void, as being against public policy.

Mr. Justice HOLLOWAY, in a case which came before the High Court of Madras, in its Original Jurisdiction, in 1870, expressed a strong opinion that the English Statutes and Common Law relating to champerty and maintenance prevailed in that Court, and rendered contracts bearing that character void. He also, with some vehemence of language, denounced such contracts as being contrary to public policy. The opinion expressed by Mr. Justice HOLLOWAY on the application of the English Statutes and Common Law was not necessary to the decision of the case, for the agreement sued upon was clearly extortionate, and there were other sufficient grounds for the refusal of the Court to enforce it—*Mulla Jaffarji Tyeb Ali Saib v. Yacali Kadar Bi* (7 Mad. H. C. Rep., 128).

This opinion of Mr. Justice HOLLOWAY seems to be directly opposed to the view expressed by Chief Justice SCOTLAND in delivering the opinion of the High Court of Madras in a former case, *Pitchakutti Chetti v. Kamala Nayakkan* (1 Mad. H. C. Rep., 153). The Chief Justice there says: "Maintenance and champerty are made offences by the Common and Statute Law of England, which in this respect has no application to the natives of this country, and in considering and deciding upon the civil contracts of natives on the ground of maintenance or champerty, we must look to the general principles as regards public policy and the administration of justice upon which the law at present rests. To this extent we think the law can properly be applied in perfect consistency with the Hindu law [253] relating to contracts. See 1 Strange's Hindu Law, 275." The passage in Strange alluded to by the Chief Justice

descants upon the similarity between English and Hindu law with regard to the invalidity of contracts which violate public policy and the interests of the community.

In a late case in the High Court of Bombay, *Damodhar Madhavji v. Kahandas Narandas* (8 Bom. H. C. Rep., O. C. J., 1), WESTROPP, C.J., declined to express any opinion as to the extent to which the law of champerty is applicable to the Presidency towns or in the mofussil.

To return to the Bengal Presidency, it will be necessary to refer to one more decision only before coming to the judgments in the present suit. In the case of *Tara Soonduree Chowdhraïn v. The Court of Wards* (13 B. L. R., 495; s.c., 20 W. R., 446), the Court (Sir R. COUCH being Chief Justice) held that the agreement it was sought to enforce was void, "as being contrary to public policy, and as therefore not giving any right to sue for the property which was professed to be passed by it." The learned Chief Justice commented upon and adopted the observations of this tribunal in the case of *Fischer v. Kamala Naicker* (8 Moore's I. A., 170). He also referred with approval to the remarks of Mr. Justice HOLLOWAY as to the mischievous effects of such agreements in India.

It is to be observed that in none of the above cases did any question arise as to the liability of the parties who entered into the agreements to third persons.

To come to the judgments in the present suit. Mr. Justice MACPHERSON was of opinion upon the point now under consideration that the agreement was illegal and void as being against public policy, and he held, on the authority of the English case of *Pechell v. Watson* (8 M. & W., 691), that the present suit might be maintained. In the judgment of the High Court, delivered by Sir R. COUCH, C.J., reversing Mr. Justice MACPHERSON's decree, the Chief Justice says: "It has been always admitted that the English Common Law, and the [254] Statutes as to maintenance and champerty, are not applicable, and are considered as having no force in this country. They certainly do not apply to the mofussil, whatever question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous, or agreements for maintenance, have been held to be void in this country, is that they are contrary to public policy; or, as described by the Judicial Committee in *Fischer v. Kamala Naicker* (8 Moore's I. A., 170), are considered to be immoral, and against public policy, and such as the law will not enforce here, and treat as void." And he held that, though such agreements were in a sense illegal, they did not amount to "an offence in India so as to give a right of action to a person who might sustain special damage from it, even if such an action might now be maintained against a person committing the offence of champerty in England."

It will now be convenient to refer to two cases before this Committee in which the subject has been to some extent considered. In *Fischer v. Kamala Naicker* (8 Moore's I. A., 170), the Court below having held an agreement to be void for champerty, this tribunal thought the judgment to be wrong on the grounds that the point had not been raised by the pleadings, and also that the agreement was in no sense champertous, and, this being so, their Lordships observed: "It was unnecessary to decide whether under the law which the Court was administering those acts which in the English law are denominated either maintenance or champerty, and are punishable as offences, partly by the Common Law and partly by Statute, are forbidden." But in the course

of the judgment they made the following observations :—" The Court seem very properly to have considered that the champerty, or more properly the maintenance, into which they were enquiring was something which must have the qualities attributed to champerty or maintenance by English law ; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the consti- [255] tution of which a bad motive is in the same sense necessary." It is unnecessary now to say whether the above considerations are essential ingredients to constitute the statutable offence of champerty in England ; but they have been properly regarded in India as an authoritative guide to direct the judgment of the Court in determining the binding nature of such agreements there.

In the more recent case before this tribunal, *Ochedambara Chetty v. Renga Krishna Muthu Vira Puchaiya Naickar* (L.R., 1 Ind. Ap., 241 ; see at p. 264 ; s.c., 13 B. L. R., 509, at p. 526) in which a suit to enforce an unrighteous and champertous bond was dismissed, the following observations were made :—

" With respect to the law of champerty or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in India is not the same as it is in England. The Statute of Champerty being part of the Statute Law of England, has of course no effect in the mofussil of India ; and the Courts of India do admit the validity of many transactions of that nature, which would not be recognized or treated as valid by the Courts of England. On the other hand, the cases cited show that the Indian Courts will not sanction every description of maintenance. Probably the true principle is that stated by Sir BARNES PEACOCK in the course of the argument, viz., that administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt and improper motive."

The result of the authorities, then, appears to be that the English laws of Maintenance and Champerty are not of force as specific laws in India ; and the decisions to this effect appear to their Lordships to rest on sound principles. So far as concerns the mofussil, there is no ground on which it can be contended that these laws are in force there. The question has chiefly [256] been whether they are in force in the Presidency towns, although the distinction between the Presidency Towns and the mofussil has not been always borne in mind.

It is to be observed that the English Statutes on the subject were passed in early times, mainly to prohibit high Judicial Officers and Officers of State from oppressing the King's subjects by maintaining suits or purchasing rights in litigation. No doubt, by the Common Law also, it was an offence for these and other persons to act in this manner. Before the acquisition of India by the British Crown, these laws, so far as they may be understood to treat as a specific offence the mere purchase of a share of a property in suit in consideration of advances for carrying it on without more, had become in a great degree inapplicable to the altered state of society and of property. They were laws of a special character, directed against abuses prevalent, it may be, in England in early times, and had fallen into at least comparative desuetude. Unless, therefore, they were plainly appropriate to the condition of things in the Presidency towns of India, it ought not to be held that they had been introduced there as

specific laws upon the general introduction of British law. The principles on which the exclusion from India of special English laws rest are explained in the well-known judgment of the *Mayor of Lyons v. The East India Company* (1 Moore's I. A., 175). It appears to their Lordships that the condition of the Presidency towns, inhabited by various races of people, and the legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Mahomedans and Hindus by their own laws and usages respectively, or where only one of the parties is a Mahomedan or Hindu by the laws and usages of the defendant, furnished reasons for holding that these special laws are inapplicable to these towns. There seems to have been always, to say the least, great doubt whether they were in force there, a circumstance to be taken into consideration in determining whether they really were part of the law introduced into them.

It would be most undesirable that a difference should exist [257] between the law of the towns and the mofussil on this point. Having regard to the frequent dealings between dwellers in the towns and those in the mofussil, and between native persons under different laws, it is evident that difficult questions would constantly arise as to which law should govern the case.

But whilst their Lordships hold that the specific English law of Maintenance and Champerty has not been introduced into India, it seems clear to them upon the authorities that contracts of this character ought under certain circumstances to be held to be invalid, as being against public policy. Some of the circumstances which would tend to render them so have been adverted to in the two judgments of this tribunal already cited.

Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.

But agreements of this kind ought to be carefully watched, and when found to be extortionate, and unconscionable, so as to be inequitable against the party; or to be made, not with the *bona fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,—effect ought not to be given to them.

Such, then, being the law on this subject in India, it fails to support the present action. It may be that the contract in this case is unconscionable, and one which ought not to have been enforced against the McQueens if their suit had been successful; but assuming this to be so, the plaintiffs, in their Lordships' view, have failed to establish that an action arises to them [258] therefrom against the defendant for the losses and costs of the litigation. By the law of India, as above interpreted, the agreement did not constitute a punishable offence, and the action cannot therefore, as pointed out by the Chief Justice below, be sustained on the ground that where an indictable offence has been committed, and an individual has suffered special loss, a remedy by action is given to him as the party aggrieved; nor does there appear to be any other principle upon which the action, under the circumstances of the present case,

can be maintained. Whatever, therefore, may be the rights of the parties to the agreement as between themselves, their Lordships think that the High Court was right in holding that the action of the plaintiffs against a third party, founded on the alleged champerty, cannot be maintained.

There remains the question whether the action can be supported against the defendant, as being an actor in the suit, and having an interest in it. It is to be observed that a suit of this kind, in the absence of malice, and of the want of probable cause, is of first impression, no precedent for it having been found either in England or India. It may be assumed that, under the first agreement, the defendant acquired a contingent interest in the property, the subject of the suit, to the extent of one-third share, besides the security for his advances; that he agreed to supply all the funds required to carry on the litigation, and that he obtained the virtual control of the proceedings; for although, under certain circumstances, McQueen was to manage the suit, and in any case to assist in the management, the supreme control was to belong to the defendant, subject to a power of revocation by the McQueens on onerous terms, which was not exercised. But this state of things created no legal privity between the plaintiffs and the defendant, from which a promise can be implied on the part of the defendant to pay the present plaintiffs the cost of the former suit, on which an action of contract can be founded: nor does it establish a legal wrong, for the former suit, as already shown, was brought without improper motives, and upon reasonable cause. It has, however, been contended that it would be only in accordance with justice and equity that he who was the principal mover of [259] a suit, and had an interest in it, should be made liable to the costs. It is obvious that a wide field of new litigation would be opened if, after the termination of the original suit, another independent suit might, on such general grounds, be brought against third persons. Interminable questions would arise as to the degree of meddling and assistance which would create the liability. So far as precedents exist, it is either in the original suit itself, or the exercise of the summary jurisdiction of the Courts, that any such liability has been enforced. It is ordinary practice, if the plaintiff is suing for another, to require security for costs, and to stay the proceedings until it is given. The now plaintiffs were fully aware, during the pendency of the former suit, of the arrangement between the McQueens and the defendant, but instead of applying for security for costs, they petitioned the Court to make him a co-plaintiff under the 73rd section of Act VIII. Without deciding whether this application was rightly rejected, it is enough to say that its rejection cannot give ground for an action which would not otherwise lie.

The instances in which persons other than parties to the suit have been held liable to costs in England, have been principally those of solicitors over whom the Court exercises disciplinary jurisdiction, as in the case of *Re Jones* (L. R. 6 Ch. Ap., 497). The Courts have also ordered the real parties to pay the costs in actions of ejectment, originally on the ground that that action was in form a fictitious proceeding, and having once assumed this power they have continued to exercise it in the actions substituted for that of ejectment. Again, the Courts, it has been said, would so interfere in case of any contempt or abuse of their proceedings—see *Hayward v. Giffard* (4 M. & W., 194). But all these cases relate to applications either in the cause itself, or to the summary jurisdiction of the Court.

A case in the High Court in Calcutta, *Bamasoonduree Dossee v. Anundlal Bose* (Bourke's Rep., O. C., 44; and Appeals from O. C., p. 96), was much relied on by the appellant's Council. There in a suit brought (in the original

jurisdiction) to recover possession of land by a nominal plaintiff, Mr. Justice [267] PHEAR, on a motion, made apparently in the suit, ordered the real plaintiffs to pay the costs. His judgment is placed mainly on the ground that the jurisdiction exercised by the English Courts in actions of ejectment was introduced into the original jurisdiction of the High Court, and was applicable to analogous actions brought to recover land there. The Chief Justice (Sir BARNES PEACOCK), in affirming this order on appeal, supported it not only on the ground on which Mr. Justice PHEAR's judgment rests, but on the circumstances of the case, which showed, as he thought, that there had been "a gross abuse of the powers of the Court, and a contempt of Court."

It is obvious that there is nothing in these judgments which gives support to the contention that an independent action will under such circumstances lie.

It was lastly insisted for the plaintiffs that if the costs in India were not recoverable, the action ought to be sustained for those incurred in the appeal to Her Majesty, subsequently to the purchase made by the defendant, pending that appeal, of all the rights of the McQueens in the property and the suit. Undoubtedly, the McQueens after this purchase became nominal appellants only, and the claim of the plaintiffs to recover these latter costs is as strong as a case of the kind can be. But even so, it is not stronger than many cases of ordinary occurrence, as, for instance, trustees suing on behalf of those beneficially interested, or the assignors of choses in action on behalf of their assignees; and in these and similar cases which have long been familiar to the Courts, whilst modes, such as requiring security for costs, have been devised for reaching the real party, no independent action for the costs against a stranger to the record has ever been sanctioned. Their Lordships, therefore, think that no distinction can properly be made between the costs of the appeal and the rest of the costs.

It results from what has been stated, that by English law an action cannot be maintained against a third person on the ground that he was a mover of, and had an interest in, the suit, in the absence of malice and want of probable cause. Consequently, if that law governs, the second ground on which it is sought to support the present action fails. And if the law [261] administered in the mofussil is to be resorted to, the absence of all precedent in a case of such common occurrence affords an irresistible presumption that no such action is maintainable there. In answer to the suggestion that if no precedent exists, it should now be made, it has been already pointed out that where there is neither privity of some kind nor a wrong, the principle upon which actions are ordinarily sustained is wanting. When it is urged that the claim should be decided upon general principles of justice, equity, and good conscience, it is to be observed, in addition to the considerations already adverted to, that these principles are to be invoked only in cases "for which no specific rules may exist." Now, it appears to their Lordships to result from what has been already observed, that rules may properly be considered to exist which define the character of actions of this kind and the circumstances under which alone they can be brought, and that it would be out of place to resort to these general principles in dealing with such actions. The consequences of such a resort in cases of this character would be to make the law utterly uncertain, to raise, as before observed, interminable questions as to the degree of interference which would sustain the action, and mischievously to multiply and perpetuate litigation after the termination of the original suit. Their Lordships, therefore, feel constrained to hold that in the absence of

circumstances to convert the prosecution of the former suit into a wrong, the present action cannot be maintained.

It has been a misfortune to the plaintiffs that security was not obtained for the costs in the course of the former suit. Their Lordships also think the defendant was to blame in not coming forward as the real party in the former appeal. Under these circumstances, whilst they must humbly advise Her Majesty to affirm the judgment appealed from, they will make no order as to costs.

Appeal dismissed.

Agent for the Appellants: Mr. J. H. Wrentmore.

Agents for the Respondent: Messrs. Clarke, Rawlins, and Clarke.

NOTES.

[CHAMPERTY.]

I. THE PRINCIPLE RE-AFFIRMED—

"For the respondents it was boldly argued that, although the English law as to maintenance and champerty is not, as such, applicable to India, yet on other grounds what is substantially the same law there, is in force. Their Lordships are of opinion that that proposition cannot be supported. In three cases before this Board (2 Cal. 233; 20 Cal. 843; 27 All. 271) a contrary doctrine has been laid down"—(1908) 35 Cal. 420 P.C.; 35 I.A., 48.

II. UNFAIR AND UNCONSCIONABLE BARGAINS—

(a) The question of inadequate price is one between the assignor and the assignee. Where the assignors maintain the transaction and ask that effect be given to it, and for that purpose they join the assignees as plaintiffs, the transaction was upheld:—(1908) 35 Cal., 420 P.C.

(b) Where the deed of sale by which the reversioner sold half the share in the estate for 1,50,000 rupees contained a false recital of payment of a lakh, but this was not challenged by the assignor who took no steps to impeach the deed, but on the other hand affirmed the transaction claiming and receiving other benefits under the deed and was urging the commencement of proceedings, held not void:—(1904) 27 All. 271; 32 I. A., 113.

(c) The disproportion between the liability to be incurred and the reward to be obtained was the test applied in (1893) 15 All., 352 P.C., to find out whether the bargain was extortionate:—(1893) 15 All., 352.

(d) Although there might be the belief that the claim is well founded, yet relief is afforded if the bargain is extortionate:—(1893) 15 All., 352.

(e) Agreements to share the subject of litigation if recovered, in consideration of supplying funds to carry it on are not in themselves opposed to public policy; but such documents should be jealously scanned and when found to be extortionate and unconscionable, they are iniquitable as against the party against whom relief is sought and effect should not be given to them:—(1893) 20 Cal., 843; 20 I. A., 112.

(f) Where for 3,700 rupees advanced to defray the expenses of litigation, a bond for 25,000 rupees was executed by one who was without means and who perfectly understood his position, it was held that the obligor should prove that the bargain was a reasonable one, and the bargain was held to be extortionate:—(1888) 11 All., 57.

- g) Where the agreement was with a money-lender, who, dealing with illiterate persons, misled them into the belief that the expenses would be approximately equivalent to the value of the share agreed to be transferred on an unwarranted representation as to the likelihood and the necessity of extensive litigation, the agreement was not enforced as being against public policy :—(1898) 20 Cal., 843 ; 20 I. A., 112.

(h) The actual amount that passed might be decreed :—(1887) 11 All., 57.

III. OPPOSED TO PUBLIC POLICY—

Where the reversioners on the death of a Hindu widow sold their rights in certain property to which they then became entitled but which were in the hands of an alieness from the widow, and provision was made for the payment of purchase money 52,600 rupees, as follows :—600 rupees immediately payable and the balance when the property should be recovered and in proportion to the success—held the condition did not make the transaction a void one as opposed to public policy :—(1908) 35 Cal., 420 P.C. reversing (1903) 31 Cal., 483.

IV. TRANSFER OF IMMOVEABLE PROPERTY—

Transfer of an interest such as the equity of redemption, however speculative it may be, is not a gamble in litigation :—(1889) 14 Bom. 72 ; (1888) 12 Bom. 559 ; (1884) 8 Bom. 323 ; (1882) 11 C. L. R. 268.

V. TRANSFER OF PROPERTY ACT, 1882, S. 135—

See as to the effect of the Transfer of Property Act, sec. 135 :—13 Cal., 145 ; 15 Cal., 486 ; *contra* (1887) 9 All., 476 ; (1888) 13 All., 102 ; (1890) 13 Mad., 225 F.B., approving the Allahabad view ; (1900) 23 Mad., 449 ; (1883) 3 Bom., 402.

VI. COSTS OF LITIGATION INCURRED—

(a) The assignee of a decree who is made respondent in an appeal from it and has taken no steps actively to support it ought not to be ordered to pay costs :—(1895) 20 Bom., 167.

(b) Guardian *ad litem* of an infant who sought to upset a will for his own purposes was held liable for the costs of the suit :—(1884) 8 Bom. 391.

VII. MALICE—

Malicious prosecution—Malice—Want of reasonable and probable cause :—See (1894) 19 Bom., 717.

VIII. JUSTICE, EQUITY AND GOOD CONSCIENCE—

The principles of justice, equity and good conscience are to be invoked only in cases for which no specific rules may exist :—2 Cal., 233, at 261.

Referred to in (1888) 15 Cal., 656, where the question was whether secs. 15 and 72 of the Indian Contract Act 1872 would govern the case of recovering back money paid to prevent a sale in execution of a decree.]

[262] ORIGINAL CIVIL.

The 18th and 21st December, 1876, and 8th January and 21st Feb., 1877.

PRESENT:

MR. JUSTICE PONTIFEX.

Soudaminey Dossee

versus

Jogesh Chunder Dutt and others.

Will—Bequest to a Class—Remoteness—Applicability of English Rules to Hindu Wills—Right of Hindu Widow to Partition.

A Hindu testator died in 1837 leaving four sons and two grandsons by a deceased son. By his will, dated in 1837, after directing that his property should be divided into five shares, of which his four sons were to take one each, and his two grandsons the remaining one, the testator made the following devise: "On the death of any or either of my said four sons, or of the said *R D* and *M D* (his grandsons) leaving lawful male issue, such male issue shall succeed to the capital or principal of the share or respective shares of his or their deceased father, or fathers, to be paid or transferred to them respectively on attaining the full age of 21 years; but if any or either of my said four sons shall die without leaving any male issue, or if he or they shall die leaving such male issue, and the whole of such issue shall afterwards die under the age of 21 years, and without male issue, in such case the share or shares of my said sons so dying shall go to and belong to the survivors of my said sons and my said two grandsons for life, and their respective male issue absolutely after their deaths in the same manner and proportion as is hereinbefore described respecting their original shares." *U*, one of the sons, died in 1858, leaving an only son *S*, born in the lifetime of the testator, who died shortly after his father intestate, and without male issue. In a suit by the widow of *S* claiming as his heir and representative to recover the share of *U* as having descended to *S* absolutely, and to obtain partition,—*Held* that, inasmuch as *U* survived the testator, the gift to the male issue of the testator's sons was void for remoteness as including objects who might have come into existence after the testator's death, and therefore be incapable of taking. The rule that where there is a gift to a class, and some persons constituting that class cannot take in consequence of remoteness, the whole bequest must fail, as well as the principle of the English Courts in deciding questions of remoteness, that regard is to be had to possible and not to actual events, is applicable to the interpretation of the wills of Hindus.

The gift to the male issue being void, the subsequent limitations were also void. *S*, therefore, and through him the plaintiff, was entitled to a share in such part of the testator's estate as by reason of the invalidity of the gifts in his will was undisposed of.

The question whether a Hindu widow is entitled to partition is one for the discretion of the Court in each particular case. In this case, where the plaintiff [263] had daughters and grandsons, and the share she was entitled to through her husband was considerable, she was held entitled to a decree for partition.

SUIT for construction of the will of one Ram Mohun Dutt, for declaration of the plaintiff's right to a share in certain immoveable property, for ascertainment of such share, for partition of the said property, and for other relief.

The plaintiff was the widow and heiress of one Sreenath Dutt, great-grandson of one Akur Dutt, who died in August 1809, possessed of considerable moveable and immoveable property, and leaving four sons, Ram Mohun, Ram

Narain, Ram Chunder, and Ram Gopaul, and having made a will, dated 9th August, 1809, whereby, after making provision for his wife and daughters, he left the residue of his property to his sons in certain specified shares, and on his death his sons took possession of his property in the shares specified in the will, and constituted a Hindu family joint in food, worship, and estate. Ram Chunder and Ram Gopaul died unmarried and without issue and intestate, leaving their brothers their heirs and representatives, who remained in joint possession and enjoyment of the property. Ram Mohun Dutt died on the 20th May, 1837, leaving a will, dated the 8th March, 1837, the construction of which was a portion of the relief prayed in the present suit. The clauses in the will relating to the property in suit were as follows :—

"I direct that my talooks, zamindaroes, houses, lands, Company's paper, bonds, and other securities, money, gold and silver ornaments, plate and all other my property and effects of every nature and kind (subject, nevertheless, to the payment of the legacies and other charges hereinafter mentioned, and subject also to the preference hereinafter given to my eldest son Doorga Churn Dutt and his male issue) shall be divided into five equal parts and shares; and I further direct that each of my four sons, Doorga Churn Dutt, Umachurn Dutt, Kally Doss Dutt, and Siboo Doss Dutt, shall hold and be possessed of one of such shares, and shall receive the interest and dividends thereof for his own use and benefit during his life, and that my two grandsons, Rajendro Dutt and Mohendro Nath Dutt, sons of my deceased son Parbutty Churn Dutt, shall hold and be possessed of the other of the said five shares during their respective lives, and shall in like manner receive the interest and dividends thereof in equal shares for their own use and benefit. [264] and I further direct that, on the death of any or either of my said four sons or of the said Rajendro Dutt and Mohendro Nath Dutt, leaving lawful male issue, such male issue shall succeed to the capital or principal of the share or respective shares of his or their deceased father or fathers, to be paid or transferred to them respectively on attaining the full age of 21 years. But my will is, and I declare that in such division my eldest son Doorga Churn Dutt for life, and his male issue after his death, shall have a larger share by two-and-a-half pice (or five-eighths of a sixteenth) more than my other sons, and than my said two grandsons, Rajendro Dutt and Mohendro Nath Dutt, anything hereinbefore mentioned to the contrary notwithstanding. But if any or either of my said four sons shall die without leaving any male issue, or if he or they shall die leaving such male issue, and the whole of such issue shall afterwards die under the age of 21 years, and without male issue, in such case the share or shares of my said sons so dying shall (after deducting therefrom the sums of Co.'s Rs. 2,000, to be paid to each of the widow or widows, if any, and the sum of Co.'s Rs. 1,000 for the marriage of each of the daughter or daughters, if any, of my son or sons so dying) go to and belong to the survivors of my said sons and my said two grandsons Rajendro Dutt and Mohendro Nath Dutt for life, and their respective male issue absolutely after their deaths in the same manner and proportions as is hereinbefore described respecting their original shares."

Ram Mohun left four sons, Doorga Churn, Umachurn, Kally Doss, and Siboo Doss, and two grandsons by a son who predeceased him, the defendants Rajendro and Mohendro Nath, since deceased. Umachurn died on 17th March, 1853, intestate, leaving an only son, Sreenath, born in the lifetime of the testator, the husband of the plaintiff. Sreenath died on the 19th March, 1853, intestate, and without male issue, leaving the plaintiff his heiress and representative, and an unmarried daughter, Katyani, who married after her father's death, and had three sons living at the time of suit. After the death of her husband the plaintiff continued to reside with, and be maintained out of the funds of the joint family, and was in joint possession with the defendants of the whole of the joint family property. The plaintiff submitted that, on the death of Umachurn, his son Sreenath became entitled to his father's share

absolutely, and that she was now entitled to the interest of a Hindu widow in the share which belonged to [265] Sreenath. She stated that she was no longer willing that her share should remain joint, and was anxious to have a partition of the property, and a share thereof allotted to her in severalty.

The defendants, who were all the other living descendants of Ram Mohun, submitted the construction of the will, and also the question whether the plaintiff was entitled to a share or only to maintenance, to the decision of the Court; they also submitted that, even if she were entitled to more than maintenance, it was not in accordance with Hindu law or custom to allow the widow of the member of a family joint in food, worship, and estate to sue for a partition and account, where she has never been injured in her rights as a member of the family.

The case came on for settlement of issues.

Mr. Kennedy, Mr. Evans and Mr. Bonnerjee for the Plaintiff.

Mr. J. D. Bell and Mr. Phillips for the Defendants other than Rajendro.

Mr. Macrae for the defendant Rajendro.

For the plaintiff it was contended, on the construction of the will, that, under the gift to the male issue of the testator, Sreenath took, on the death of his father Umachurn, an absolute estate in his father's share; and that the plaintiff, his widow, was entitled to that share as the heir and representative of her husband. The case of *Srimati Bramamayi Dasi v. Joges Chandra Dutt* (8 B. L. R., 400), a decision on the construction of the same will, was referred to. It was also contended that the plaintiff, as a Hindu widow, was entitled absolutely to partition; and that such a right had been recognized in numerous unreported cases. On this point the cases of *Padmamanu Dasi v. Jagadamba Dasi* (6 B. L. R., 134), *Cossinauth Bysack v. Hurrosondery Dasi* (Clarke's Rules and Orders, Add. Ca., 91), *Hurvy Doss Dutt v. Uppoornah Dasi* (6 Moore's I. A., 433), and Macnaghten's Considerations of Hindu Law, 45, were referred to.

[266] For the defendants it was agreed that Sreenath took under the original gift; but it was contended that he took subject to the limitations contained in the subsequent gift over, limitations which it was competent to the testator to make and which were not void; and, therefore, on his death whatever share he took went not to his widow, but to the other descendants of Ram Mohun and their male issue.

The question, however, was raised by the Court during the argument for the defendants, whether the original gift was not void for remoteness, inasmuch as it was a gift to a class in which other objects besides Sreenath were included, who might be incapable of taking by reason of their coming into existence after the death of the testator; and if this were so, the subsequent gift over would be *a fortiori* void; and *Leake v. Robinson* (2 Mer., 363) was referred to.

It was then contended that the principles of English law in this respect must not be applied to the construction of the will; that a gift to a class by a Hindu must be taken to have been intended by him to be operative only as to those of the class who could take consistently with the law; and that the bequest did not fail, but that Sreenath, who was born during the lifetime of the testator, took to the exclusion of others of the class coming into existence afterwards; and that if the gift over were held to fail, the property would descend in a manner quite contrary to the intention of the testator, viz., to the

widow of a grandson who had no male issue. The cases of *Krishnamamani Dasi v. Ananda Krishna Bose* (4 B. L. R., O. C., 231, at p. 279, per PEACOCK, C. J.), *Tagore v. Tagore* (4 B. L. R., O. C., 103), and *Arumugam Mudali v. Ammi Ammal* (1 Mad. H. C. Rep., 400) were referred to. As to the right of the widow to partition, it was contended that there was no authority that a Hindu widow was absolutely entitled to partition; that the passage from Macnaghten was a mere dictum; that the case of *Padmamani Dasi v. Jagadamba Dasi* (6 B. L. R., 134) was distinguishable as being only a case of partition against a co-widow; that that case was not borne out by the texts of Hindu law cited in it by PHEAR, J.; that the estate of a Hindu widow was one to be enjoyed by her subject to the control of the male members of the family, which control would cease if she were allowed partition; and that partition would enable a Hindu widow to deal with and affect property by alienation in a way in which she was not allowed to deal with or affect it.

For the plaintiff in reply, the Dayabhaga, ch. III, s. 1, cl. 16, was referred to as giving an express right to partition to any of the co-heirs; and it was contended that the widow represented the estate for all purposes, and could exercise any right which could have been exercised by her husband. The cases of *Bissonauth Chunder v. Bamasoondery Dassee* (12 Moore's I. A., 41), *Soorjemonny Dossee v. Denobundoo Mullick* (9 Moore's I. A., 123), *Nishtarinee Dabee v. Ram Narain Mookerjee* (3 T. & B., 31), *Treepoorasoondery Dassee v. Debendra Nath Tagore* (I. L. R., 2 Cal., 45), and *Woomasoondery Chowdranee v. Judoo Nath Shaw Chowdry* (unreported, decided by PHEAR, J., on the 16th August, 1875, were referred to; and it was stated that a search among the records of the Court had resulted in numerous cases (about 60) being found in which decrees for partition had been allowed at the suit of Hindu widows.

On the construction of the will it was contended that the original gift was not void for remoteness, and that under it Sreenath took an estate in the share of his father Umachurn, which was not liable to be defeated by the subsequent gift; that the latter gift was void, and the case of *Porter v. Fox* (6 Sim., 485), was referred to. It was further contended that if the first gift were held void, the plaintiff would be entitled to the share which Sreenath was entitled to in the property so undisposed of by the will.

Cur. adv. vult.

Pontifex, J.—The plaintiff in this case sues as widow of her deceased husband, Sreenath, for a partition of the estate formerly belonging to Ram Mohun, her husband's grandfather. [268] Ram Mohun had executed a will dealing with this property. (The learned Judge read the clauses of the will set out, and continued.) Under this will the plaintiff claims that, on the death of Umachurn, one of the testator's sons, his only son Sreenath, who survived him, became absolutely entitled to Umachurn's share, and that she, as Sreenath's widow, is now entitled thereto.

This claim is resisted by the defendants, who are willing to admit that Sreenath became entitled under the original gift, but insist that his interest was defeasible under the gift over which I have read. It is, therefore, the interest of neither party to argue that the original gift to the male issue of the testator's sons is invalid as including objects too remote, or, in other words, objects to whom, under the law as now settled, the testator could not lawfully make a devise. But though neither party has urged this objection, it was raised by me during the argument, and I apprehend that I am bound to take it into consideration.

Taking the gift to Umachurn and his male issue by itself, it is clear that although his son Sreenath was born in the testator's lifetime, and, therefore, would have been a valid object of the testator's bounty, yet, as Umachurn survived the testator, he might possibly have had other male issue besides Sreenath, who would fall within the meaning of the testator's words "such male issue shall succeed."

Now in deciding questions of remoteness it is an invariable principle of the English Courts to pay regard to possible and not to actual events, and the fact that a gift *might* include objects too remote or incapable of profiting directly by the testator's bounty is held to be fatal to its validity. The question is, however, to be considered according to the state of circumstances at the period of the testator's death, and not merely according to the state of circumstances at the date of the will.

I don't for one moment pretend that this rule, merely because it is a rule of the English Courts, should, if unreasonable, or inconvenient, be extended to the interpretation of the wills of Hindus. But it is to be noticed that the rule is not a rule of the strict English Common Law, because questions of remoteness applying to executory limitations as distinguished from contingent remainders only arose for consideration after the Restoration, when executory limitations, originally devised, it is said, by Bridgman, were first admitted and upheld by the Courts, although an infringement on the rules of the Common Law. The rule was, in fact, established as founded on reason and convenience.

Now, in this particular case, if Umachurn had predeceased the testator, his son Sreenath would have been a valid object of gift, for in that case the whole class of Umachurn's male issue must have been known at the death of the testator. But, in fact, Umachurn survived the testator, and at the testator's death it was quite possible that other sons in addition to Sreenath might be born to Umachurn. If any such other sons had been born, they certainly would not have been capable of taking under the testator's will. And in that case it seems to me that it would not have accorded with the testator's intentions that Sreenath should take the whole of Umachurn's share to the exclusion of his brothers. The question of the testator's intention in such a case as this was well considered by Sir WILLIAM GRANT, in *Leake and Robinson* (2 Mer., 363, at p. 309), and of course the question of intention is the same whether a testator be English or Hindu.

If then the rule to which I have referred did not apply to the construction of Hindu wills, there would have been an uncertainty from the period of the testator's decease until the death of Umachurn as to whether there was or was not an intestacy with respect to Umachurn's share. For if Umachurn had other sons, then as the testator could not have intended Sreenath to take the whole to the exclusion of them, there would have been an intestacy.

It seems to me that the rule is, in a special manner, applicable to and necessary for the Hindu law of devise; for I take it to be a fundamental principle of that law that the persons who are to take a testator's estate must be certain and known at the time of his death, which would not be the case if capacity to take depended on the contingency whether other persons should [270] or should not come into existence. The rule that where there is a gift to a class, and some persons constituting such class cannot take in consequence of the remoteness of the gift or otherwise, the whole bequest must fail, has been held to apply to Hindu wills by the late Mr. Justice NORMAN in construing this

particular will (see 8 B. L. R., p. 410). But it was not necessary for him in that case to decide whether the rule as to regarding possible and not actual events was also applicable. And, indeed, he extrajudicially (see p. 409) stated that Sreenath took an absolute interest in the share which belonged to his father. With this last conclusion I am, for the reasons before stated, unable to agree. Nor do I think that the decision referred to by Mr. Bell, of PEACOCK, C.J., *S. M. Krishnaramani Dasu v. Ananda Krishna Bose* (4 B. L. R., O. C., 279), applying as it does to bequests which are not similar in terms to the bequests in Ram Mohun's will affects this question. In that case the gifts of the annuities after the decease of the first taker did not in terms comprehend a class of issue whom he should leave surviving him.

In the present case, in my opinion, the gifts to the male issue of such of the testator's sons and grandsons as survived him, must be held to be invalid and incapable of taking effect and, therefore, I must hold that Sreenath took nothing under the devises in the testator's will. And if the devises to the male issue are void, as including objects too remote or incapable of taking a benefit under this will, all limitations ulterior or expectant on such remote or invalid devises are also void for the reason given in the case of *Proctor v. The Bishop of Bath and Wells* (2 H. Bl., 358), such reasons being equally applicable to a Hindu as to an English testator, and such reasons would of course apply more strongly to a case where an object of the prior devise—as Sreenath in this case—actually came into existence.

Upon these grounds I think that Sreenath, and through him his widow, would be entitled to a share in such part of the estate of the testator as by reason of the invalidity of the gifts in his will is undisposed of.

But the plaintiff's claim is met by another objection on the part of the defendants. They insist broadly that, according to [271] Hindu law, a widow cannot claim a partition: and they rely on what they assert to be the fact that no reported decisions exist in which such a right has been held to belong to a widow.

On the other hand, the plaintiff has submitted a list of, I think, some 40 unreported cases in this Court, in which partition has been decreed at the suit of a widow. I take it that this question is very much a question of discretion for the Court in each particular case. The Court would probably refuse partition by metes and bounds to a childless widow, who was entitled to a very small share.

But in this case the plaintiff has daughters, and the daughters have sons, and the share of Sreenath in the testator's undisposed of estate will be considerable. I think that in such a case as this a widow is entitled to a decree for partition. Otherwise she might be unable, during her life, to improve the heritage of her children.

It seems to me, therefore, that the plaintiff will be entitled to a decree for partition, and that the only issues necessary to be raised are—

1. What sons and grandsons of the testator named in his will survived him?
2. What sons and grandsons of the testator named in his will died in his life-time leaving any and what issue living at the testator's decease?
3. What property is the subject of partition?

Attorneys for the Plaintiff: Messrs. Ghose and Bose.

Attorney for the Defendants; Bahoo P. C. Mookerjee.

NOTES.

[CONSTRUCTION OF HINDU WILLS.]

I. GIFTS TO A CLASS—

The English rule of *Leake v. Robinson* has now been settled to be inapplicable to India :— (1905) 32 Cal. 992 F. B.; 9 C. W. N., 749 1 C. L. J., 482. (1897) 24 Cal. 646; (1886) 12 Cal., 663; (1889) 12 Mad., 393; 29 Mad., 412; *contra* (1878) 4 Cal., 455, 9 Bom., 491, (1901) 29 Cal., 260, which express the older view, as in this case.

See also (1890) 15 Bom., 326; (1891) 15 Bom. 543; (1891) 15 Bom. 652.

This doctrine applies even where the gift is bad for remoteness :—(1886) 12 Cal., 663, at 681; but see Dr. Mukorjee's Perpetuities to the contrary.

Limitation in favour of "the sons of my sisters, that is to say, their sons who are now in existence, as also those who may be hereafter born" upheld in favour of those living at the death of the testator :—(1909) 32 Cal., 992 F. B.

But where the intention is that the whole class must take rather than individual members thereof, the rule is applied :—(1901) 26 Bom., 419; (1897) 22 Bom., 533; 18 Cal., 663.

Where the gift is to the joint family, gifts are upheld :—6 All., 560 at 574; (1901) 25 Mad. 149 at 154, 155.

II. REGARD IS TO BE HAD TO POSSIBLE AND NOT TO ACTUAL EVENTS—

(a) "The person senior in age among my lineal descendants" :—(1906) 3 C. L. J., 606.

(b) "Person or persons who might at the death of the widow be the heir or heirs of the testator" :—(1902) 30 Cal., 369.

(c) "Where a gift is made to a class of persons some of whom are incapable of taking, the disposition fails as to all. The rule applies even though all the members of the class are born before the gift takes effect if it was antecedently possible that they might not have been so born and the fact that the gift might have included objects too remote is fatal to its validity irrespective of the event" :—(1901) 29 Cal., 260 (276). But this case was overruled in (1905) 32 Cal., 992 F. B.

(d) See also (1873) 20 W. R., 472, where the words were, "should the adopted son die . . . my entire estate shall pass to my nearest sapinda gnat."

(e) Where there was an arrangement between the members of a joint family for keeping the family property for ever, and the clause was attempted to be construed as a gift over to the other sharers in case any one sought partition during the life of any of the contracting parties, it was observed that such a gift could not take effect. "A gift whether primary or substitutionary can only be to some one in existence at the time of the gift, and this gift, if it be one, is a gift not to the brothers, but to them or their respective heirs born or unborn at the date of the document, as the case might be" :—6 Cal., 106 (116).

(f) "After the decease of the survivor of them, in trust for the male issue of my said brother if any there be" :—9 Bom., 491.

(g) "After K's decease the said house shall duly be enjoyed by K's children" :—(1887) 12 Bom., 185. See also (1885) 9 Bom., 491.

III. PARTITION AT THE INSTANCE OF THE WIDOW—

Widow entitled to claim partition but conditions may be imposed to prevent waste when there is reason to apprehend waste :—(1903) 31 Cal., 214.]

[272] APPELLATE CIVIL.

The 16th March, 1877.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MACPHERSON
AND MR. JUSTICE MARKBY.

In the matter of the Petition of Soorjmukhi Koer.....Appellant.

*Privy Council's Appeals Act (VI of 1874), s. 11—Deposit of Costs of Appeal—
Power to enlarge time.*

The requirements of s. 11, Act VI of 1874, as to the deposit of costs, are not absolutely imperative. The Court has power in its discretion to modify them, and when the period for making the deposit expires on a day when the offices of the Court are closed, it is a reasonable exercise of that discretion to allow the deposit to be made on the day they re-open.*

THE points involved in the following questions, relating to the construction of Act VI of 1874, having arisen in this and several other cases on appeal to the Privy Council, they were referred by MARKBY, J., for the consideration of the Court :—

1. Whether, when the last day for making the deposit under s. 11 of Act VI of 1874 falls at a time when the offices of the Court are closed, the deposit may be made on the day on which the offices re-open?
2. Whether the Court has any discretion to enlarge the time prescribed by s. 11 for making the deposit?

The reference came before the above Judges, and their **Opinion** was delivered by

Garth, C. J. (who, after reading the questions, continued):—We consider that we may answer both these questions, by saying that the requirements of s. 11 as to the deposit of costs are not absolutely imperative. Had they been so, this Court [272] would not have any power to modify them. But we think they are not so. There is no provision similar to that in s. 10 requiring the petition to be dismissed in case of default. We think, therefore, that the Court has some discretion, and that it would be in all cases a reasonable exercise of that discretion, if, when the period for making the deposit expires on a day when the offices of the Court are closed, the deposit were allowed to be made on the day that the offices re-open.

* Reference by the Judge in charge of the Privy Council Department, in Privy Council Appeal No. 80 of 1876.

† See *In the matter of Lalla Gopee Chund*, 1. L. R., 2 Cal., 128, and *In the matter of Funendro Deb Roykut v. Jogendro Deb*, 23 W. R., 220. See also *Thakoor Kapilnath Sahai v. The Government*, 1. L. R., 1 Cal., 142.

NOTES.

[EXTENSION OF TIME--

This decision was approved by the Privy Council in *Burjose v. Bhayina* (1883) 10 Cal., 557 P. C. :—It only remains to state that a preliminary point was raised as to whether the Judicial Commissioner had a right to extend the time for giving security in this appeal. Their Lordships upon that point have to say that they concur in the view which was taken by the Full Bench of the Court in Calcutta, that the words in the Act which have been quoted relating to the giving of security are directory only; and, although not to be departed from without cogent reason in this particular case, it seems to them that the Commissioner has exercised a right to discretion.]

[2 Cal. 273]

APPELLATE CRIMINAL.

The 18th January, 1877.

PRESENT :

MR. JUSTICE JACKSON AND MR. JUSTICE McDONELL.

The Empress of India

versus

Judoonath Gangooly.

Criminal Procedure Code (Act X of 1872), s. 272—Appeal—Officer appointed to prefer Appeal—Judgment of Acquittal—Conviction on charge of murder or culpable homicide not amounting to murder—Acquittal.

On the trial by a jury of a person on a charge of murder, the jury found the accused not guilty of the offence of murder, but convicted him of culpable homicide not amounting to murder. The Sessions Judge, although he disagreed with the verdict, declined to submit the case to the High Court under s. 263† of the Criminal Procedure Code. The Local Government, thereupon, directed the Legal Remembrancer to appeal under s. 272 of the Code, and in pursuance of this direction an appeal was preferred by the Junior Government Pleader. *Held*, that the appeal was duly made. *Held*, further, that a judgment passed by the Court of Session, following the verdict of a jury acquitting the prisoner, is a judgment of acquittal within the meaning of s. 272. *Held*, also, that there being an acquittal on the charge of murder, the appeal lay.

* Criminal Appeal, No. 278 of 1876, against an order of J. O'Kinealy, Esq., the Sessions Judge of the 24-Pergunnahs, dated 8th May 1876.

† [Sec. 263 :—In cases tried by jury, the jury may retire to consider their verdict. It shall be the duty of an officer of the Court not to suffer any person to speak to or hold any communication with any member of such jury. When the jury have considered their verdict, the foreman shall inform the Court what is their verdict, or what is the verdict of a majority.]

Verdict to be given on each charge.

Judge may question jury.

Procedure where jury differ.

The jury shall return a verdict on all the charges on which the accused is tried, and the Court may ask them such questions as are necessary to ascertain what their verdict is. Such questions and the answers to them shall be recorded.

If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable the jury may deliver their verdict, although they are not unanimous.

THE prisoner, Judoonath Gangooly, was tried by a jury for the murder of one Dasse Raur. The jury acquitted him of the charge of murder, but convicted him of culpable homicide not amounting to murder. The Sessions Judge, although he remarked that he did not concur with the verdict, declined to submit the case to the High Court under s. 263* of the Criminal Procedure Code. He recorded two separate findings and sen-[274]tences, stating in the first, that the jury had found the prisoner not guilty of murder and directing his discharge; and in the second, stating that the jury had found the prisoner guilty of culpable homicide not amounting to murder, and sentencing him to 10 years' rigorous imprisonment. The Local Government directed the Legal Remembrancer to prefer an appeal to the High Court under s. 272† of the Code, "against the judgment of the Sessions Judge acquitting the prisoner of the charge of murder." In pursuance of this direction, a petition of appeal was presented and filed by the Junior Government Pleader.

Mr. Ingram (with him the Junior Government Pleader, Bahoo Juggadunund Mookerjee,) for the Crown.

Mr. M. M. Ghose for the Prisoner.

Mr. Ghose.—There are three objections to the hearing of this appeal: *First*, it has not been preferred by one of the persons mentioned in s. 272. No public prosecutor has as yet been appointed under s. 57 of the Code, and the Junior Government Pleader has not been generally appointed to prefer appeals of this nature, nor was he specially appointed to prefer this particular appeal. Mr. Ingram stated that he was instructed by the Legal Remembrancer. [JACKSON, J.—The appeal must be taken to be an appeal by the Government.] *Secondly*.—The prisoner has been convicted, and not acquitted. Where, upon certain facts found, the jury bring in a verdict of guilty of a particular offence, there is no such acquittal as would give a right of appeal under s. 272; that section, it is submitted, applies only to cases of absolute acquittal. *Thirdly*, s. 272 only gives a right of appeal from judgments of acquittal; it cannot, therefore, apply to cases of trial by jury in which there is no judgment; but only the summing up by the Judge, the verdict by the jury, and the sentence or order of the Court. The Code of Criminal Procedure throughout

If the Court does not think it necessary to dissent from the verdict of the jurors or of a majority of the jurors, it shall give judgment accordingly. If the accused person is acquitted, the Court shall record judgment of acquittal. If the accused person is convicted, the Court shall proceed to pass sentence on him according to law.

If the Court disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which the prisoner has been tried, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court. If the Court does so, it shall not record judgment of acquittal or of conviction on any of the charges on which the prisoner has been tried, but it may either remand him to custody or admit to bail.

The High Court shall deal with the case as submitted as it would deal with an appeal, but it may acquit or convict the accused person on the facts as well as law, without reference to the particular charges as to which the Court of Session may have disagreed with the verdict; and if it convict him, shall pass such sentence as might have been passed by the Court of Session.]

* [Sec. 263 :—q. v. *supra* I. L. R., 2 Cal. 263.]

† [Sec. 272 :—The Local Government may direct an appeal by the public prosecutor or

No appeal in case of acquittal, except on behalf of Government. other officer, specially or generally appointed in the behalf from an original or appellate judgment of acquittal; but in no other case shall there be an appeal from a judgment of acquittal passed in any Criminal Court.

Such appeal shall lie to the High Court. No appeal shall be presented under this section after six months from the date of the judgment complained of.

The High Court may in any case so appealed direct a new trial by another Court, or may pass such judgment, sentence or order as may be warranted by law.]

draws a distinction between a "judgment" and a "sentence" or "order." It is doubtful whether an appeal can be maintained on a question of fact. The section is a novel one, and must be construed with the utmost strictness.

[275] Mr. Ingram for the Government.—The only argument to be drawn from the novelty of the section is that, inasmuch as its wording is general, the Legislature intended to give the Local Government a general and absolute power of appeal. Under the former Code, which was drawn under the influence of English ideas of criminal justice, the verdict of a jury could only be touched under the revision section; but the present Code provides three ways of interfering with such verdict,—viz., under s. 263, where the Court disagrees with the verdict, under s. 272 and under s. 288. The prisoner has been acquitted upon the charge of murder, and an appeal lies from such acquittal. Under s. 263, the jury are bound to return a verdict on all the charges on which the accused is tried; under s. 452,† there must be a separate charge for every distinct offence, and each charge must be tried separately, except in the cases by the Code excepted. Then s. 457‡ provides for an exceptional case under that section, the accused may be convicted of the offence which he is proved to have committed, although he is charged with a "different" offence; and illustration (b) shows that murder and culpable homicide amounting to murder are different or distinct offences; lastly, s. 461§ provides that the Court, in passing judgment, shall distinctly specify the offence of which the accused is convicted. The word "judgment" in s. 272 means what falls from the Court after the verdict; it is the conclusion of a syllogism of which the major premiss is, every man who commits a particular offence shall be punished in such and such a way; the minor premiss, —this man has committed that offence, and the conclusion is, judgment according to the law. Section 263 shows that there is a judgment in trials by jury: "if the Court does not think it necessary to dissent from the verdict, it shall give judgment

* [Sec. 263:—q v. *supra* I L. R., 2 Cal. 273.]

† [Sec. 452:—There must be a separate charge for every distinct offence of which any person is accused, and every such charge must be tried separately except in the cases hereinafter excepted.

Separate charges for distinct offences.

ILLUSTRATION.

A is accused of a theft on one occasion, and of causing grievous hurt, on another occasion. A must be separately charged and separately tried for the theft and the causing grievous hurt.]

When offence proved included in offence charged.

‡ [Sec. 457:—When a person is charged with an offence, and part of the charge is not proved, but the part which is proved amounts to a different offence, he may be convicted of the offence which he is proved to have committed, though he was not charged with it.

ILLUSTRATIONS.

(a) A is charged under section 407, Indian Penal Code, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under section 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under section 406.

(b) A is charged with murder. He may be convicted of culpable homicide or of causing death by negligence.]

§ [Sec. 461:—When the trial in any Criminal Court is concluded, the Court in passing judgment, if the accused person be convicted, shall distinctly specify the offence of which, and the section of the Indian Penal Code or other law under which, he is convicted; or if it be doubtful under which of two sections, or under which of two parts of the same section such offence falls, the Court shall distinctly express the same, and pass judgment in the alternative according to section seventy-two of the said Code.]

Judgment to specify offence.

Judgment in the alternative.

accordingly." Section 271 * restricts the right of appeal of an accused person convicted in a trial by jury to matters of law, but there is no such restriction in s. 272. As to the power of appeal under the latter section in trials by jury, see the observations of PHEAR, J., in *Queen v. Koonjo Leth* (11 B. L. R., 14).

Mr. Ghose in reply.

[276] The Judgment of the Court was delivered by

Jackson, J.—During the argument we disposed of the first part of the objection taken by Mr. Ghose, who has, at our request, carefully and feelingly advocated the case on behalf of the prisoner. That objection was, that we had not before us an appeal such as is contemplated by s. 272 of the Criminal Procedure Code, inasmuch as the petition of appeal had not been preferred by the Government "Prosecutor or other officer, specially or generally appointed in this behalf." It appeared, and still appears to us, that, under the authority conveyed by the Secretary's letter to the Legal Remembrancer, the appeal was duly made by one of the Government pleaders, and has been regularly and properly sustained before us by the counsel instructed by, and appearing on behalf of, the Legal Remembrancer.

Mr. Ghose next contended, that in the first place s. 272 was not meant to apply, and did not apply to cases where the accused person has been tried and acquitted by the verdict of a jury; and in the next place that an appeal would not lie, inasmuch as there has not been any operative judgment of acquittal, the prisoner not having been set at liberty, but having been convicted of a minor offence arising out of the same set of facts on which he was charged with murder. We observe that one of these points, viz., what is included in a judgment of acquittal has been adverted to though not expressly decided by PHEAR, J., in the case of *Queen v. Koonjo Leth* (11 B. L. R., 14). But irrespective of that expression of opinion, we ourselves do not entertain the least doubt upon this subject. It appears abundantly from the various sections of the Code of Criminal Procedure relating to judgments, that the judgment passed by the Court of Session following the verdict of a jury which acquits is, undoubtedly, a judgment of acquittal. The Legislature has allowed an appeal in cases of acquittal by the Local Government, under s. 272, in the widest terms, and without any limitation whatever. Then as to the contention that there was no acquittal in this [277] case, it appears manifestly from the record that, as regards the particular charge of murder, the prisoner was acquitted, and ordered to be discharged or set at liberty; and that but for the finding of the jury and the sentence of the Court in respect of the other offence included in the charge, the prisoner would, so far as the charge of murder was concerned, have been set at liberty on his acquittal. He was charged with the offence of murder, which is an offence distinct from the offence of culpable homicide not amounting to murder. The Judge not having thought fit to refer the case under s. 263, the judgment stood as a judgment of acquittal. The Local Government is charged with the responsibility of considering in such cases, whether the public interests require that an appeal should be preferred, and as in the exercise of its judgment it has thought fit to prefer this appeal, we think the appeal lies. It remains to consider what decision we ought to arrive at upon the

* [Sec. 271 :—Any person convicted on a trial held by a Sessions Judge may appeal to High Court. An appeal may lie on a matter of fact as well as a matter of law, except where the conviction was by a jury, in which case the appeal shall be admissible on a matter of law only.]

Appeal from sentence of Sessions Judge.

appeal so preferred, and I confess that I should have greatly desired that the learned Sessions Judge who tried the case in the Court below had thought right to set out in the proceedings the grounds upon which he abstained from doing that which the law enjoins him to do under s. 263, and not imposed upon the Judges of the High Court the onerous and painful duty of passing the proper sentence in the case. (The learned Judge proceeded to consider the evidence, and held that the accused was guilty of murder and sentenced him to death.)

. Appeal allowed.

NOTES.

[Government is not entitled to appeal on an interlocutory order, *e. g.*, refusal by the Sessions Judge to add new charges (1892) 16 Bom., 414.]

[278] ORIGINAL CRIMINAL

The 19th and 22nd March, 1877.

PRESENT :

MR. JUSTICE WHITE.

In the matter of the Empress of India on the Prosecution of Malcolm

versus

Casper and others.

High Courts' Criminal Procedure Act (X of 1875), s. 147. Transfer of Case before Police Magistrate to High Court. Power to issue Mandamus.

A charge was made against the accused of using criminal force under s. 141* of the Penal Code. The Police Magistrate heard the evidence for the prosecution, and without disbelieving it, decided it did not amount to the offence charged. Held that, assuming that an error of law had been committed, the High Court had no power to issue a *mandamus* to the Magistrate to commit the defendants; it was not a case where the Magistrate had declined

* [Sec. 141:—An assembly of five or more persons is designated an "unlawful assembly," if the common object of the persons composing that assembly is—
Unlawful assembly.

Firstly.—To overawe by criminal force, or show of criminal force, the Legislative or Executive Government of India, or the Government of any Presidency, or any Lieutenant-Governor, or any Public Servant in the exercise of the lawful power of such Public Servant; or

Secondly.—To resist the execution of any law, or of any legal process; or

Thirdly.—To commit any mischief or criminal trespass, or other offence; or

Fourthly.—By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifthly.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.—An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.]

jurisdiction; he had exercised his jurisdiction and heard the case. *Held* also, it was not a case which the Court could transfer under s. 147* of the High Courts' Criminal Procedure Act.

THIS was an application under s. 147 of the High Courts' Criminal Procedure Act (X of 1875), for a rule calling on Mr. Dickens, one of the Police Magistrates of Calcutta, to show cause why a case should not be transferred to the High Court for hearing and final determination, or for a *mandamus* to compel the Magistrate to commit.

The defendants were charged before the Magistrate, under s. 141 of the Penal Code, with being members of an unlawful assembly, and, in pursuance of the common object of such assembly, with having used criminal force, or show of criminal force, and ejected the prosecutor from the Armenian Church, of which he was in possession. The Magistrate took evidence in the case, and came to the conclusion on that evidence, that no offence had been made out. When the application was first made, the Court suggested that it had no power, under the circumstances, to grant it, and asked for an authority to show that, in a similar case, the Court of Queen's Bench or this Court would issue a *mandamus* or grant a *certiorari*, and gave leave to renew the application.

[279] Mr. Phillips (Mr. G. Gregory with him), renewing the application said, that he had been unable to find any case in which the Court of Queen's Bench had issued a *mandamus* ordering the Justices to commit; but there was a reason for that remedy not being given in England, which did not exist here. The Queen's Bench does not grant a *mandamus* until all the other remedies open to the applicant have been exhausted. Now, in England, in such a case as this, the remedy would be to go before a grand jury; therefore, a *mandamus* would not lie. But in this country the grand jury has been abolished, and there being no other remedy, a *mandamus* will issue, the Court having the powers, in that respect, of the Court of Queen's Bench. The Magistrate did not disbelieve the evidence, for he stopped the case for the prosecution. He considers that, admitting the facts proved to be true, they do not constitute any offence; he has, in other words, mistaken the law. Where a *prima facie* case is made out, the Magistrate is bound to commit—Burn's Justice of the Peace, Vol. I, p. 773. He has no further discretion. [WHITE, J. —Suppose in such a case as this in England you went before a grand jury they might throw out the bill. You might, indeed, go before a second grand jury; but they also might ignore the bill—would the Queen's Bench compel the grand jury to find a true bill? And if not, the remedy you mention is very incomplete. I doubt whether the reason why the Queen's Bench won't grant a *mandamus*, is because there is a remedy by going before the grand jury.] It is submitted that it is; and that reason, the grand jury having been abolished, not existing here, this Court has power to issue a *mandamus*. In cases where there is no other remedy the Queen's Bench does grant it. In a case where there is no other remedy, a

* [Sec. 147:—Whenever it appears to the High Court of Judicature at Fort William, Madras and Bombay, that the direction hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case from any Criminal Court situate within the local limits of its ordinary original criminal jurisdiction, and the High Court shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only.]

Magistrate can be ordered to grant a summons: see *The King v. The Justices of Kent* (14 East, 395). [WHITE, J.—Here the Magistrate has exercised his jurisdiction, and dismissed the case: that seems to me to be your difficulty.] His action amounts to saying that the law does not give him power to commit, because there is no offence,—that is, he says he has no jurisdiction: in other words, [280] declines jurisdiction. See 2 Geo. IV, c. 74, s. 2 as to his being bound to commit. A somewhat similar case is the refusal to issue a summons, in which case the Queen's Bench can make an order that the summons be issued—see *The Queen v. Adamson* (1 Q. B. D., 201, *per* COCKBURN, C. J., at p. 205). This is a decision on a preliminary point, not a case which the Magistrate has heard and decided. It is a matter of law as to which he has no discretion. It is similar to a case of refusal of summons, which is only a way of putting a case in train for hearing. [WHITE, J. The Magistrate appears to me to have exercised his jurisdiction, not to have declined it. It differs from a refusal to issue a summons. He has heard the case.] He has dealt with the case in such a way as amounts to declining jurisdiction. A *prima facie* case was made out for the issue of a summons, and the Magistrate refused to issue it. [WHITE, J.—I have no more power than the Court of Queen's Bench, and you have not shown me any case in which that Court has granted a *mandamus* in a case like this. I think it is only where there is another effective remedy that the Queen's Bench declines to issue a *mandamus*.] Even taking that to be so, it is submitted it would issue here, as there is no other effective remedy.

As to the application under s. 147, the fact that the grand jury has been abolished ought to lead the Court to put as wide a construction on the section as is possible. Section 147 differs from the old law, and is intended to have a wider scope. In 33 Geo. III, c. 52, s. 153, which was the former law, there is nothing to limit the interference of the High Court to orders for convictions. In this country appeals from acquittals are allowed, and to refuse to interfere, simply because it is a case of acquittal, would be narrowing the law to what it is in England, where appeals from acquittals are not allowed.

As to the facts of this case constituting an offence under s. 141 of the Penal Code, it is submitted they do. [WHITE, J.—On this branch of your application, one difficulty is, what am I to quash or affirm if I do interfere under the section?] The order of discharge may be quashed, and this Court may hear and determine the case itself. The order made by this Court [284] must be made on the merits. [WHITE, J.—Does not that show that the proceeding intended by s. 147 was some final proceeding or order of the Criminal Court?] It is submitted that it only shows that there must be some substantial matter to be adjudicated upon after the transfer.

White, J.—I have, in the course of the argument, stated my views so fully that it is unnecessary to do more than recapitulate the reasons for my decision.

Mr. Phillips, on behalf of the prosecution, applies, on affidavit, for one of two orders—either for a rule under s. 147 of the High Courts' Criminal Procedure Act (X of 1875), calling on the Magistrate to show cause why these proceedings should not be transferred to this Court for hearing and final determination; or for a *mandamus* to compel the Magistrate to commit on a charge of being a member of an unlawful assembly under s. 141 of the Penal Code.

When the case came before me on the first occasion, I was informed that the Police Magistrate, having heard the evidence, did not disbelieve the facts

proved, but thought that they did not amount to the offence with which the defendants were charged, and, therefore, declined to commit them for trial. When I heard that such was the nature of the case, I requested Mr. *Phillips* to refer me to some authority for my granting his application. He has not brought before me, however, any authority which shows that either the Court of Queen's Bench, or this Court, has ever issued a *mandamus*, or granted a *certiorari*, in a case similar to the present one. He has, indeed, referred me to two cases, *The Queen v. Adamson* (1 Q. B. D., 201) and *The King v. The Justices of Kent* (14 East, 395), in which the Court of Queen's Bench granted a writ; in the first case ordering the Justices to hear and determine a case which they had refused to hear; and in the second case, ordering them to issue a summons, which they had refused to issue. But both these cases, when examined, show that the Court of Queen's Bench does not issue a *mandamus* in such cases unless the inferior Court has actually declined jurisdiction, or has acted under [282] circumstances which amount practically to declining jurisdiction. Now, in this case the Magistrate has not declined to exercise jurisdiction. He has heard the evidence in the case, and has come to the conclusion that no offence under the Penal Code has been committed. He has, in fact, exercised his jurisdiction, and decided the case in favour of the defendants. This is sufficient to dispose of the first branch of Mr. *Phillips*' application. Quite irrespective, however, of this, I may state that a *mandamus* could not issue in the form asked for; if it issued at all, it would go not to order the Magistrate to commit, but to order him to hear the case again, and upon a sufficient case being made out, then to commit.

As to the second branch of the application, which is to transfer the case to this Court under s. 147 of Act X of 1875, I think I am equally without power to deal with the case in the way I am asked to do. That section provides, that "whenever it appears to the High Court that the direction hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case, and shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only." The present case is not, I think, within the purview of the section. If I transferred it, I should be doing so not for the purpose of quashing or affirming a conviction or other proceeding, but for the purpose of hearing the case, taking the evidence of the witnesses, and myself determining whether a case for committal had been made out or not. I think the section is not wide enough to enable me to do that, and I should be extending the section beyond the intention of the Legislature if I put it in force to transfer such a case as this.

I can well imagine that the refusal of a Magistrate to commit may now and then result in a grievous failure of justice, but if the Legislature intended to provide for such a case, the Court should have been specifically armed with power to deal with such case. I cannot infer such a power in the absence of express words. I am, therefore, unable to grant this applica-[283]tion. I have assumed throughout these remarks that an error of law has been committed, but I have made that assumption only for the purposes of the argument. Considering the law bearing on the application to be such as I have stated, I have thought it unnecessary to hear the affidavit. The refusal to commit is not tantamount to an acquittal, and the prosecution can, if they choose, go before the Magistrate again, though I am by no means saying they

ought to do so. The application must be refused (see *Corporation of Calcutta v. Bheecunram Napat, post*).

Application refused.

Attorney for the Applicant : Mr. Leslie

NOTES.

[See also (1877) 2 Cal., 290, (1882) 9 Cal., 397.]

[2 Cal. 283]

APPELLATE CIVIL.

The 2nd June, 1876.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE AINSLIE

Debi Dutt Sahoo.....Plaintiff

versus

Subodra Bibee and others.....Defendants.

*Act XI of 1855, s. 18 --Act VIII of 1859, ss. 2 and 3. Mortgage by
Administrator of a Minor's Property—Purchaser with Notice,
Title of—Duties of Purchaser.*

A mortgage of the property of a minor made by the administrator appointed under Act XI of 1855 is invalid, unless the sanction of the Court has been previously obtained under s. 18 † of the Act.

Where the administrator was sued, as representing the minor, by the mortgagee, and made no defence to the suit, and the property was sold under a decree so obtained to the mortgagee, by whom it was again sold to a third person, who knew that the administrator had executed the mortgage in that capacity,—*held*, that the decree did not protect the mortgagee who purchased at the Court sale, nor her vendee, from suit by the minor for recovery of the property.

THE plaintiff in this suit was one of four sons of one Imrit Lall Sahoo, a trader, who died in December 1863, intestate. The plaintiff being a minor,

* Regular Appeal No. 65 of 1875, against a decree of W. DaCosta, Esq., Subordinate Judge of Zilla Sarun, dated the 18th of January 1875.

† [Sec. 18 :—Every person to whom a certificate shall have been granted under the pro-

vision of this Act, may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor, and may collect and pay all just claims, debts, and liabilities due to or by the estate of the minor. But no such person shall have power to sell or mortgage any immoveable property, or to grant a lease thereof for any period exceeding five years, without an order of the Civil Court previously obtained.]

his brother Rameswar Dutt obtained, under s. 7 * of Act XL of 1858, a certificate of adminis-**[284]**tration of the minor's property. Rameswar Dutt was also appointed guardian of the person of the minor. After the death of Imrit Lall, his sons took possession as his heirs of all his property, and living as a joint Hindu family carried on the business formerly carried on by their father. On the 14th July 1867 (Asar, 1274), Rameswar Dutt, for himself and the plaintiff his minor brother, and the other two brothers, Bisseswar Dutt and Purneswar Dutt, gave a bond for Rs. 37,000 to Subodra Bibee, payable on the 30th Pous, 1275 (February, 1868), in which bond, as a security for the above amount, they pledged Mouzah Dhubolia and a certain warehouse in Mouzah Shamsoodinpur, both which properties belonged to all the four brothers. The consideration set out in the bond was as follows: *1st*, a sum of Rs. 2,500, due on an account current extending from 24th Asin 1923 S. (18th October 1866), to date of the bond; *2nd*, of Rs. 27,500, on account of bills discounted by Subodra Bibee, the said bills having been dishonoured on presentation in Calcutta, and *3rd*, of the sum of Rs. 7,000, being a loan made by Subodra Bibee to pay certain business debts, for which suits were then pending.

No question was raised as to the due execution of the bond, or the existence of the debts therein mentioned: it was admitted that no such sanction of the Civil Court as is provided for by Act XL of 1858, s. 18, was obtained.

Subodra Bibee in another suit had sued all four brothers on this bond, treating it as a mortgage bond. None of the defendants in that suit appeared, and service of summons upon them having been proved, the suit was treated as undefended, and a decree obtained on the 28th March 1868, directing a sale of the mortgaged property. The property was, accordingly, put up for sale under the decree, and bought by Subodra herself on the 1st June 1868, through her gomastha Gopi Lall, who was made a defendant in this suit. On the 16th November 1870, Subodra sold the purchased property and her outstanding rights under the decree to Mr. Lewis Cosserat, who had already purchased the indigo factory in Mouzah Dhubolia from the four brothers (the plaintiff being represented by his guardian Rameswar Dutt) under a conveyance dated 9th January 1868.

[285] Debi Dutt having attained majority brought the present suit to recover possession of his share of the property from Mr. Cosserat, upon the ground that it was illegally mortgaged by his brother and guardian, and that, notwithstanding the proceedings and sales which subsequently took place, he had a right to regain possession of his estate.

The Subordinate Judge held, that the suit was not maintainable, on the ground that the plaintiff was, by his guardian, a party to the suit on the bond instituted by Subodra Bibee, and that ss. 2 and 3, Act VIII of 1859, barred any other remedy than a review of judgment in that suit, especially as the plaintiff did not allege that the bond was a fraudulent one.

*[Sec. 7:—If it shall appear that any person claiming a right to have charge of the property of a minor is entitled to such right by virtue of a will or deed,

Certificate of administration to whom to be granted.

willing and fit to be entrusted with the charge of his property, the Court may grant a certificate to such relative.

and is willing to undertake the trust, the Court shall grant a certificate of administration to such person. If there is no person so entitled, or if such person is unwilling to undertake the trust, and there is any near relative of the minor who is

The Court may also, Court may appoint such person guardian.

if it think fit (unless a guardian has been appointed by the father), appoint such person as aforesaid, or such relative or any other relative or friend of the minor, to be guardian of the person of the minor.]

From that decision the plaintiff appealed to the High Court.

Mr. R. T. Allan (with him Baboo Moheschunder Chowdry) for the Appellant.

Mr. Arathoon (with him Baboo Chunder Madhub Ghose) for the Respondents.

The arguments sufficiently appear in the judgment of the Court.

The following cases were cited: - For the appellant, *Greenwar Sing v. Muldun Lall Doss* (16 W. R., 252), *Surat Chunder Chatterjee v. Ashutosh Chatterjee* (21 W. R., 46, s. c. reported as *Shurrit Chunder Chatterjee v. Bagkissen Mookerjee* 15 B. L. R., 350), and *Prosunno Kumari Debye v. Golab Chand* (14 B. L. R., 450). For the respondents, *Hunooman Persaud Panday v. Mussamat Babooe Munraj Koonaree* (6 Moore's L. A., 393), *Lalla Banusedhur v. Koonwar Bindisseree Dutt Singh* (10 Moore's L. A., 454), *Lekraj Roy v. Mahatab Chand* (14 Moore's L. A., 393), *Looloo Sing v. Rajendur Laha* (8 W. R., 364), *Alfootoomnissa v. Goluck Chunder Sen* (15 B. L. R., 353), *Sheoraj Kover v. Nukchudee Lall* (14 W. R., 72), *Sherajutoollah Chordhry v. Abedoomnissa Bibee* (17 W. R., 371), *Modhoo Soodun Sing v. Rajah Parthee Bullab Paul* (16 W. R., 231), and *Prosunno Kumari Debye v. Golab Chand* (14 B. L. R., 450).

[286] The Judgment of the Court was delivered by

Garth, C. J. (who, after stating the facts, continued): Without going at length, however, into the general question how far a minor is bound by a decree made against his guardian, during his minority, we think it clear that in this case the plaintiff was entitled to bring the fresh suit for the purpose of asserting his rights, and that, as against the present defendants, it was the only effectual remedy which he could pursue. If his object had merely been to reverse or alter the judgment in the former suit, it is possible that an application for a review would have answered his purpose. But the plaintiff's object was to unrip transactions which formed no part of the proceedings in the former suit, and as against Rameswar Dutt, who merely acted in that suit as the plaintiff's guardian, and as against Mr. Cosserat, who had nothing whatever to do with the former suit, it is obvious that any application for the review of the proceedings in that suit would have been utterly ineffectual, and that as against these persons the plaintiff's only remedy was the one which he has adopted. His contention and his interests in this suit are not identical with, but directly opposed to, those of Rameswar Dutt.

He says that Rameswar, acting professedly as his guardian, has been dealing with his property in a way which the law expressly forbids, and that, in consequence of his having so dealt with it, and also in consequence of certain legal proceedings in which Rameswar has improperly acquiesced, his (the plaintiff's) share of the mortgaged property has wrongfully come into the hands of Mr. Cosserat, and his object is to release his share of the property from the position in which it has been placed by the wrongful acts of his guardian.

The first question, therefore, which we have to decide is, whether the defendant Rameswar was acting illegally when he mortgaged the plaintiff's share by the deed of July 14, 1867.

It is admitted that he was appointed guardian of the plaintiff under Act XL of 1858, and that he never obtained the sanction of the Judge to the mortgage, as by s. 18 of that Act he was bound to do.

The words of the section are: "No such person" (i.e., guardian of the estate under a certificate granted under the Act) "shall [237] have power to sell or mortgage any immovable property or to grant a lease thereof for any period exceeding five years without an order of the Civil Court previously obtained."

The same words are used in s. 14,* Act XXXV of 1858, limiting the powers of a manager of a lunatic's estate, and it was held by PHEAR and AINSLIE, JJ., in *The Court of Wards v. Kupulmun Singh* (10 B. L. R., 364), that, after the passing of the Act, no manager, *de facto* or *de jure*, can have power to do that which the Act forbids.

There is a decision of MACPHERSON and LAWFORD, JJ., in *Surat Chunder Chatterjee v. Aushootosh Chatterjee* (24 W. R., 46), in an appeal in which the only question was the effect of s. 18, Act XL of 1858, and it was held that a sale made by a guardian without authority from the Court was invalid, even though the purchaser had acted honestly and paid a fair price.

On the other hand, a case was relied upon by the defendants, *Alfootoonnissa v. Goluck Chunder Sen* (15 B. L. R., 353), decided by MARKBY and MITTER, JJ., from which it would appear that those learned Judges considered that a mortgage of a minor's property by his guardian without the consent of the Court was a mere irregularity. But we have consulted Mr. Justice MARKBY, who delivered the judgment in that case, and who informs us, that although the word "irregularity" might have been used, it was by no means the intention of the Court in that case to treat the conduct of the guardian in mortgaging his ward's property without leave of the Court as any other than a direct breach of the law; and we find also that, before MACPHERSON and LAWFORD, JJ., delivered judgment in the case of *Surat Chunder Chatterjee v. Aushootosh Chatterjee* (24 W. R., 46), they also consulted MARKBY and MITTER, JJ., and that the judgment in the latter case was given with their express concurrence. The ground of the decision by MARKBY and MITTER, JJ., in *Alfootoonnissa v. Goluck Chunder Sen* (15 B. L. R., 353) was, that events had subsequently transpired in that case which induced the Court to hold that the mortgage, though improper and unauthorized in the first instance, ought to stand; more especially, as in the suit [289] which was afterwards brought upon the mortgage deed and in which a decree was obtained, the minor himself was properly represented. Their decision, therefore, will be found not to conflict with the view which we take in the present case.

In this case we are of opinion that, in mortgaging the plaintiff's share without the sanction of the Court, the defendant Rameswar was, undoubtedly, dealing with his ward's property in a way which the law forbids, and that in not defending the suit brought upon the mortgage bond, and allowing the property to be sold under the decree, he was improperly sacrificing his ward's interests.

Subodra Bibee, the mortgagee, took the mortgage, carried on the suit, and purchased the property with full knowledge of Rameswar's conduct; and the defendant, Mr. Cosserrat, had also notice that Rameswar had been dealing with his brother's property in a way unwarranted by law, because it appears that

* [Sec. 14.—Every manager of the estate of a lunatic, appointed as aforesaid, may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a lunatic; and may collect and pay all just claims, debts and liabilities due to or by the estate of the lunatic. But no such manager shall have power to sell or mortgage the estate or any part thereof, or to grant a lease of any immovable property for any period exceeding five years, without an order of the Civil Court previously obtained.]

there was an agreement dated the 5th February, 1868, made by Bisseswar, Rameswar, and Purmeswar, with Mr. Cosserat, reciting that Rameswar had been appointed guardian of his minor brother Debi Dutt, And that he, as such guardian, and for himself, together with his other two brothers, had, on 9th January 1868, sold the Dhubolia Indigo Factory to Mr. Cosserat. The agreement then goes on to indemnify the purchaser specially in respect of any claim that might be thereafter put forward by the minor brother, Debi Dutt, and generally in respect of any other claims. This document shows that Mr. Cosserat must, at least, have understood that, in purchasing the minor's property, he was on dangerous ground, and having this knowledge, he was bound to satisfy himself that the mortgage-bond had been duly executed under the authority of the Civil Court, as required by law. He cannot say that he was a *bonâ fide* purchaser for value without notice, for he certainly had notice that Rameswar Dutt's power of dealing with his ward's property was only such as a guardian appointed under Act XL of 1858 could exercise; and he was, therefore, bound to enquire whether the mortgage had ever been sanctioned by the Court. As a purchaser from Subodra he could take no better title [289] than she had, and unless the decree protected her title, it does not secure his. But she cannot be protected by the decree. She knew from the first, that Rameswar had acted in a manner unauthorized by law; she knew that the suit on the mortgage-bond had been undefended; and further, that notice of that suit had not been given to any one but to those whose interests were opposed to those of the minor. But then it was urged very strongly by the defendant's pleader, that if the debts, for which the bond of the 14th July 1867 was given, were debts due by the father, or if they were debts incurred by all the brothers in carrying on a business which they had a right to carry on for and at the risk of the plaintiff, Rameswar would have been justified in giving a simple money-bond at reasonable interest for the payment of those debts, and that, upon that bond, a decree might have been obtained by the bond-holder, and the property in question sold under that decree.

It was then argued that the instrument of the 14th July 1867 was only a bond of this description, with a mortgage of the property in question super-added by way of further security; that the suit was founded upon the personal obligation of this bond, as well as upon the mortgage security; that, consequently, the defendant had a right to sever one portion of the instrument from the other, and to insist that there was quite sufficient cause of action to support the decree without reference to the mortgage portion of the transaction.

But assuming, for the purposes of argument, that in this instance the mortgagee could have severed one portion of the instrument from the other (which is at least doubtful), and that she could have sued upon the deed of July 1867, as a simple money-bond, and obtained a decree in that suit, and sold the plaintiff's share of the property, the answer is, that in point of fact she has not adopted that course. She has sued upon the instrument as a mortgage-bond; she has obtained a decree upon it as a mortgage-bond; the decree is such as she could not have obtained, if she had sued merely upon the personal obligation; and it was under that decree that the property has been sold. The defendants, therefore, cannot now change the nature of that suit, or the form of the decree, for the purpose of placing [290] themselves as purchasers under that decree in a different or better position: and as we find that Subodra and Mr. Cosserat were both affected with notice of Rameswar's improper conduct, we consider that the plaintiff is entitled to succeed in this suit as against all the defendants, and to recover possession of his share from Mr. Cosserat.

The appeal must, therefore, be allowed with costs and interest as usual, payable by the respondents who have appeared; and the plaintiff must be declared entitled to recover the property in suit, with costs bearing interest at 6 per cent. per annum from date of decree of the lower Court, payable by Rameswar Dutt Sahoo, Subodra Bibee, and Mr. Cosserat.

Appeal allowed.

NOTES.

I. CERTIFICATED GUARDIANS--

Mortgage without Court's sanction void :—(1880) 2 All., 902 ; (1882) 11 C. L. R., 345. Lease :—(1887) 15 Cal., 40.

II. UNCERTIFICATED GUARDIANS--

As to the case of a *de facto* guardian, see (1878) 4 Cal., 38, overruled in (1879) 4 Cal., 929 ; 29 Cal., 476 ; 27 Bom., 393.

III. MINOR'S SUIT--

It is not sufficient for the minor to allege that the suit was not defended by the guardian *ad litem*, it ought to have been alleged and proved that an available good ground of defence was not put forward at the hearing by the omission of the guardian to appear at the trial :—(1907) 6 C. L. J. 448.]

[2 Cal. 291]

ORIGINAL CRIMINAL.

The 19th and 23rd April, 1877.

PRESENT ·

MR. JUSTICE MACPHERSON.

The Corporation of Calcutta

versus

Bheecunrao Napit *alias* Bheecun Napit.

High Courts' Criminal Procedure Act (X of 1875), s. 147—Acquittal—

Presidency Magistrates' Act (IV of 1877), s. 181—The Calcutta

Municipal Act (Beng. Act IV of 1876), ss. 75—79.

The powers of interference given to the High Court by s. 147 of the High Courts Criminal Procedure Act were not intended to be exercised in the case of an acquittal by the Magistrate, but only in the case of convictions or other orders whereby a defendant is aggrieved or injured (see *Malcolm v. Gasper*, 1. L. R., 2 Cal., 278).

APPLICATION under s. 147 of the High Courts' Criminal Procedure Act (X of 1875). The facts in support of the application appeared from the affidavit of M. R. Shircore, formerly License Officer to the Justices of the Peace for the town of Calcutta, and since the passing of Beng. Act IV of 1876, License Officer to the Corporation established under that Act. He stated that, under s. 78 of the Act, he had received express authority from the Corporation to assess persons exercising within the town of Calcutta any trade, profession, or calling [291] specified in the third schedule of the Act; that, in pursuance of such authority, he assessed the defendant as the keeper of a shop for the sale of *majum*, an intoxicating drug, under class 3 of the third schedule to the Act for the year 1876, and on the 21st November 1876, caused to be served on the

defendant a notice, informing him that he had been so assessed, and that unless he took out a license under that class, and paid the sum of Rs. 25 therefor, he would be prosecuted without further notice; that the defendant having failed to take out a license, a summons was issued from the Court of the Honorary Magistrates for the Town of Calcutta, requiring the defendant to answer the charge of having exercised his trade without having taken out a license as provided by ss. 75 and 76, and sched. iii of Beng. Act IV of 1876, and having thereby committed an offence punishable under s. 77; and that the said summons came on for hearing on the 16th March 1877, before Babu Omesh Chunder Dutt, one of the Honorary Magistrates of Calcutta, who ordered the defendant to be discharged.

At the hearing it was admitted that no license had been taken out; but it was contended that as Beng. Act IV of 1876 came into force on the 1st July 1876, and as the defendant had offered to pay Rs. 12-8, being the proportion of the license fee he considered himself liable to pay under the Act for the latter half of 1876, he was not further liable. The License Officer, however, refused to accept a less sum than Rs. 25, the fee for the whole year. The Magistrate was of opinion that the defendant's liability only commenced from the 1st of July 1876, the date of the Act coming into force, and that he should have taken out his license for the latter half of 1876; but, inasmuch as he had offered to pay the fee for that period, and as it appeared he was still willing to pay it, the Magistrate held he had incurred no penalty, and ordered his discharge.

The present application was, accordingly, made either for the transfer of the case to the High Court, or for a *mandamus* to compel the Magistrate to commit.

Mr. J. D. Bell, in support of the application, contended, that the decision of the Magistrate was erroneous in law, inasmuch as, under Beng. Act IV of 1876, he had no power to revise the [292] assessment made by the officer authorized to assess, but was bound, on its being shown that the defendant had not taken out a license in the class under which he was assessed, to convict him under s. 77. Under Beng. Act IV of 1876, the officer of the Corporation was the proper person to make the assessment, and that assessment was final, unless an appeal was brought; here no appeal had been preferred. The cases of *Malcolm v. Gasper* (1. L. R., 2 Cal., 278) and *The Queen v. The Justices of Middlesex* (12 L. J. M. C., 36) were referred to.

Macpherson, J. —I am of opinion that s. 147 gives me no power to grant this application. The object in fact is to appeal against an acquittal. But s. 147 does not provide for such an appeal. It contemplates the transfer of a case before disposal, or interference on behalf of persons aggrieved or injured by an order of the Magistrate. But there was no intention to give power to interfere in order to set aside an acquittal. If it had been intended to give that remedy, it would, no doubt, have been expressly given, as in the Criminal Procedure Code and in the Presidency Magistrates' Act, IV of 1877. One section of the latter Act (s. 181) really shows that s. 147 was intended to apply only where there has been a conviction, for it makes notice to the Government prosecutor necessary before an application can be made under s. 147.

Even, however, if I had the power to interfere, I would not exercise it in such a case as this.

Application refused.

Attorneys for the Corporation of Calcutta: Messrs. Sanderson & Co.

[293] FULL BENCH.

The 11th December, 1876, and 20th February, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE KEMP,
MR. JUSTICE MACPHERSON, MR. JUSTICE MARKBY
AND MR. JUSTICE AINSLIE.

In the Matter of the Petition of Chunder Nath Sen and another.*

*Superintendence of High Court—24 and 35 Vict., c. 104, s. 15—Order
under Criminal Procedure Code (Act X of 1872), s. 518.*

The High Court cannot interfere, under s. 15 of the Charter Act, with orders duly passed by a Magistrate under s. 518 of the Criminal Procedure Code.

THE petitioners were the proprietors of an old established *hat*. A new *hat* was opened by one Hurrnath Dass in close proximity to the petitioner's *hat*, and was held on the same days. The Assistant Magistrate, having regard to the circumstances of the case as they appeared from the evidence of witnesses taken before him, and from police reports, made an order under s. 518¹ of the Criminal Procedure Code, whereby the petitioners were prohibited from holding their *hat* on the days in question. The petitioners, thereupon, applied to the High Court to have the Assistant Magistrate's order quashed, and the case came on for hearing before MARKBY and MITTER, JJ. The question of the High Court's jurisdiction to entertain such an application, having regard to the provisions of s. 520² of the Code, had been referred to a Full Bench by GARTH, C.J., and BIRCH, J., in a case which came before them; but, as upon further enquiry it was ascertained that the question then referred did not arise, it was not decided. In consequence, however, of the opinion expressed by those learned Judges that the question ought to be referred to a Full Bench, MARKBY and BIRCH, JJ., adopted that course in the present case.

Baboo Kati Mohun Doss and Gria Sunker Mozoomdar for the Petitioners.

[294] Baboo Mohun Mohur Roy and Doorga Mohun Doss for Hurrnath Doss.

* Criminal Motion, No. 29 of 1875, against an order of Baboo K. G. Gupta, Assistant Magistrate of Backergunge, dated the 26th November 1875.

†[Sec. 518 :—A Magistrate of the District, or a Magistrate of a division of a District, or any Magistrate specially empowered, may, by a written order, direct any person to abstain from a certain act, or to take certain order with certain property in his possession or under his management, whenever, such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance, or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, or danger to human life, health, or safety, or a riot or any affray. * * *]

Orders not judicial proceedings.

‡ [Sec. 520 :—Orders made under sections five hundred and eighteen and five hundred and nineteen are not judicial proceedings.]

Bahoo Kali Mohun Doss.—Although orders under s. 518 are non-judicial, and it has been decided that this Court cannot interfere with them under s. 297, and that they are not appealable, it is submitted that this Court can set them aside under s. 15 of the Charter Act. This Court has interfered in cases in which the Magistrate has not taken the initial steps which are directed to be taken under that section, and also when his order ought to have been under s. 521—*Banee Madhub Ghose v. Wooma Nath Roy Chowdry* (12 W. R., Cr., 26), *Chunder Coomar Roy v. Omesh Chunder Mozoomdar* (22 W. R., Cr., 78), *Sree Nath Dutt v. Unnoda Churn Dutt* (23 W. R., Cr., 34). [MARKBY, J.—Those cases only amount to this. All the proceedings of a Magistrate are *prima facie* judicial; but the Legislature has expressly provided that certain proceedings shall be considered non-judicial. If a proceeding before a Magistrate is to be brought under the latter class, it must be shown that the circumstances exist which bring it within that class. In what respect are the powers of this Court under s. 15 of the Charter Act greater than its powers under Chap. XXII of the Criminal Procedure Code?]. In *Arzanoollah v. Nazir Mullick* (21 W. R., Cr., 22), your Lordship, while holding that this Court could not interfere under the Criminal Procedure Code with orders made under s. 518, intimated that you might interfere with them upon an application under s. 15 of the Charter Act. [MARKBY, J.—I expressed no such opinion in that case, nor is there even the slightest indication of such an opinion]. In *Tej Ram v. Harsukh* (I. L. R., 1 All., 101) the Allahabad High Court held, that it could not interfere under s. 15 with an order of a subordinate Court, on the ground that it proceeded on an error of law or of fact; but this Court has gone further, and has held that it will interfere with illegal proceedings.

Pleaders for the opposing party were not called upon.

[293] The Opinion of the Full Bench was delivered by

Garth, C.J.—As the Magistrate states that riot or affray was imminent, and that he considered that the direction he gave tended to prevent, and was likely to prevent, a riot or affray, and as the facts stated by the Magistrate show that there were some grounds for the opinion which he expressed, we think that he had power, under s. 518 of the Criminal Procedure Code, to make the order complained of. This Court, therefore, cannot interfere with it under s. 15 of the Statute 24 and 25 Vict., cap. 104. nor can the Court interfere on any other ground, as by s. 520 the order made is declared not to be a judicial proceeding, however much it may infringe upon what are, or may be (irrespective of this section), the undoubted legal rights of the petitioners.

Petition dismissed.

NOTES.

[See (1879) 5 Cal., 7 F. B.; (1882) 8 Cal., 580; (1891) 19 Cal., 127; 24 Bom., 532, 24 Mad., 46.]

[2 Cal. 296]

ORIGINAL CIVIL.

The 13th February and 9th March, 1877.

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE MITTER.

Kally Prosonno Ghose

versus

Gocool Chunder Mitter and another.

Hindu Law - Adoption Hindu widow with permission to adopt, position of--Divesting of property.

A Hindu testator died, leaving all his property to *P* and *B*, his two sons, absolutely, in equal shares. *B* died in 1845, leaving a minor son, *K*. *P* died in 1851 without male issue, leaving a widow *B D*, and a daughter. *P* also left a will, by which he gave, subject to certain trusts for the worship of the family idols, all his property to his widow *B D*, for her life, and on her death to his daughter's son (if any) : the daughter died without issue before her mother. *B D* died in October 1864 leaving a will, of which she appointed her brother *G* executor, and *G*, in accordance with the directions in her will, took possession of the property, which *B D* took as widow and under the will of *P*. *K* died in 1855, when still a minor, leaving a minor widow, and having made a will, by which he gave permission to his widow to adopt a son. The widow of *K* adopted a son in August 1876. In a suit brought by the plaintiff as adopted son of *K* and heir of *P*, to recover the property left by *P*, the issue was raised whether, assuming the plaintiff to be the legally adopted son of *K*, he was the heir of *P*. *Held*, that his adoption not having taken place when [296] the succession to the property of *P* opened out on the death of *B D*, he was not entitled to the property ; his adoptive mother could not claim on the death of *B D* to hold the property as trustee for the plaintiff ; and inasmuch as the property must have vested in some one on the death of *B D*, and property once vested cannot, by Hindu law, be divested, the plaintiff was not entitled to succeed.

SUIT for declaration of right to, and possession of, certain immoveable property.

* The facts, as far as they are material to this report, were as follows :—Petambur Ghose, a Hindu inhabitant of Calcutta, died in August 1825, leaving two sons, Parbutty Churn Ghose and Bhugoban Chunder Ghose, and two widows, and leaving a will, by which he gave all his property to his two sons absolutely in equal shares ; and Parbutty and Bhugoban took possession of all the property, and constituted a joint Hindu family. In October 1845, Bhugoban died, leaving a widow, Potitpaboni, and an infant son, Khetter Mohun, and leaving a will, of which he appointed his widow sole executrix, and by which, after making provision for the worship of certain idols, he gave all his property, moveable and immoveable, to his son Khetter Mohun Ghose absolutely ; and Potitpaboni Dossee and Khetter Mohun continued to live as members of the joint family. In May 1855 Khetter Mohun Ghose died at the age of 15 years and 8 months, leaving his mother, Potitpaboni, and his widow, the defendant Bamasoondery, a minor and having made a will, of which he appointed his mother executrix, and by which he, among other things, directed that when his widow attained majority she should adopt a son, and that as long as such adopted son was a minor, Potitpaboni should hold the property for him and make it over to him on his attaining majority ; and the defendant

Bamasoondery, on attaining majority, obtained letters of administration to the estate of Khetter Mohun in July 1861. In August 1876, the defendant Bamasoondery adopted the plaintiff, a minor, in pursuance of the will of Khetter Mohun Ghose. Parbutty Churn died in 1851 without male issue, leaving a widow, Bindadehee Dossee, his heiress, and a daughter, Kristo Mohiny Dossee, and having made his will, of which he appointed his widow executrix, and by [297] which he gave all his property (subject to certain legacies and annuities, and certain trusts for the worship of the family idols) to his widow for life, and, on her death, to his daughter's sons if any; and on his death his widow took and continued in possession of the whole of his property. Kristo Mohiny died intestate and childless in the lifetime of her mother. Bindadehee died in October 1864, leaving a will, whereof she appointed her brother, Issur Chunder Mitter, since deceased, sole executor; and whereby she directed that, on his death, the defendant Gocool Chunder Mitter should be her executor: and by her will she directed that her executor should take possession of the whole of the immoveable property which she had up to her death possessed and enjoyed according to the will of Parbutty Churn, and should, out of the said property, as directed in the will of Petambur Ghose and Parbutty Churn, defray the expenses of the worship of the idols and perform all other religious and pious acts. Gocool Chunder, eventually, on the death of Issur Chunder in 1874, obtained probate of the will and possession of the property as executor of Bindadehee. The defendant Gocool Chunder refusing to give up the property, the plaintiff brought the present suit against Gocool Chunder and Bamasoondery for a declaration that he was the duly adopted son of Khetter Mohun, and that as such duly adopted son he was entitled, as heir of Parbutty Churn, to the property left by him. The defendant Gocool Chunder put the plaintiff to proof of his title, and submitted that the claim was barred, more than twelve years having elapsed since the death of Bindadehee, when the property descended.

The case came on before PONTIFEX, J., for settlement of issues, and it was then suggested by the Court that, in the case of the plaintiff failing to prove his claim, the Government might have an interest in the property, and it was ordered that the Government should be made a party to the suit, and the preliminary issue was settled for argument, whether, assuming the plaintiff to be the lawfully adopted son of Khetter Mohun, he was the legal heir to Parbutty Churn. The case now came on for argument of this issue before PONTIFEX and MITTER, JJ.

Mr. J. D. Bell, Mr. Evans, and Mr. Bonnerjee for the Plaintiff.

[298] Mr. Montrion for the defendant Gocool Chunder.

The Standing Counsel Mr. Kennedy (with him the Advocate-General, officiating, Mr. Paul) for the Secretary of State.

Mr. Bell contended that, on the broad principles laid down as to the succession of an adopted son, the plaintiff was entitled to succeed to the estate of Parbutty. He succeeds to collateral as well as to direct relations—*Sumbho Chunder Chowdhry v. Narain Dibe* (3 Knapp, 55) and *Lokenath Roy v. Shamasoonduree* (S. D. A., 1858, 1863). In this case the estate must have vested in some person, and there was no one else in whom it could vest: therefore, it must be considered to have vested in the adopted son. And this is so though he did not come into existence until after the testator's death. The possession of an adopted son is a peculiar one, and forms an exception to the usual rule that a person to take must be in existence when the gift takes

effect : see *Jotindra Mohan Tagore v. Ganendra Mohun Tagore* (9 B. L. R., 377, at p. 397). He is recognised, whether adopted by the father himself, or by a person empowered by him, after his death, as standing in the same position as a child actually begotten by the father. In this case, on his adoption, this estate must be considered as having vested in the adopted son at the testator's death, or rather at the date of the permission to adopt. The cases as to property not being liable to be divested do not apply to the plaintiff here; see *Kalidas Das v. Krishna Chundra Das* (2 B. L. R., F. B., 103). Here the plaintiff must be considered to have been begotten and in the womb of his adoptive mother from the date of the permission to adopt. [PONTIFEX, J.—If Parbutty had died without a will, his widow would have taken a life estate as heir, but she had an estate left her by will. How does she take? By English law she would take as devisee; see *Strickland v. Strickland* (10 Sim., 374). If she takes as devisee and not as heir, we must look for her successor at Parbutty's death, and at that time the heir was Kristo Mohiney, his daughter.] It is submitted she took as devisee.

[299] Mr. Montriou for the defendant Cocool Chunder.—There was in the widow the meeting of two inconsistent estates, and the lesser one was merged in the larger : she succeeded as heir to the whole estate, and that right was not superseded by the fact that she held her husband's permission to adopt. The right of an adopted son only vests in him from the date of the actual adoption—*Bamundoss Mookerjee v. Mussamut Tarinee* (S. D. A., 1850, 533; s.c., on appeal, 7 Moore's I. A., 169). This case was confirmed on appeal by the Privy Council. The widow does not hold the estate as a trustee—*Rash Behari Roy v. Nemaye Churn* (W. R., 1864, 223). The widow there had the full and complete title as heir to the whole estate. The analogy of a Hindu widow with a permission to adopt is not that she is to be considered *enceinte* at the death of her husband, and as remaining so until adoption; but that she is in a position to give birth to a son at any time she likes, the permission to adopt being a substitute for her husband; see the case of *Sri Raghunadha v. Sri Brojo Kishore* (L. R., 3 I. A., 154, at p. 193; s.c., 1. L. R., 1 Mud., 69, at p. 83). The defendant Cocool is not a wrong-doer; he is, if the widow did not take the complete estate as heir, in the position of a stakeholder, and the plaintiff must prove his title to the property which he claims: he must succeed by the strength of his own title, and not by reason of any weakness in ours. The Government cannot claim against this defendant as if they were plaintiffs.

The Standing Counsel (Mr. Kennedy) for the Government.—The estate, when it had once vested, could not be divested in favour of the adopted son—*Kalidas Das v. Krishna Chundra Das* (2 B. L. R., F. B., 103) and *Lakhi Prya v. Bhairab Chandra Chaudhri* (5 Sel. Rep., 315). No authority has been cited in favour of the analogy between a widow with a power to adopt and a lengthened period of gestation. The son had no right whatever until adoption—*Bamundoss Mookerjee v. Mussamut Tarinee* (7 Moore's I. A., 169) and *Dossmoney Dossee v. Prosonomoye Dossee* (2 J. J., N. S., 18). The plaintiff not being in existence when the [300] succession opened, was not capable of taking—*Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry* (10 Moore's I. A., 279).

Mr. Bell in reply.—A son born in the natural way can claim mesne profits of an estate during the period of gestation. [PONTIFEX, J.—Is that so?] It is submitted he could. Suppose a person dies leaving property in the hands of a manager, and no heir comes forward for some years, the account

would, in a suit by the heir, date back to the death of the last owner. [PONTIFEX, J.—But here the widow was entitled to the income for her life at any rate.] The passage cited from *Sri Raghunadha v. Sri Braja Kishore* (L. R., 3 I. A., 154, at p. 193; s. c., I. L. R., 1 Mad., 69, at p. 83) is in the plaintiff's favour. The Government has no title as long as any one is in existence who can benefit the ancestor's soul. The Hindu text-books show in what cases the King would take an estate, and those in which he would not take; see the *Dayabhaga*, ch. IX, sec. 1, and *Menu*, ch. IX, verse 189. [PONTIFEX, J., referred to *The Collector of Masulipatam v. Caraly Vencata Narainapak* (8 Moore's I. A., 521). Suppose the Government had taken the estate in default of heirs and had sold it.] The sale would have been subject to the birth of a child, i.e., in this case the adoption. The heir must be some one who can perform the ceremonies for the good of the ancestor. [Mr. Kennedy referred to a passage in the *Vyavastha Darpana*, 1st ed., 295, and to a recent case decided the other way (*Shibnath Dhar v. Badaccoomance Dossee*, decided by GARTH, C. J., and PONTIFEX, J., on 30th March 1876, affirming on appeal a decision of MARKBY, J., dated 11th of June 1875).] It is submitted a stranger like the defendant cannot perform the ceremonies. No authority has been cited to show that an estate cannot be divested in favour of an adopted son. The case of *Bhoobun Moyee Debia v. Ram Kishore Achar Chowdhry* (10 Moore's I. A., 279), shows that no power exists on the part of the father to give power to his widow to adopt a son who should interfere with any direct male issue. [MITTER, J.—That case shows the vesting would date from the actual adoption, not from the permission to adopt. PONTIFEX, J., referred to the case of *Gobindo Nath Roy v. Ram Kany Chowdhry* (24 W. R., 183).] If the first adopted son had died, the power would have continued, and another might have been adopted; see *Itam Soondai Singh v. Surbanee Dossee* (22 W. R., 121) and *Bhoobun Moyee Debia v. Ram Kishore Achar Chowdhry* (10 Moore's I. A., 279). The adopted son is to be considered a posthumous son. There is no authority for saying that where an estate is not owned by any one, it is not to belong to Government rather than to a person in the position of the defendant Gocol Chunder.

Cur. adv. vult.

The Judgment of the Court was delivered by

Mitter, J.—The following genealogical table will materially help in setting out the facts of this case:—

PITAMBUR GHOSE

Died August 1825.

Parbutty Churn Ghose
(Died 1851)
Married Bindadebee Dossee
(Died 1864)
|
Daughter
Kristo Mohiny Dossee
(Died childless between the deaths
of Parbutty and Bindadebee)

Bhugoban Chunder Ghose
(Died October 1855)
Married Potitpabon Dossee
Khetter Mohun Ghose
(Died 1855)
Married Bamasonder Dossee,
who, after her husband's death,
in August 1876, adopted
KALLY PROSONNO GHOSE,
the plaintiff.

The plaintiff in this case is the alleged adopted son of Khetter Mohun, and the defendant is the brother of Bindadebee, widow of Parbutty, whose property

is the subject-matter of dispute in the present case. Parbutty died in 1851, leaving him surviving Bindadebee, his widow, Kristo Mohiney, a daughter, and Khetter Mohun, his brother's son. He executed a will before his death, bequeathing all his property to Bindadebee for life, and the remainder to daughter's sons that might be born thereafter. These bequests were subject to certain trusts for carrying out the worship of the family idols mentioned therein. Under this will Bindadebee remained in possession of the disputed property up to the time of her death, in 1864. In the meantime, both Kristo Mohiney and Khetter Mohun died childless.

[302] Khetter Mohun, it is alleged, before his death, executed a will, which contains, among other provisions, a permission to his wife Bamasoondery to adopt. But the adoption of the plaintiff, in pursuance of this alleged permission, as admitted in the plaint, did not take place until 1876. Bindadebee, who died in October 1864, left all her properties, including those now in dispute, to her brother Issur Chunder. The defendant Gocool, who is the brother of Issur Chunder, has succeeded to them after the death of Issur. Thus, under the will of Bindadebee, the properties in dispute have remained in the possession of Issur and Gocool, successively, from October 1864, when Bindadebee died. The plaintiff, it is said, as stated before, was adopted in August 1876, and he claims all these properties as the heir of Parbutty.

Various questions have been raised by the defendant, but the issue which we have now to determine is this :—Assuming that the plaintiff is the lawfully adopted son of Khetter Mohun, is he the legal heir to Parbutty?

If the plaintiff's adoption had taken place before the death of Bindadebee, there can be little doubt that, upon the facts stated above, he would have been the legal heir to Parbutty. But the question which we have to determine in this case is, whether, he having not been adopted at the time when the succession to Parbutty's estate opened out on Bindadebee's death, his subsequent adoption would confer upon him any right as legal heir of Parbutty to claim these properties from the hands of a person, who, with his predecessor in title, had remained in possession of them for nearly twelve years before the institution of the suit, and is still in possession.

In the year 1864, when Bindadebee died, the properties in dispute must have devolved on some person or persons, because there can be no property without an owner. The plaintiff was not then in existence as the adopted son of Khetter Mohun. To whom then did they pass? Putting the will of Bindadebee on one side, because for the purpose of this issue it is not disputed by the defendant that it must be assumed that it did not operate to create any valid title in his favour, the ownership of these properties must have vested either in some person who [303] was under the Hindu law the reversionary heir to Parbutty after the death of Bindadebee, or in the Government, if no such person was in existence.

The contention of the plaintiff that, on the death of Bindadebee, his adoptive mother became entitled to hold these properties as the trustee of the future adopted son, is not, I think, sound. No texts in the Hindu law have been cited in support of it, and so far as the authority of decided cases goes, the question seems to have been settled conclusively against any such view.

In the case of *Bamuniooss Mookerjee v. Mussamat Tarinee* (7 Moore's I. A., 169), a Hindu widow, having authority to adopt, brought a suit in her character as widow, to recover possession of her husband's share of the family property. She was met with the objection, that the suit brought in her,

capacity as widow was badly framed, because possessing an authority to adopt, she could only sue on behalf of her future adopted son. 'This objection was overruled, and it was held, "that the mere fact of there being authority given by her husband to adopt a son, did not, before an adoption had actually taken place, supersede and destroy her personal right as widow to sue." The point seems to have been more directly decided in two other cases, *Dukhina Dossee v. Rash Beharee Mozoomdar* (6 W. R., 231), and *Gobind Chandra Surma Mozoomdar v. Anand Mohan Surma Mozoomdar* (2 B. L. R., A. C., 313). On the death of Bindadebee, therefore, the plaintiff's adoptive mother could not claim to hold possession of the properties in dispute in trust for the future adopted son. The ownership in them must have vested then either in some person whose name has not been disclosed in this case, and who was the reversionary heir to Parbutty after the death of Bindadebee, or in the Government, if no such person was in existence.

This being so, the plaintiff cannot succeed in this case, unless he can establish that, on his adoption, the ownership of these properties was divested from the person who had succeeded to them upon the death of Bindadebee, and vested in himself. If this proposition could be established, it would lead [304] in many cases to very mischievous and inconvenient results. There is no limitation of time within which a Hindu widow is bound to exercise the right of adoption, and there might be cases not of unrequent occurrence, in which persons rightfully succeeding to properties as heirs might, after a long lapse of time, be suddenly called upon to relinquish their possession in favour of a person adopted into the family of the last owner many many years after the death of the latter. A proposition so startling as this is ought to be established by the clearest possible authority.

No text from the Hindu law has been cited in its support. On the other hand, the definition of 'heritage,' as given in the *Dayabhaga*, paragraphs 4 and 5 of chap. I, tends to lead to the opposite conclusion. These paragraphs are to the following effect :—

"The term 'heritage,' by derivation, signifies what is given. However, the use of the verb (da) is here secondary or metaphorical: since the same consequence is produced,—namely, that of constituting another's property after annulling the previous right of a person who is dead or gone into retirement or the like. But there is no abdication of the deceased, and the rest in regard to the goods. Therefore, the word 'heritage' is used to signify wealth in which property dependent on relation to the former owner arises on the demise of that owner." When a person, therefore, succeeds to a property by right of inheritance under the Hindu law, in the language of the *Dayabhaga*, this consequence is produced,—namely, that of constituting another's property after annulling the previous right of a person who is dead or gone into retirement or the like. His right is, therefore, absolute, and carries with it all the natural incidents of ownership, unless otherwise controlled by any other express provision of the law. In the case of succession by females, we know there are such express provisions relating to the right of transfer by sale, gift, &c. But I am aware of no authority in Hindu law-books which supports the proposition that this right of ownership is subject to be destroyed by a person being brought into existence subsequently, a person who, if he had been in existence at the time when the succession opened out, would have been a [305] preferable heir. This is opposed to natural justice and all principles of the Hindu law.

In the Full Bench case of *Kalidas Das v. Krishna Chandra Dass* (2 B. L. R., F. B., 103). Sir BARNES PEACOCK takes the same view of the law. The question in that case was, whether the estate of a deceased person, which became vested in his nephew, his son having been excluded from inheritance on the ground of congenital blindness, could be divested in favour of the blind man's son born after the succession of the nephew. "There is no case of which I am aware," says Sir BARNES PEACOCK (page 110), "in which, according to the Hindu law as administered in Bengal, a male who takes by descent takes anything less than a full and absolute estate subject to charges for maintenance, &c., or to show that he is not at liberty to alienate that estate by gift or sale. The cases of widows, and sons adopted after the deaths of their adoptive fathers, were referred to in the course of argument, to show that an estate, less than a full and absolute estate, may be taken by inheritance, and that an estate vested by descent may be divested. But these cases are not analogous. The case of a widow succeeding to the estate of her husband upon his dying without issue, and the case of other females, depend upon particular texts. Baudhayana, after premising a woman is entitled, proceeds 'not to the heritage; for females and persons deficient in an organ of sense or member are deemed incompetent to inherit.' The construction of this passage, 'a woman is not entitled to the heritage,' is, that the succession of the widow and certain others, (viz., the daughter, the mother, and the paternal grandmother) takes effect under express texts without any contradiction to this maxim—Dayabhaga, chap. XI, sec. 6, verse 11. The case of a widow adopting a son after her husband's death, and thereby divesting the estate which she took upon the death of her husband without issue, is one in which only her own estate is divested. There is no case in which an estate vested in a male heir by inheritance can be divested by the adoption of a son by a widow after her husband's death, and the case of a widow divesting her own estate by the adoption of [306] a son is not one from which inferences can be drawn by analogy as to the divesting of an estate once vested in a male heir by inheritance." The observations of the Judicial Committee of the Privy Council in *Ram Kishore Achary v. Mussamat Bhoobun Moyee Debia* (10 Moore's I. A., 279) and in *The Collector of Uadura v. Mootoo Ramalinga Sathupathy* (2 Moore's I. A., 397), lend considerable support to this conclusion.

The facts in the case of *Ram Kishore Achary v. Bhoobun Moyee Debia* (10 Moore's I. A., 279) are briefly these:—One Gour Kishore died, leaving him surviving his widow, Chundrabullee, and an infant son, Bhowanee Kishore. He, before his death, executed an *anumati-putro*, giving authority to the widow to adopt a son, in case Bhowanee Kishore died childless. After his death, Bhowanee Kishore succeeded to his property, and died childless after having married Bhoobun Moyee. Chundrabullee after Bhowanee Kishore's death adopted Ram Kishore. The question that had to be determined in the case was, whether Ram Kishore was entitled to take possession of the properties left by Bhowanee Kishore by evicting Bhoobun Moyee. "The question is," their Lordships observe in page 311, "whether the estate of his son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate and take as an adopted son what a legitimate son of Gour Kishore would not have taken. This seems contrary to all reason and to all the principles of Hindu law, as far as we can collect them." Again, further on they say: "If Bhowanee Kishore had died unmarried, his mother, Chundrabullee Debia, would have been his heir, and the question of adoption would have stood on,

quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no decision has been cited from the text-books, and no principle has been stated to show that, by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in [307] possession can be defeated and divested." The "ordinary rule" referred to in this passage seems to be, that in no case "the estate of the heir of a deceased 'person' vested in possession can be defeated and divested" in favour of a subsequent adopted son, unless the adoption is effected by the direct agency of the former or with his or her express consent.

In the other case, *Collector of Madura v. Mootoo Ramalinga Sathupathy* (12 Moore's I. A., 397. s.c., 1 B. L. R., P. C., 1), I think the same rule has been enunciated. The main question for decision in that case was, whether, in the Dravida country in the Madras Presidency, a widow not authorised by her husband to adopt may adopt a son to him if authorised by the consent of his kinsmen. Having decided this point in favour of the validity of such adoption, their Lordships make the following observation regarding the question: "Who are the kinsmen whose assent will supply the want of positive authority from the deceased husband?" In page 441 they say: "Where the husband's family is in the normal condition of a Hindu family, that is undivided, that question is of comparatively easy solution. In such a case the widow, under the law of all the schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorise an adoption by her, yet, if there be no father, the consent of all the brothers, who in default of adoption would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will." In the case of succession by the widow to the separate property of her husband, the adoption taking place through her agency, has, in accordance with the rule laid down above, the effect of divesting her estate.

Following this rule, this Court, in *Gobindo Nath Roy v. Ram Kanay Chowdhry* (24 W. R., 183), has held, that the subsequent adoption by a widow cannot affect the right of an alienee from her, the [308] alienation having taken place before the adoption. This case is exactly in point, and is a direct authority against the contention of the plaintiff.

The learned Counsel for the plaintiff, in the course of argument, has relied upon the following observation of the Judicial Committee in the well-known case of *Tagore v. Tagore*. This passage, which is to be found in page 397 of 9 Bengal Law Reports, is to the following effect:—"As to the case of adopted children (so much relied upon during the argument) it is distinguishable, because of the peculiar law applicable to that relation. The Hindu law recognizes an adopted child, whether adopted by the father himself in his lifetime, or by the person to whom he has given the power of adoption after his death, from amongst those of his class, as one to stand in the place of a child actually begotten by the father. In contemplation of law such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting, or otherwise taking from the testator,

as if he had existed at the time of the testator's death, having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence, capable of taking at the time when the gift takes effect." Their Lordships make these observations in connection with the question, whether, by the Hindu law of gift, a gift made to a person not in existence at the time of such gift, is valid; having decided that it is not valid, they say that such gifts by the adopted father in favour of a future adopted son form an exception to the general rule, and the words "as if he had existed at the time of the testator's death having been actually begotten by him" do not refer to a case of collateral succession by an adopted son, but to his right of inheritance to his adoptive father's estate.

General observations of their Lordships of the Judicial Committee, similar to those quoted above, made in the case of *Sri Raghunadha v. Sri Brojo Kishore* (L. R., 3 I. A., 154), have also been pressed [309] upon our attention on behalf of the plaintiff. The passage quoted, to be found at page 193 of the third volume of the Law Reports, Indian Appeals, is as follows: "Their Lordships have deemed it right to make these remarks, though not essential to the determination of the present appeal, because this doctrine of the power of a widow, not having her husband's express permission to adopt a son to him, which before the decisions in the *Ramul case* had not assumed very definite proportions, has obviously an important bearing upon the law of property in the Presidency of Madras. It may be the duty of a Court of Justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property, and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of or capable of exercising dominion over property." That "the rights of parties in actual possession" in this passage do not refer to any vested rights, will be apparent by referring to the particular facts of that case. The property in dispute in that case was not a joint family property, and the surviving members of the joint family unjustly took possession of it, by excluding the widow of the owner, who was entitled by the Mitakshara law to succeed to it. Therefore, "the rights of parties in actual possession" in that case were not vested rights, but merely the reversionary rights to succeed after the death of the widow. That such contingent rights are liable to be defeated by an adoption is not disputed for one moment. These observations, therefore, do not in any way support the contention put forward on behalf of the plaintiff.

As a last resort an argument based upon the particular provision in Parbutty's will regarding the worship of certain family idols, has been pressed upon us in support of the plaintiff's right. It has been said that the defendant, being a stranger to the family, [310] is not competent to carry out the direction as to the worship of the family idols. The defendant is a Hindu and a relative of the family; and I am aware of no rule of law or custom which would render him incompetent to carry out the worship of the aforesaid idols as directed in the will of Parbutty. Even if this contention were well founded, I do not see how it would help the plaintiff in establishing his right to inherit to the estate of Parbutty, he having not been adopted when the widow of Parbutty died.

For these reasons I am of opinion that this particular issue must be decided against the plaintiff.

Pontifex, J.—I quite concur in the judgment which has just been delivered by my learned colleague. As our decision is against the plaintiff on that issue, his suit must be dismissed as against Gocool and the Government. But as the principal defendant has not set up any right in himself, but claims to hold Parbutty's property only for the true owner, I think the dismissal should be without costs. For the same reason I think that Gocool should, out of the estate of Parbutty in his hands, pay the costs of the Government, whom I directed to be made defendants, and retain his own costs. The dismissal of the suit against Gocool will be without prejudice to the rights (if any) of the Government in relation to Parbutty's property.

Suit dismissed.

Attorney for the Plaintiff: Mr. *Leslie*.

Attorneys for the Defendant Gocool Chunder: Messrs. *Sen* and *Parr*.

Attorney for the Government: The Government Solicitor, Mr. *Sanderson*.

NOTES.

[ESTATE ONCE VESTED CANNOT BE DEVESTED—

I. ADOPTION BY WIDOW—

- (a) The mother succeeding as heir to her son may adopt, although the son had attained full ceremonial competency by marriage, investiture, etc. . —(1900) 25 Bom., 306.
- (b) When the inheritance passed to the widow as heir to the last male holder, his daughter-in law, the widow of a predeceased son could not adopt although in Bombay the daughter takes a full estate :—(1896) 22 Bom., 551.
- (c) Mother succeeding as heir to her son, the paternal grandmother has no authority to adopt :—(1894) 19 Bom., 331.
- (d) Adoption by the step-mother when the inheritance had vested in the grandmother, invalid .—(1885) 12 Cal., 246

II. ESTATE OF CO-WIDOWS—

Adoption divests the estate as well of the other widows who inherited the property as of the adopting widow :—(1890) 18 Cal., 69.

III. JOINT FAMILY—

- (a) Where the joint family reduces to one male coparcener, the power to adopt can be exercised :—(1891) 18 Cal., 385.
- (b) Where the continuity of existence of a joint family is brought about by a posthumous son being born after the death of the last male holder, the widow of a predeceased coparcener can make a valid adoption :—(1904) 29 Bom., 51.
- (c) Where the joint family property passed to collateral heir of the last surviving male member, power to adopt cannot be exercised .—(1890) 14 Bom., 463.

Y. EFFECT OF FRAUD—

A succeeded to the property of B; subsequently, C, his uncle's widow, adopted D; the adoption might have taken place before the death of B had it not been for the fraud of C in suppressing the will of his uncle which gave authority to the widow. *Held*. that the adopted son could claim no share in the estate of B, even though there was fraud :—(1881) 7 Cal., 178.

Y. EFFECT OF ADOPTION ON PREVIOUSLY INHERITED ESTATES—

Adoption of a boy after the vesting of inheritance from his natural father, does not divest such estate :—(1896) 1. C. W. N., 121.

VI. ALIENATIONS—

- (a) As to the effect of adoption on the alienation previously made by the widow :—See (1887) 11 Bom., 609 ; 33 Bom., 88.
- (b) Effect of remarriage on alienation .—(1907) 8 C.L.J., 542.
- (c) Effect of adoption and gift over under devise :—8 C.W.N., 266.]

[311] APPELLATE CIVIL.

The 16th March, 1877.

PRESENT

MR. JUSTICE KEMP AND MR. JUSTICE AINSLIE.

The Bank of Hindoostan, China, and Japan, Limited.....Plaintiffs
versus
 Shoroshibala Dabee and another.....Defendants.

Mortgage—Reg. XVII of 1806—Service of notice of foreclosure.

The provisions of s. 8 of Reg. XVII of 1806, that a copy of the mortgagee's application to foreclosure is to be served with the Judge's perwanna referred to in that section, are imperative and not merely directory. Where the evidence fell short of proof that a copy of such application was served with the perwanna of the Judge,—*Held*, that such failure of proof was fatal to the plaintiff's suit to recover possession of the mortgaged premises after the expiration of the year of grace.

When the plaintiffs, second mortgagees who had foreclosed their mortgagor's equity of redemption, sued for possession of the mortgaged property, and alleged that their mortgagor's equity of redemption had been finally foreclosed by the first mortgagee after due proceedings and expiry of the year of grace without redemption, and that they were, therefore, entitled to absolute possession, and filed on the ground that notice of foreclosure had not been duly served, —*Held*, they were not entitled to a decree as mortgagees for possession, subject to their accounting to the mortgagors, that being relief different from that prayed for in their plaint.

SUIT by mortgagees to obtain absolute possession, after foreclosure, of two zamindaries, Turuf Bhowani Churn and Nilan Bhowani Churn. These estates had, as the plaint alleged, formerly belonged to the defendants Shoroshibala Dabee and Hemendro Nath Mookhopadhyay, who, by a mortgage in the English form, dated the 4th of September 1863, mortgaged the estates to a person named Gobind Chunder Sen. The mortgage stipulated that the mortgage loan was to be repaid on the 4th of September 1868. On the 29th of December 1866, Gobind Chunder Sen executed a transfer, by way of mortgage in the English form, of his interest under the mortgage deed of the 4th of September 1863, to the plaintiff Bank. On an application by Gobind Chunder Sen under the provisions of Reg. XVII of 1806, the mort-[312]gage of the 4th September 1863* was foreclosed on the 4th of December 1866. After the death of Gobind Chunder Sen, his son, the defendant Nundo Lall Sen, on the 15th of April 1868, brought a suit for possession of the disputed properties comprised under the mortgage of the 4th of September 1863, and obtained a decree in the Court below ; but, on appeal, this decision was reversed by the High Court, on the ground that the suit was premature, and the whole of the proceedings, including the foreclosure in December 1866, were set aside. On the 12th of January,

* Regular Appeal, No. 155 of 1875, against a decree of J. P. Grant, Esq., Officiating Judge of Zilla Chittagong, dated the 9th of April, 1875.

1871, Nundo Lall Sen applied under the Regulation for foreclosure of the mortgage of the 4th September 1863. From the report of the serving peon it appeared that the notice had been served on the 25th of February 1871, by affixing a copy on the outer door of the house of the defendants Shoroshibala Debee and Hemendro Nath Mookhopadhya. The serving peon was subsequently examined by interrogatories, but there was nothing in the evidence to show that a copy of Nundo Lall Sen's application for a foreclosure had been served as required by s. 8 of Reg. XVII of 1806. The mortgagors, under the mortgage of the 4th of September 1863, failed to deposit the money with interest due to Nundo Lall Sen within the year of grace prescribed by the Regulation, and the mortgage became foreclosed on the 26th of February 1872. The plaintiff Bank, on the 23rd of October 1870, applied to the Zilla Court to foreclose against the defendant Nundo Lall Sen the mortgage of the 29th of December 1866 from his father Gobind Chunder Sen, and the year of grace under those foreclosure proceedings expired on the 13th of September 1872, the mortgage-money not having been paid in the *interim*. The plaintiff Bank, therefore, brought this suit, alleging that the defendants Shoroshibala and Hemendro were in wrongful possession of the zamindari, their title to retain possession being lost. The plaintiff Bank prayed that the Court would put them in possession of the property, their full title being established, and award them mesne profits for the time they had been wrongfully kept out of possession, and grant them such other relief as they were entitled to. They stated that their cause of action accrued on the 13th of September [313] 1872, the date of the foreclosure of the mortgage of the property hypothecated.

The defendants Shoroshibala Debee and Hemendro Nath Mookhopadhya pleaded, *inter alia*, that the proceedings for the foreclosure of the mortgage of the 4th of September 1863 were irregular and invalid, inasmuch as the notice of foreclosure had not been duly served upon them in accordance with the Regulation. The case was tried by the Officiating Judge, who was of opinion that there was no proof of the service of the mortgagees' application for foreclosure of the mortgage of the 4th of September 1863 on the defendants Shoroshibala Debee and Hemendro Nath Mookhopadhya, as required by the Regulation, and that this defect was fatal to the plaintiff's suit, which was consequently dismissed.

The plaintiffs appealed to the High Court.

The Advocate-General, Offg. (Mr. Paul) and Mr. Stokoe for the Appellants.

Baboo Nilmadhub Bose and Nulit Chunder Sen for the Respondents Shoroshibala Debee and Hemendro Nath Mookhopadhya.

The defendant Nundo Lall Sen did not appear on the appeal.

The *Advocate-General*.—The service of the Judge's perwanna alone is sufficient. The Sheriff's return, coupled with the evidence of the peon, sufficiently shows that, in fact, a copy of the application did in fact accompany the notice. Hemendro Nath was not examined to prove the contrary. The decision in the case of *Denonath Gangooly v. Nursing Proshad Dass* (14 B. L. R., 87), relied on by the lower Court, proceeds upon a mistaken view taken by the Court of the practice on the Original Side of the Court with regard to the service of notices of foreclosure. The learned *Advocate-General* said that he had an affidavit showing what the practice in this respect was, but he submitted that, at any rate, their Lordships would themselves, by inquiry of their

own officer, ascertain what really was the practice. Every presumption should be made in favour of the regularity of service—*Rez v. Inhabitants of Whiston* (4 Ad. & Ell., 607).

[314] Mr. *Stokoe* on the same side.—The provisions of the Regulation are directory only—*Maxwell's Interpretation of Statutes*, 330—342; *The Liverpool Borough Bank v. Turner* (2 De G. F. & J., 502); *Nowell v. Mayor of Worcester* (23 L. J., Exch., 139); *Read v. Croft* (6 Scott's Cases, 770). There is no earlier decision to be found than that of *Santee Ram Jana v. Modoo Mytee* (20 W. R., 363), to the effect that service of application is essential. In the case of *Denomath Gangooly v. Nursing Proshad Dass* (14 B. L. R., 87), the only authority referred to by MARKBY, J., is *Construction S. D. A.*, No. 644, which apparently has no bearing on the point. On this point the following cases and authorities were also cited: *Nawab Futeh Alee Khan v. Amatoon Hossein Begum* [S. D. A. (1858), 1775]; *Koonjoy Sutbhama v. Sheopursun Singh* [S. D. A. (1854), 281]; *Ashootosh Deb v. Goolzar Beebee* [S. D. A. (1854), 511]; *Construction S. D. A.*, No. 630; *Macpherson on Mortgages*, 174, 184, —6th ed., 212, 219; *Field's Regulations*, 376; *Mahesh Chandra Sen v. Tarini* (1 B. L. R., F. B., 14); *Saligram Tewaree v. Beharee Misser* [W. R., (1864), 36], and *Eusuf Ali Khan v. Azumtoonissa*, [W. R. (1864), 49].

It has been held in cases of sales of *patni taluks* under Reg. VIII of 1819, that the provisions regarding service of notice of sale are directory only, and not imperative—*Sona Bebee v. Lall Chand Chowdhry* (9 W. R., 242); *Ram Sabuk Bose v. Kaminee Dossee* (14 B. L. R., 394); *Petambur Panda v. Damoodur Das* (24 W. R., 129); *Gouree Lall Singh v. Joodhisteen Hazra* (I. L. R., 1 Cal., 359). If the foreclosure proceedings are ineffectual, the mortgagees are, at any rate, entitled to possession subject to the mortgagors' right to redeem under the express terms of the mortgage deed—*Prannath Chowdhry v. Ram Rutton Roy* (4 W. R., P. C., 37; S.C., 8 Moore's I. A., 323); *Khelut Chunder Ghose v. Tarachurn Koondoo* (6 W. R., 269); *Denomath Gangooly v. Nursing Proshad Dass* (14 B. L. R., 87); and *Mankee Koer v. Sheikh Munnoo* (14 B. L. R., 315). The Court can give that relief in this suit on the frame of the present issues; see Act VIII of 1859, s. 141 *Hunooman Persaud Panday v. Musst. Babooee Munraj* [315] *Koonwaree* (6 Moore's I. A., 393, at p. 411); *S. M. Nistarini Dasi v. Makhan Lall Dutt* (9 B. L. R., 11 at p. 29); *Arbuthnot v. Betts* (6 B. L. R., 273); *Gopalnarain Mozoomdur v. Muddomutt Gupta* (14 B. L. R., 21, at p. 43), and *Gobind Chunder Mookerjee v. Dorgapersad Baboo* (14 B. L. R., 337).

Baboo Nil Madhab Bose for the respondents *Shoroshibala Debee* and *Hemendro Nath Mookhopadhya*.—The mortgagor was entitled, under the Regulation, to be furnished with a copy of the Judge's *perwanna*, together with the notice of foreclosure. The evidence did not prove that this was sent. The procedure under s. 8 of the Regulation is not merely directory, but has to be carried out as a condition precedent to foreclosure—*Construction S. D. A.*, No. 644; *Ibid.* No. 630; *Macpherson on Mortgages*, 172—6th ed., 210; *Santee Ram Jana v. Modoo Mytee* (20 W. R., 363); *Denomath Gangooly v. Nursing Proshad Dass* (14 B. L. R., 87). On the evidence, the Court cannot presume that the copy of the application was served. The plaintiffs are not legal representatives of *Govind Chunder Sen* within the meaning of the Regulation. The Bank not having itself foreclosed as against *Shoroshibala Debee* and *Hemendro Nath Mookhopadhya*, cannot take advantage of the foreclosure of *Nundo Lall Sen*—*Sarasibala Debi v. Nanda Lall Sen* (5 B. L. R., 389).

Mr. *Stokoe* in reply.

Our. adv. vult.

The following **Judgments** were delivered :—

Kemp, J. (after stating the facts and the finding of the Judge, continued):—The main point argued before us for the Bank, the plaintiffs appellants, was whether there had been a legal service upon the defendants. Section 8, Reg. XVII of 1806, provides, "that whenever the receiver or holder of a deed of mortgage and conditional sale may be desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall, after demanding payment from the borrower, or his [316] representative, apply for that purpose by a written petition, to be presented by himself, or by one of the authorized vakeels of the Court, to the Judge of the zilla or city in which the mortgaged land or other property may be situated; and that the Judge, on receiving such application, shall cause the mortgagor or his legal representative to be furnished, as soon as possible, with a copy of it, and shall at the same time notify to him, by a perwanna under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive." Now in this case notice of foreclosure was sent by the Officiating Judge of Chittagong to the High Court on the Original Side on the 14th of February 1871. It is also clear that a copy of the applicant's petition for foreclosure was forwarded with that notice. The notice was entrusted to a peon, by name Kishto Roy, for service. He made the following return: "The within-mentioned defendants could not be found. On Saturday, the 25th of February 1871, I affixed a copy of the notice on the outer door of the house No. 11, Rutton Sircar's Garden Street, Jorasanko, the dwelling-house of the defendants." The return of the Sheriff was to the following effect: "I do hereby certify and return that I have made diligent search after the within-named Sreemutty Shoroshibala Debee and Hemendro Nath Mookerjee, but they are not, nor is either of them, found. I did, therefore, on Saturday, the 25th day of February instant, affix copies of the written notice on the outer door of the house No. 11, Rutton Sircar's Garden Street, in Calcutta, where the said Sreemutty Shoroshibala Debee and Hemendro Nath Mookerjee are residing. Dated this 28th day of February 1871." Therefore, from the returns of the peada and the Sheriff it is clear that no copy of the application of the mortgagee was furnished to the mortgagors. (After reading the evidence of the peon Kishto Roy, his Lordship continued):—This return of the peon and the Sheriff's answer, taken with the peon's evidence, in my opinion, establish the fact that the notice was served on the mortgagors Shoroshibala and Hemendro Nath.

[317] We have then to consider a further question, —namely, whether the absence of the service of a copy of the written application for foreclosure is fatal to the plaintiff's claim to foreclose. It was contended by the learned counsel for the appellant, that the Court must presume that the peon did his duty; and that as the notice which was sent down by the Zilla Judge shows that a copy of the application accompanied that notice, the Court must presume that the peada did his duty, and that the mortgagors were also furnished with a copy of the application to foreclose. It was further contended that the words of s. 8, so far as they relate to the duty of the Judge to furnish the mortgagors with a copy of the application for foreclosure, are directory and not mandatory; and that the Court must, therefore, presume that a copy of the application to foreclose was duly furnished to the mortgagors.

On the other hand, it was contended by the pleaders for the respondent that the present objection is not a technical one; and that it has been uniformly

held, both by the Sudder Court and this Court, that the procedure laid down in s. 8, Reg. XVII of 1806, must be strictly followed. The pleader also referred to the decisions in the cases of *Denonath Gangooly v. Nursing Proshad Das* (14 B. L. R., 87) and *Santee Ram Jana v. Modoo Mytee* (20 W. R., 363), where MARKBY, J., in a case in which singularly enough the same peada, Kishto Roy, was entrusted with the service of the process, held that the procedure according to the Regulation not having been strictly followed, the foreclosure could not be declared. I am clearly of opinion that it is absolutely necessary that the mortgagor should be furnished with a copy of the written application of the mortgagee to foreclose, for the Regulation enacts that a party who is desirous of foreclosing a mortgage shall apply to the Zilla or City Judge, and that the Judge, on receiving such application, shall cause the mortgagor or his legal representative to be furnished, as soon as possible, with a copy of it, that is of the application, and shall at the same time notify to him, the mortgagor, by perwanna under his seal and official signature, that if he shall not redeem [318] the property mortgaged in the manner provided for by s. 7 within one year from the date of the notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive. Now there may be a case in which there is more than one mortgage: and, therefore, it is very necessary that the mortgagor should be informed of the nature, and contents of the written application made by the mortgagee; and the Regulation enacts that a mortgagee who is desirous of foreclosing a mortgage must carry out the requirements of the law. Further, it is also necessary that the mortgagor should be precisely informed as to the property or properties respecting which the mortgagee is desirous to foreclose. It is argued that, inasmuch as in the Court below, the written statements of the principal defendants Shoroshibala and Hemendro Nath did not so much question the fact of a copy of the application having been furnished to them, as it did the fact of the service on them of the notice of foreclosure, if we can find that the notice was served, we ought, in the absence of any objection on the other side, either in the Court below or, as disclosed in the written statement, to hold that simple service of the notice, even if not accompanied by a copy of the application for foreclosure, is sufficient to meet the requirements of the law. Now it is true that the fifth issue raised in the Court below was, Has notice of foreclosure been served on the defendants in this suit? and if the case had been tried on that issue alone, it might be that we should have come to a different decision as to the sufficiency of the service. But it is very clear that, at the hearing of the suit, both parties went to trial on a modified issue. The plaintiff accepted the modification of the issue originally drawn, and both parties argued in the Court below with reference to the question whether it was necessary that a copy of the application for foreclosure should accompany the notice, and whether in fact such copy of the application did accompany the notice, and was furnished to the mortgagors. It was the duty of the plaintiffs, having accepted this modification of the issue, to prove that the mortgagors were furnished with a copy of this application. No interrogatories were sent down to the peon who served the notice as to whether a copy of the application accompanied the notice, and was made [319] over by him to the mortgagors. The plaintiffs never attempted to prove that a copy of the application either accompanied the notice, or was furnished to the mortgagors. We hold that it is absolutely necessary that a copy of the application should be furnished to the mortgagors; and as it is clear that such copy was not furnished, we must hold in this case that the claim of the plaintiffs to foreclose as against Hemendro Nath and Shoroshibala must fail; and we agree with the Judge on that part of the case.

Then it is contended that, at all events, this Court ought to declare that the plaintiffs are entitled to possession as against Hemendro Nath and Shoroshibala, subject to the plaintiffs accounting for the usufruct, and leaving to the defendants the right of redemption. With reference to this contention, we find that this was not the prayer of the plaintiffs in the Court below, nor was any such relief sought for in the plaint. We, therefore, cannot pass any order with regard to the question of possession.

It was further argued that, as against Nundo Lall Sen, who has not appeared in this Court, the plaintiffs are, at all events, entitled to a decree: and that the Court below was wrong in making the plaintiffs pay the costs of Nundo Lall Sen. We think, with reference to the judgment of the late Chief Justice Sir RICHARD COYNE (see 11 B. L. R., 311, note), that foreclosure should be declared as against Nundo Lall Sen, subject to the decree for reconveyance on repayment, which was made by this Court on appeal from the decision of MACPHERSON, J., on the 12th of May 1873, as therein directed. We do not think it right to award any costs as against Nundo Lall Sen.

The appeal of the plaintiffs is dismissed with costs.

Ainslie, J.—The first question in this case is whether service of a copy of the application for foreclosure, together with the notice required by s. 8 of Reg. XVII of 1806, is absolutely essential. It was held by MARKBY and BIRCH, JJ., in *Santee [320] Ram Jana v. Modoo Mytee* (20 W. R., 363), that it was a condition precedent; and by MARKBY and MITTER, JJ., in *Denonath Gangooly v. Nursing Proshad Dass* (14 B. L. R., 87), that it was absolutely necessary. It has been said in the latter case, the language used by MARKBY, J., shows that he did not then go quite so far as he did in the first case. He said that, "if it be necessary to establish the service of a copy of the application, it has not been done." From this the inference is drawn that there was some doubt in the mind of the learned Judge on the subject. It seems to me that this was not so, for if the preceding passage of the judgment be read with the penultimate passage, it is perfectly clear that he lays down that, without service of a copy of the application for foreclosure, there can be no foreclosure, and the same is broadly stated by Mr. Justice MITTER. The form of expression referred to probably resulted from the fact that, in that particular suit, it was necessary to dismiss the plaintiff's claim apart altogether from the question of due service of notice.

It has been argued that Reg. XVII of 1806 is a Regulation in relief of a mortgagor, whose title, but for the Regulation, is absolutely at an end by the contract on the expiry of the time limited in the contract: and that the order prescribing service of a copy of the application is directory merely, and not essential for the purpose of the Regulation, such purpose being simply to give due warning to the borrower that the lender intends to enforce his rights.

Under Reg. I of 1798 conditional sales were, undoubtedly, considered as binding contracts to be enforced according to their terms. But it seems to me that Reg. XVII of 1806, by barring the operation of the contract until the application for foreclosure, and for a year thereafter, has in effect changed their character—instead of being sales subject to a limited right of redemption, they have become contracts of security subject to be converted into absolute sales. This being now the nature of the transaction, we can only look upon foreclosure as a means of summarily terminating the rights of the mortgagors. It is, therefore, necessary for the Courts to hold that no part of the formalities [321] prescribed by the Regulation is unessential. Two cases under the *Patni*

Regulation VIII of 1819 have been cited,—one, the case of *Ramsabuk Bose v. Kaminee Dossee* (14 B. L. R., 394), and the other, *Gouree Lall Singh v. Fodhisteer Hazra* (I. L. R., 1 Cal., 359), as being analogous to the present case. It seems to me that neither of those cases are in point. In the first case, which was before the Judicial Committee of the Privy Council, it was held that inasmuch as actual service of the notice had been proved, actual service could not be defeated by a defect in the form of the return. And the second case rather went upon the particular words of the 14th section of the Regulation, and the sale there was held good, although it was admitted that the law had not been strictly complied with; because it was said that there were no circumstances of prejudice, and that it was necessary for the purpose of setting aside the sale that, to use the language of the law, a "sufficient plea" should be made out; the Court held that the plea set forth was not sufficient.

The second point to be considered is, whether the notice was actually served, and if so, whether it was accompanied by a copy of the application for foreclosure.

(The learned Judge, after discussing the evidence, and finding it sufficient to prove the service of the notice, but not of the copy of the application for foreclosure, proceeded:)

We are, therefore, thrown back on the recital in the notice issued from the Judge's Court, that a copy of the application accompanied it, as the sole evidence in the case to establish the delivery of a copy of the application required by the Regulation; and it has been strongly contended that we ought to presume that everything that Court ought to have done was done.

In the case of *Denonath (Gangooly v. Nursing Proshad Dass* (14 B. L. R., 87) MARKBY, J., distinctly refused to recognize this argument. It is said that he based his judgment on the practice of the Original Side of this Court; but that in respect of mofussil processes, the practice till recently was not to mention a copy of the application for foreclosure either in the Judge's order directing service, or in [322] the Sheriff's answer to it. It may be that the practice was as stated. But even if so, I think we ought not to rest the whole case of the plaintiffs on this presumption; foreclosure being an act which puts an end to the right of the mortgagor, it must be carried out strictly in accordance with the Regulation. It rests upon such notice as the law requires to be given, and it is eminently the duty of the mortgagee to see that everything is done in conformity with the law, and to secure proper and sufficient evidence to show that the notice has been served in due compliance with the requirements of the law, in case he should be forced to come into Court to obtain a decree for possession in order to give full effect to the foreclosure. If this has not been done, he alone is to blame for it, and must take the consequences.

It is further said that, although the plaintiff may not be entitled to foreclosure in this case, he is entitled as mortgagee to an order for immediate possession subject to accounting to the mortgagor. In the case of *Sarasibala Debi v. Nanda Lall Sen* (5 B. L. R., 389), a similar application was made, but the Court then declined to order possession to be given to the mortgagee on the ground that it was a distinct cause of action from that on which he had sued. It seems to me clear that we cannot in this suit make the order asked for from us. This is a suit brought on the allegation that a mortgage formerly subsisting had been terminated in consequence of the service of notice of foreclosure and the expiry of the year of grace. The plaintiff came into Court suing as actual owner of this property. What he now asks for is a right which can only be

exercised by one who is a mortgagee, and not the actual owner of the property. His position is altogether changed; that which gives a cause of action in one case does not necessarily do so in the other. I, therefore, think we ought to refuse the application. To prevent any difficulties hereafter in any further litigation which may take place in respect of this mortgage, I think that there should be a distinct declaration that Nundo Lal's interest in the property under mortgage to his father is foreclosed, subject of course to such [323] conditions as may be imposed on that foreclosure by the decree made in the suit of the plaintiff against him disposed of in this Court on the 12th of May 1873.

I, therefore, concur in the order made by my learned colleague.

Appeal dismissed.

NOTES.

[As to the imperative character of the formalities as to notice, see 14 Cal., 365 P. C.: 14 I. A. 30.]

[2 Cal. 323]

APPELLATE CIVIL.

The 14th September, 1876.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Ahmed Mahomed Patel.....Defendant

versus

Adjein Dooly and another.....Plaintiffs.*

Limitation—Act IX of 1871, sch. II, cl. 113 Specific performance—Trust—Laches.

In 1860 certain shares in a company then formed were allotted to S, on the understanding, as the plaintiffs alleged, that 120 of such shares should, on the amount thereof being paid to S, be transferred to, and registered in the books of the company in the names of the plaintiffs. In 1862 the plaintiffs completed the payment to S in respect of the shares, and during his lifetime received dividends in respect of the said shares. S died in 1870, leaving a will, probate of which was granted to the defendant as his executor. In a suit brought by the plaintiffs after demand of the shares from the defendant, and refusal by him to deliver them, to compel the defendant to transfer the shares to the plaintiffs and register the same in their names, the plaintiffs' case was that the shares had been held in trust for them, and that, consequently, their suit was not barred by lapse of time. *Held* that the transaction between S and the plaintiffs did not amount to "a trust for any specific purpose" within the meaning of s. 10 of the Limitation Act, or to a trust at all, but to an agreement of which the plaintiffs were entitled to specific performance; and the limitation applicable was that provided by cl. 113 of sch. II, Act IX 1871, and, therefore, the suit was not barred. Nor were the plaintiffs disentitled to relief by reason of any laches or delay in bringing the suit.

SUIT to obtain delivery of certain shares in the Rangoon Iron Bazaar Company. The plaintiffs stated that, in 1860, one [324] J. H. Fowler was possessed of certain immoveable property in Rangoon, known as the Rangoon Iron Bazaar, and he agreed with certain other persons to form a limited company to carry on the business of a bazaar, he himself to have one-fourth

* Regular Appeal, No. 170 of 1875, against a decree of C. J. Wilkinson, Esq., Recorder of Rangoon, dated the 11th of May 1875.

of the total number of shares. The second paragraph of the plaintiffs' written statement was as follows:— "That as the remaining three-fourths of the proposed company was to be mortgaged to the said J. H. Fowler, and as it was necessary to have seven persons to form the company, it was arranged to associate six persons only with J. H. Fowler in forming the company, each of the said persons holding a number of shares in trust for a number of persons, to whom, on the liquidation of the mortgage in favour of J. H. Fowler, and on payment by them of the value of their shares, the shares would be transferred and registered in their names." The company was started with the issue of 4,000 shares of Rs. 25 each, of which one Ebrahim Ismailjee Seedat took 1,000. The plaintiffs further alleged that the interest of the said Ebrahim Ismailjee Seedat in the 1,000 shares taken by him did not exceed 160 shares, the rest being held by him in trust, among others, for the plaintiffs, for whom he held 120 shares, which it was agreed should remain in his name until the full value of them should be paid to him by the plaintiffs and until the mortgage to J. H. Fowler should be liquidated, when the 120 shares would be transferred to the plaintiffs and registered in their names; that the plaintiffs, partly in 1861, and partly in 1862, duly paid the said Ebrahim Ismailjee Seedat for the said shares, and the mortgage to J. H. Fowler had been paid off: but the said Ebrahim Ismailjee Seedat did not transfer the said shares to them; that the plaintiffs had sometimes received from Seedat dividends on the said shares; that Seedat died in June 1870, leaving a will, probate of which was shortly afterwards granted to the defendant as the executor named in the said will; that the plaintiffs, accordingly, after making a demand for the said shares, brought this suit to compel the defendant, as the representative of the estate of Seedat, to transfer to them the said 120 shares, and to have the said shares registered in the plaintiffs' names in the books of the company. They also sued for Rs. 435 as their shares of the [323] dividends on the shares, which had been recovered by the defendant in a suit brought by him against the company. The plaint was filed on the 11th December 1874. The defence was that the shares were a portion of the estate of the said Seedat; that he had not held them in trust for the plaintiffs or other persons, but for himself; and that the plaintiffs were not entitled to any portion of the said shares or the dividends thereon. At the trial an objection was raised, that the suit was barred by limitation. The Recorder of Rangoon, Mr. Wilkinson, found that the plaintiffs' case was made out, and held with reference to an issue as to limitation taken at the trial, that the defendant held the shares as a trustee for the plaintiffs, and that the suit was not barred by limitation. He, accordingly, gave a decree for the plaintiffs. The defendant appealed from his decision to the High Court.

The grounds of appeal were that the shares were not held by the defendant in trust for the plaintiffs; that the claim was barred by limitation; and that even if it was not barred by limitation, the plaintiffs, by their laches, had disentitled themselves to any relief.

Mr. Ingram for the Appellant.

Mr. Evans and *Mr. Sheill* for the Respondents.

The Judgment of the Court was delivered by

Garth, C.J. (who, after finding on the facts in favour of the plaintiffs, continued):—It is now further contended that, assuming the plaintiffs are entitled to the shares, their present claim is barred by limitation. The

plaintiffs (no doubt foreseeing this difficulty) have attempted to guard against it in their pleadings by stating that the shares were held for them by Seedat in trust; and we observe that the learned Recorder has so dealt with the case, and has considered that, upon this ground, the suit is not barred by limitation.

We feel great difficulty in adopting this view; and even if we could look at the transaction in the light of a trust, we do not see that there would be any answer to the plea of limitation.

[326] If the facts proved by the plaintiffs gave rise to any trust, it would clearly not be "an express trust," or, in other words, "a trust for any specific purpose," within the meaning of s. 10 of the Limitation Act. It could only be one of those implied trusts, which result from particular relations existing between parties not created for any specific purpose, or by any express declaration of, or conveyance to, the persons who undertake the trust—see the notes to s. 2 of Act XIV of 1859, and authorities there cited (Thomson on Limitation, 1st ed., pp. 233—237).

The transaction in this case as described by the plaintiff himself in his evidence is simply a contract, and nothing more. It was agreed, he says, between Seedat and the plaintiffs, that the plaintiffs should take 120 of the 1,000 shares, which were allotted to Seedat; and that when the plaintiffs paid for those shares, Seedat should transfer them into the plaintiff's names. The plaintiffs then paid Seedat for the shares within a reasonable time, and Seedat was bound to transfer them, and the breach of his agreement to do so would clearly have been good ground for an action for damages in England in a Court of law.

But the plaintiffs had another remedy against Seedat, and that is the one which they seek to enforce in this suit,—viz., to compel him specifically to perform his contract by transferring the shares, and there is no difficulty in the plaintiffs' way as regards limitation, because by clause 113 of the 2nd schedule of the Limitation Act, the three years' limitation does not begin to run till "the plaintiff has notice that his right is denied."

The plaintiffs' right in this case, so far as appears, never was denied until immediately before the suit was brought. Indeed, so far as Seedat was concerned, he constantly and invariably admitted it; so that the Statute of Limitation is really no bar.

But then the defendant says, that, in order to entitle the plaintiffs to a specific performance of this contract, they should, according to a well-known rule in equity, have come to the Court as early as they reasonably could. But this is one of that well-known class of cases where one party to a contract [327] has been allowed for years by the other party to enjoy all the beneficial interest which the contract could confer, but without being clothed with the title which would perfect his legal rights—as for instance, where a lessee under an agreement for a lease has enjoyed the property for years, as completely as if the lease had actually been granted. Under the circumstances if the intended lessor were to refuse the tenant his lease, or any of the benefits which he had a right to enjoy under it, the tenant might always come into a Court of equity, and compel the landlord to grant the lease. [See per Lord REDESDALE in *Crofton v. Ormsby* (2 Sch. & Lef., 583, at p. 604), *Clarke v. Moore* (1 Jon. & Lat., 723), *Ridgway v. Wharton* (6 H. L. C., 238, at p. 292), per Lord ST. LEONARDS, and other cases, cited in *Fry on Specific Performance of Contracts*, 322.]

In the same way here, the plaintiffs have, from the time when they paid for these shares, enjoyed the beneficial interest in them; and they never had occasion to insist upon their legal title to the shares being completed by transfer, until their title to them was denied by the defendant.

We, therefore, consider that, in the result the decision of the learned Recorder was perfectly just, and we, accordingly, dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[See *Chinnatambi v. Channana Gounder*, (1896) 19 Mad. 391.]

[2 Cal. 327]

PRIVY COUNCIL.

The 24th, 25th and 28th November, 1876.

PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH
AND SIR R. P. COLLIER.

Abidunnessa Khatoon.....Defendant

versus

Amirunnessa Khatoon.....Plaintiff.

[*On Appeal from the High Court of Judicature at Fort William in Bengal.*]

[41 A. 66]

Res-judicata — *Execution proceedings—Act VIII of 1859, ss. 102, 103, and 208—Act XXIII of 1861, s. 11.*

The question which, under s. 11, Act XXIII of 1861, may be determined by a Court executing a decree, must be between parties to the suit in which the decree was passed, and must relate to the execution of the decree.

[328] A person who was not on the record when the decree was made, does not constitute himself a party to the suit by applying for execution, and a question as to his legitimacy is, consequently, not one which the Court executing the decree is competent to entertain. A declaration by a Court in execution proceedings, that a person not a party to the suit applying for execution is legitimate, since it is made without jurisdiction, cannot, under s. 2, Act VIII of 1859, be pleaded as a bar to a regular suit in which it is sought to establish the illegitimacy of the applicant.

Sections 102 and 103 of Act VIII of 1859 relate only to proceedings prior to decree, and not to proceedings in execution.

Section 208 of the same Act does not apply where the person seeking to execute is not a transferee from the original decree-holder either by assignment or operation of law. The section does not apply to cases where the right to an equitable interest in a decree is seriously contested; and was not intended to enable a Court to try, on an application for execution, such an important question as the legitimacy of an heir.

Since proceedings under s. 208, Act VIII of 1859, are, by s. 364 of the Act, not liable to appeal, a suit would, probably, lie to reverse an order passed therein.

* [Confirming 20 W. R. 306.]

THIS appeal was preferred from a decision of a Division Bench of the Calcutta High Court, COUCH, C.J., and GLOVER, J. (20 W. R., 305), dated the 26th July 1873, affirming a decision of the Subordinate Judge of Dacca, dated the 29th September 1871.

The suit was brought to set aside certain proceedings taken by the defendant Abidunnissa, in execution of a decree which she had obtained against the plaintiff Amirunnissa, and for a declaration that a child named Wajed Ali, who had in these proceedings been declared to be the posthumous son of Abidunnissa's husband Wahed Ali, was not, the son of Wahed Ali. The principal question for determination was, whether such a suit could be maintained. Both the lower Courts held that the suit might be maintained, and found as a fact that Wajed was not the son of Wahed.

The material facts of the case, and the nature of the previous proceedings out of which it arose, are fully set forth in their Lordships' judgment.

Mr. *Doyle*, who appeared for the appellant Abidunnissa, contended that the question as to Wajed Ali's legitimacy had been [329] tried and determined in the execution proceedings by a Court of competent jurisdiction, and could not, under the provisions of s. 2, Act VIII of 1859, be reopened in the present suit. He cited the following cases: *Soorjomonee Dayce v. Suddanund Mohapatte* (12 B. L. R., 304), *Chowdhry Wahed Ali v. Mussamut Jumae* (11 B. L. R., 149), *Aga Syed Abdool Hoosain v. Icnaine and Snadden* (13 Moore's I. A., 69), *Raghunundun Karm v. Sumessar Panday* (13 B. L. R., 489), and *Hurrolal Doss v. Soojamut Ali* (8 W. R., 197).

Mr. *Leith*, Q.C., and Mr. C.W. *Arathoon* for the Respondent were not called upon.

The Judgment of their Lordships was delivered by

Sir R. P. Collier.—The facts necessary to the understanding of the question which arises in this appeal may be thus shortly stated :

Wahed Ali brought a suit against his father Abdool Ali, to recover possession of a considerable quantity of landed property, and it may be enough for the present purpose to describe the subject of contention between them thus : The father had executed certain hibbanamahs in favour of his son, when that son was an infant : it was alleged on the part of the father that the son had, subsequently, executed certain ikrarnamahs, whereby he divested himself of the benefit which he derived under the previous hibbanamahs. The Court of First Instance dismissed the suit of the son, with the exception of that part which related to some property which he derived from his mother, and about which no question arose. Upon that, Wahed appealed to the High Court. Pending the appeal, Wahed died : and thereupon the High Court, as it appears to their Lordships under the powers given them by s. 103^a of Act VIII of 1859, substituted his widow Abidunnissa for Wahed for the purpose of prosecuting the appeal. The appeal was prosecuted : the High Court found the ikrarnamahs to have been invalid, and reversed the decision of the Court below. The Court observe

* [Sec. 103 :—If any dispute arise as to who is the legal representative of a deceased plaintiff, it shall be competent to the Court either to stay the suit until the fact has been duly determined in another suit, or to decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit.]

Proceeding in case of dispute as to who is the legal representative of a deceased plaintiff.

that, since [330] the death of Wahed, "disputes have arisen, and litigation is now pending, concerning his proper legal representative; and for the purpose of prosecuting this appeal we have admitted his widow Mussamut Abidunniassa Khatoon to be his legal representative." At the conclusion of the judgment they thus express themselves: "The decree of the Court below is reversed with costs. Confining ourselves to the matters in issue in the present suit, our decree will proceed on the basis of the validity of the three deeds of gift, and the invalidity of the later documents. We shall declare that Moulvi Wahed Ali was in his lifetime, and that those who are now by law his heirs and representatives are, entitled to a decree for setting aside the documents relied upon by the respondents, and for the recovery of the property sued for." It is to be observed that the decree drawn up in pursuance of this judgment does not conform to that portion of the judgment in which it is said that the representatives of Wahed are entitled to a decree for the recovery of the property sued for. The decree is in these terms:—"It is declared that the several ikrar-namahs and miras pottahs, dated respectively the 29th Falgoun 1259, 16th Aughran 1263, 6th Jeyt 1264, and the 15th Aughran 1263, were of no effect and void against Moulvi Wahed Ali in his lifetime, and are void against his lawful representatives. And it is further ordered and decreed that the defendants, respondents, who appeared in this appeal, do pay to the plaintiffs, appellants, the sum of Rs. 3,000." So, in fact, all that could be executed under this decree is the order for costs, the rest of the decree being declaratory only.

It has been argued, however, that the decree ought to be taken to be in conformity with the judgment. Their Lordships are by no means satisfied that this decree *improvide emanavit*. If it were necessary, they would be disposed to take it as it stands, and to declare that the rights of the parties were determined by it. But, in the view which they take of the case, it is not necessary to decide this point; and it may be assumed for argument's sake that the decree is in conformity with the latter words of the judgment which have been read.

An appeal was preferred from this judgment to Her Majesty [331] in Council, and in 1875 the judgment was reversed (see 15 B. L. R., 67; s.c., L. R., 2 In. App., 87). In the meantime, however, pending the appeal, certain execution proceedings were taken. The widow Abidunniassa applied for execution on behalf of herself, and also, in a different character, as guardian of an infant son, Wajed Ali, whom she alleged to have been born to her husband after her husband's death. The legitimacy of this child was disputed by Abdool Ali. Certain other parties also applied for execution, Messrs. Wise and Dunne; but, as nothing appears to turn on the proceedings taken by them, no further mention will be made of them.

The Judge of Dacca, before whom the case originally came, appears to have held that he had no jurisdiction in a mere execution proceeding to determine such a question as the legitimacy or the illegitimacy of Wajed Ali, the son whom the widow had put forward as being legitimately born to Wahed. Unfortunately, we have not the original judgment of the Judge of Dacca before us. But we come to the conclusion that the Judge so decided, from the first order of the High Court on remand, and what proceeded from the Judge upon the remand. The High Court, in remanding the case, made these observations: "The lower Court has assigned no good reason whatever for not entertaining and disposing of the application for execution made in this case. Under ss. 102 and 103, and s. 208 of Act VIII of 1859, the case may, so far as anything

has been shown to us to the contrary, be perfectly well disposed of without a separate regular suit." And thereupon they remanded the case to be disposed of by the Judge of Dacca, and directed him to determine the question of the legitimacy of Wajed Ali. After a second remand, this question was heard and decided by the Judge of Dacca, and decided against the widow, the Judge holding that Wajed Ali was supposititious. Subsequently, on appeal, the same matter came before the Court; and two Judges of the High Court reversed the judgment of the Judge of Dacca, and held that Wajed Ali was the legitimate son of Wahed. They refer to the proceedings in this manner: They state: "The question that is now before us is, [332] whether the person who goes by the name of Wajed Ali is or is not a posthumous son of the said Wahed Ali; and whether, therefore, one Abidunnissa, who is admittedly the guardian of Wajed Ali, if there is such a person in reality, is entitled to execute the said decree partly in her own right and partly as mother and guardian of the said Wajed Ali,"—and they decree,—"that Abidunnissa be declared entitled to execute the whole of her decree against the judgment-debtor before us,"—that is, in her two capacities, partly for herself and partly in her new capacity of guardian of Wajed Ali. It appears to their Lordships, that she, in her character of guardian of Wajed Ali, became a new party in these proceedings, just to the same extent that Wajed Ali would have become himself, if, after he had come of age, he had appeared by his attorney.

Upon this, Abdool Ali having died, his widow Amirunnissa instituted the present suit for the purpose of setting aside the last judgment which has been referred to mainly upon two grounds: in the first place, that in an execution proceeding it was not competent to the Court to entertain such a question as the legitimacy of Wajed; and secondly, upon the merits. On the other hand, Abidunnissa contends that the suit is not maintainable, because the very question has been decided between the same parties in a previous suit by a Court of competent jurisdiction. In other words, she pleads *res judicata*, and she also joins issue upon the merits.

As far as the merits are concerned, both Courts have found that Wajed was not the son of Wahed; and the sole question before their Lordships is this, whether this question is *res judicata* or not. There is no doubt that, in the execution proceeding which has been referred to, the very same issue was tried between the same parties. The sole question is, whether the Court had jurisdiction in such a proceeding to try it.

Some attempt was made to establish that Abdool had originally consented to the exercise of this jurisdiction, but their Lordships cannot assume this. The inference appears to them the other way. They have not the record of the first proceeding before the Judge of Dacca; but the Judge of Dacca decided that he had not jurisdiction to determine the question in that [333] suit. It appears to their Lordships that it ought not to be assumed that he would have come to that conclusion unless the objection had been raised; the assumption would be the other way. They cannot, therefore, assume consent even if consent would have given jurisdiction in such a case.

The question, whether the jurisdiction existed or not, depends entirely upon the construction of certain sections in two Acts which have been referred to; the first being Act VIII of 1859, and the second, Act XXIII of 1861. The sections of the first Act relied upon by the Court in their first remand, are ss. 102, 103, and 208. The first sections, 102 and 103, relate to the substitution, in the case of the death of a sole plaintiff or surviving plaintiff, of a legal representative of such plaintiff. The 102nd section refers to cases where there is

no dispute. Section 103 is the section which, as before observed, was acted upon in this case, when Abidunnissa was allowed to prosecute the suit, and is to this effect: "If any dispute arise as to who is the legal representative of a deceased plaintiff, it shall be competent to the Court either to stay the suit until the fact has been determined in another suit, or to decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit." Under the terms of this section, it not being decided by the Court that Abidunnissa was the legal representative of her husband, she was admitted "for the purpose of prosecuting the suit"; those being the very words used by the Court in their judgment. This section manifestly cannot apply to the case of Wajed, because this section, which comes under the heading of "proceeding before judgment", has reference only to a state of things existing before the hearing of the suit; or at the hearing of the suit; and before and at the hearing of the suit there was no suggestion whatever that Wajed had any interest whatever in it.

Then we come to s. 208, which, undoubtedly, is a section relating to proceedings for execution, and after judgment and decree. It is to this effect:—"If a decree shall be transferred by assignment or by operation of law from the original decree-holder to any other person, application for the execution of the decree may be made by the person to whom it shall [334] have been so transferred, or his pleader; and if the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder." It appears to their Lordships, in the first place, that, assuming Wajed to have the interest asserted, the decree was not, in the terms of this section, transferred to him, either by assignment, which is not pretended, or by operation of law, from the original decree-holder. No incident had occurred on which the law could operate to transfer any estate from his mother to him. There had been no death; there had been no devolution; there had been no succession. His mother retained what right she had; that right was not transferred to him: if he had a right, it was derived from his father; it appears to their Lordships, therefore, that he is not a transferee of a decree within the terms of this section.

Their Lordships have further to observe that they agree with the Chief Justice in the view which he expressed, --that this was not a section intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree. It was not intended to enable them to try an important question, such as the legitimacy or illegitimacy of an heir. They are further fortified in this view by the consideration that, under s. 364 of this Act, no appeal would lie from any judgment or decision given in a proceeding under s. 208; it appears difficult to suppose that such an important question as this should be triable without appeal. Therefore, in their Lordships' view, agreeing with that of the Chief Justice, s. 208 does not apply. Even if it did apply, it would appear to their Lordships that, inasmuch as proceedings under it are not subject to appeal, probably a suit would lie for the purpose of reversing an order made in pursuance of it.

Act VIII then being disposed of, we next come to the second Act, Act XXIII of 1861. The sole section relied upon has been the 11th, which is in these terms: "All questions regarding the amount of any mesne profits which, by the terms of the decree, may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit, between the [335] date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to

have been paid in discharge or satisfaction of the decree, or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing decree, and not by separate suits, and the order passed by the Court shall be open to appeal." Their Lordships quite accede to the view of the learned counsel for the appellant, that this section was intended to enable questions to be tried in execution cases which could not have been so tried before, and to provide, as might have been expected, an appeal from decisions in such trials; but the question narrows itself to this, whether the present case comes under these words: "Any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree." There must be two conditions to give the Court jurisdiction. The question must be between parties to the suit, and must relate to the execution of the decree.

Their Lordships are of opinion that it would be straining the words of this section beyond any legitimate construction which could be put upon them, to apply them to the present case. In their judgment, Wajed Ali, appearing by his mother (and, as before observed, it would have been the same thing if he had been of age and had appeared in the usual way by his attorney or mooktear), in no proper sense of the word was a party to this suit. No rights of Wajed Ali were determined or considered in the suit. He was not on the record when judgment was given, nor when the decree was made. He subsequently applied for execution of the decree; but it appears to their Lordships impossible to say that a person by merely applying for execution of the decree thereby constitutes himself a party to the suit. Their Lordships are, therefore, of opinion that this section does not apply.

Under these circumstances, their Lordships have come to the conclusion that the issue which has been referred to in the case was not *res judicata* by a competent Court in a competent proceeding: and for this reason they will humbly advise Her [336] Majesty to affirm the judgment of the High Court and to dismiss this appeal with costs.

Appeal dismissed.

Agents for the Appellant: Messrs. Lawford and Waterhouse.

Agent for the Respondent: Mr. T. L. Wilson.

NOTES.

[PARTY TO SUIT—RES JUDICATA—BAR OF S. 244, C. P. C., 1882—

1. An alleged transferee by merely applying for execution of the decree does not constitute himself a party to the suit:—(1878) 3 Cal. 371.

2. Even where the allegation is that the decree had been purchased *benami* and the party alleging herself to be the real purchaser was the applicant.—(1878) 3 Cal. 371.

3. When the question is whether the property in dispute belongs to the judgment-debtor or to his estate or not, and that question is raised in a proceeding in execution between parties to the suit or their representatives, it matters not on what grounds the objection is taken to the property being made the subject of execution and the question is one to be determined in execution and section 244 (C.P.C., 1882) bars a separate suit:—(1893) 17 Mad. 399.

See also (1890) 17 Cal. 711 F. B.

4. Where the claim set up was service vatandar, regular suit barred:—(1894) 19 Bom. 328.

5. When the plea of estoppel is available to a decree-holder, it is likewise available to the purchaser at the execution sale as his representative or as one claiming under him :— (1894) 18 Mad. 13.

6. Where all the conditions prescribed by section 13 of the Code of Civil Procedure are necessary to bar the trial in a subsequent suit of an issue adjudicated upon in a previous suit exist, the fact that in the first suit the defendant was an execution creditor and in the second he is a purchaser at the execution sale makes no difference as to the second suit being barred by *res judicata* :—(1894) 18 Mad. 13.

7. Order in execution of a decree, as to whether interest in decree passed by a deed :— (1878) 4 Cal. 209.]

[2 Cal. 336]

FULL BENCH.

The 11th December, 1876, and 22nd February, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE KEMP,
MR. JUSTICE MACPHERSON, MR. JUSTICE MARKBY, AND
MR. JUSTICE AINSLIE.

Dhonessur Koorer..... , ...Decree-holder

versus

Roy Gooder Sahoy.....Judgment-debtor.*

*Limitation Act (IX of 1871), sched II, art. 167--Application for
execution of decree—Suit.*

Per GARTH, C.J., and MARKBY and AINSLIE, JJ. (KEMP and MACPHERSON, JJ., dissenting).—The periods of limitation prescribed in sched. II of Act IX of 1871 are to be computed subject to the provisions contained in the body of the Act.

An application made on the 8th January 1875, to execute a decree, the last preceding application having been made on the 8th January 1872, was held to be within the time allowed by art. 167, sched. II, Act IX of 1871.

Per Curiam.—The word 'suit,' as used in the Act, does not include 'applications.'

ON the 8th January 1872, Dhonessur Koorer applied for execution of a decree against Roy Gooder Sahoy, but took no further steps in the matter till the 8th January 1875, when she made a fresh application to execute the decree. Both the lower Courts held that this application was barred by the Limitation Act. The decree-holder appealed to the High Court when, in consequence of the opinion expressed by JACKSON, J., in *Banee [337] Kant Ghose v. Haran Kisto Ghose* (24 W. R. 405) being in conflict with the opinion of McDONELL, J., in the same case, and with the opinion of BIRCH and McDONELL, JJ., in *Raya Pramotha Nath Roy Bahadoor v. Watson* (24 W. R. 303), KEMP and BIRCH, JJ., who heard the appeal, referred the following questions for the opinion of a Full Bench :—

1. Whether the periods of limitation prescribed in Act IX of 1871, sched. II, division 3, are to be computed subject to the provisions contained in the body of the Act ?

* Miscellaneous Special Appeal, No. 109 of 1876, against an order of E. Drummond, Esq., Judge of Zilla Sarun, dated the 11th February 1876, affirming an order of S. W. DaCosta, Esq., Subordinate Judge of that district, dated the 28th of May 1875.

2. If the provisions of the Act apply to sched. II, division 3, is the word 'suit' to be interpreted so as to comprehend 'applications' in execution of decree?

Baboo *Bhojrub Chunder Banerjee* (with him Baboo *Bama Churn Banerjee*) for the Appellant.—Section 13 of the Limitation Act provides that, "in computing the period of limitation prescribed for any suit, the day on which the right to sue accrued shall be excluded." It is submitted that an application for the execution of a decree is a suit within the meaning of that section. [AINSLIE, J.—This Court has ruled more than once that the word 'suit' in s. 1, cl. (a), does not include applications.] Yes, that must be admitted: see *Rohini Nundun Mitter v. Bhogoban Chunder Roy* (14 B. L. R., 144, note) and *Kughoo Nath Doss v. Shiromonee Pat Mohadebee* (24 W. R., 20): but in *Raja Promotho Nath Roy v. Watson* (24 W. R., 303), BIRCH and McDONKELL, J.J., following the decision in *Hurro Chunder Roy Chowdhry v. Sooradhonne Debia* (B. L. R., Sup. Vol., 985), held, that the word 'suit' in s. 14 of the Act does include applications for the execution of decrees. In the case last cited, PEACOCK, C.J., says, with respect to proceedings in execution "the word 'suit' does not necessarily mean an action. . . . Any proceeding in a Court of justice to enforce a demand is a 'suit'; and this view was adopted by STUART, C.J., in opposition to the rest of the Court, in the recent case of *Jwan Singh v. Sarnam Singh* (I. L. R., 1 All. 97). Wherever a proceeding is not strictly a proceeding to enforce a demand, special provision seems to have been made [338] for it. Thus s. 13 specially provides for certain applications, and s. 15, explanation 2, enacts that a plaintiff resisting an appeal presented, on the ground of want of jurisdiction, shall be deemed to be prosecuting a suit within the meaning of that section. The same larger sense appears to be attached to the word 'suit' in s. 7, which deals with the case of persons under legal disability. But, apart from the applicability of s. 13 to proceedings in execution, it is submitted that the appellant's application was made within the period allowed by art. 167 of the 2nd sched. The heading of the 3rd column, "time when period begins to run," is somewhat ambiguous; but the ambiguity is removed if for 'when' we read 'from which' or 'from when.' The corresponding expression in the body of the Act is 'from the time when'; see ss. 18, 19, 20, 21 and 25. Had the word 'from' been used, the day on which the preceding application was made must have been excluded—Act I of 1868, s. 3, cl. 2.* [GARTH, C.J.—Unless the day be excluded, time would begin to run before the decree was passed.] Yes, instead of three years there would be only three years minus one day, and supposing the time specified in the 3rd column had been one day, the applicant would, in fact, have had no time at all. The Privy Council have held, on general principles, that the six months allowed for appeals to Her Majesty in Council must be reckoned exclusive of the day on which the decree appealed from was pronounced—*In the matter of the Petition of Ramanooogra Naram* (13 W. R., P. C., 17).

Baboo *Kally Kissen Sein* for the Respondent.—The 2nd sched. of Act IX of 1871 provides periods of limitation for suits, appeals, and applications; and the heading of the 3rd column is the same, whether suits or applications are referred to. In the case of suits, however, s. 13 expressly enacts that the day on which the cause of action arose shall be excluded. This would be wholly unnecessary if the word 'when' in the heading of the third column is to be read as 'time from when.' Throughout the Act the distinction between 'suits,'

*[Sec. 3, Cl. 2:—For the purpose of excluding the first in a series of days or any other period of time, t shall be sufficient to use the word "from."]

'appeals,' and 'applications' is carefully marked, and [339] the limitation of the provisions of s. 13 with respect to suits *eo nomine* shows that the Legislature did not intend the section to have the wide application now contended for.

Baboo Bhoyrub Chunder Banerjee in reply.

Cur. adv. vult.

Garth, C.J.—The Judgment which I am about to pronounce is concurred in by MARKBY and AINSLIE, JJ.

1. We are of opinion that the periods of limitation prescribed in the 2nd sched. of the Act of 1871 are to be computed subject to the provisions contained in the body of the Act. The schedules form a part of the Act and must be read together with it for all purposes of construction.

2. We think that the word 'suits' in the Act of 1871 was not intended to include 'applications.' In the Act of 1859 the word might have had a more extended meaning; but in the Act of 1871 a distinction seems to have been carefully drawn between 'suits,' 'appeals,' and 'applications'; each of these subjects being separately dealt with, and in different divisions of the schedule.

3. It appears to us, however, that, in the special appeal which is the subject of this reference, the Courts below were wrong in refusing the application of the decree-holder upon the ground that she was barred by lapse of time. It was obviously the intention of the Act to give the decree-holder three years, and not less than three years, from the time of his former application, for the purpose of making a fresh one. And the only way of carrying out that intention, and putting a reasonable construction on the Act, is by excluding the day upon which the former application was made from the computation of the three years. It could hardly have been the intention of the Legislature that the three years' limitation should begin to run before the first application had been made: and yet this would be the necessary consequence of the construction which has been adopted by the Courts below.

[340] It is perfectly true that the provisions of s. 13 do appear to give some colour to that construction; and it is impossible to construe the words in question in either way without some apparent inconsistency; but by reading the phrase at the head of the schedule, 'time when the period begins to run' as meaning 'time from which the period begins to run,' we think we should be doing no real violence to the language of the Act, and that we should be, undoubtedly, carrying out the intention of the Legislature.

In our opinion, therefore, the application was made by the decree-holder in due time: the judgments of both the lower Courts should be reversed; and the case should be remitted to the Court of First Instance to be dealt with upon its merits.

The appellant will be entitled to his costs in this Court as well as in the Courts below.

Kemp, J. (MACPHERSON, J., *concurring*).—We agree in thinking that an 'application' is not a 'suit' within the meaning of the Limitation Act. But we are unable to say that we concur in the rest of the judgment just delivered. We think, nevertheless, that the result arrived at is probably in accordance with the real intention of the Legislature.

NOTES.

[This case was followed in *V. K. Gujav v. V. D. Barve*, (1878) 2 Bom., 673.]

[341] PRIVY COUNCIL.

The 28th, 29th and 30th November, 1876.

PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH AND
SIR R. P. COLLIER.

Konwar Doorganath Roy.....Plaintiff

versus

Ram Chunder Sen and others.....Defendants.

[*On Appeal from the High Court of Judicature at Fort William in Bengal,*]

[4 I. A. 52]

Hindu law—Endowment—Powers of Shebait—Alienation—

Notice to purchaser.

A plaintiff who seeks to set aside an alienation of lands on the ground that they are debutter, i.e., dedicated in perpetuity to support the worship of an idol, must give strong and clear evidence of the endowment. The mere fact that the rents of a particular mehal have been applied for a considerable period to the worship of an idol, is not sufficient proof that the mehal is debutter.

The *shebait*, or manager, of a debutter estate has authority where the purposes of the endowment require it, to raise money by alienating a part of the estate, his position being analogous to that of a manager of an infant heir under the Hindu law. The cases of *Hunoomanpersad Panday v. Mussamut Babooe Munraj Koonreree* (6 Moore's I. A., 393) and *Prosunno Kumari Debja v. Golab Chand Baboo* (14 B. L. R., 150; S. C., L. R., 2 Ind. Ap., 145) referred to and approved.

The written conveyance of certain lands stated them to be debutter, and to be alienated to raise money to repair the temple of the idol. In a suit to set aside the alienation, it appeared that, at the time of the transaction, the temple required repairs, but that the vendor had not applied the whole of the purchase-money to that purpose. There being no evidence of any collusion on the part of the purchaser, or that he was aware at the time of the purchase that the money was to be applied otherwise than the conveyance expressed, *held*, that the sale was valid.

Even if it had appeared that the purchaser had notice that the whole of the purchase-money was not required for the purposes of the endowment, but that part of it was to be expended on other objects, an action would not lie to set aside the sale altogether, since the purchaser would be entitled to be reimbursed so much of the money as had been legitimately advanced.

THIS was an appeal from two decrees of a Division Bench of the Calcutta High Court, dated the 21st April 1874, reversing a decree of the Officiating Subordinate Judge of Zillah Moorshedabad, dated the 6th January 1873.

[342] The suit in which these decrees were pronounced was brought by the appellant, Konwar Doorganath Roy, as plaintiff, to recover from the defendants, the respondents on the appeal, khas possession of a mehal, named Gopeejan or Goaljan, which the plaintiff contended was debutter, and belonged to him as shebait of an idol named Radha Mohun Thakoor, to whose worship it had been dedicated by his, the plaintiff's, ancestor, Rajah Mahanund Roy, but which he alleged had been unlawfully alienated by his grandmother, Rani Rashmoni, to the persons from whom the defendants derived their title.

Rajah Mahanund Roy, by whom the plaintiff alleged that the idol had been endowed, died in the year 1805, leaving three sons, Ram Krishna, Joy Krishna, and Bijoy Krishna, who became entitled on his death to succeed to his property in equal shares. Ram Krishna died without issue, leaving a widow, Rani Bhagiruthi, as his heir. On the death of Joy Krishna and his wife, without issue, his share passed to Bijoy Krishna, who thus became entitled to two-thirds of the property which had belonged to his father, Rajah Mahanund. Bijoy Krishna died in 1832, without issue. Shortly before his death he executed an anumati patra, whereby he gave his widow, Rani Rashmoni, a life estate in the whole of his property, with authority to adopt a son. In pursuance of this power, Rani Rashmoni adopted Konwar Krishna Chunder, who died without issue in 1843, leaving in his turn authority to his widow, Rani Prosunmoyi, to make an adoption. Konwar Doorganath Roy, the present appellant, was adopted by Prosunmoyi. Rani Rashmoni died in 1870 having retained, up to the time of her death, the possession and management of Bijoy Krishna's estate.

In the year 1834, proceedings were instituted against Rani Rashmoni by Rani Bhagiruthi, the widow of Ram Krishna, to recover her husband's one-third share of the lands, &c., which he had inherited from his father, of which Rashmoni had taken possession. A final order was passed in these proceedings in December 1841, by which it was, among other things, directed that Bhagiruthi should receive from Rashmoni 120 out of the 360 bighas of "the brammottar tarraf of Gopeejan."

Subsequently, in the year 1847, Rashmoni, on payment to [343] her of a sum of Rs. 1,900, executed a maurasi and mokurari patta of the remaining two-thirds share of Gopeejan, to two persons, named Ram Soondur Sen and Nimai Soondur Roy, at an annual rent of Rs. 325; and in the year 1849, by a deed of sale to one Soodha Krishna Sen, she permanently assigned over Rs. 300 annually out of the rent of Rs. 325 payable to her. The terms of these two instruments, in so far as they are material, will be found set forth hereafter in their Lordships' judgment.

In the year 1855, Rani Prosunmoyi, representing herself as acting as guardian of Konwar Doorganath Roy, and as shebait of the idol Radha Mohun Thakoor, sued to have the above mentioned instruments set aside; but it was held by the Sudder Court, affirming the decision of the Principal Sudder Ameen of Moorshedabad, that they could not be set aside while Rani Rashmoni lived.

The present suit was brought in 1871, after the death of Rani Rashmoni, with the object of having the instruments executed by her in favour of Ram Soondur Sen and Nimai Soondur Roy, and of Soodha Krishna Sen, set aside; and of recovering the Gopeejan mehal, less the 120 bighas taken by Rani Bhagiruthi, under the order passed in December 1841.

The defendants, who were the representatives in title of the alienees, raised various pleas. They objected that the plaintiff was not legally adopted; that the suit was barred by limitation; that the property was not in fact debutter; and that the alienations by Rashmoni had been made for just and necessary purposes. In the written statement of some of the defendants, the alienations were said to have been made in order to raise funds to pay the Government revenue of other mehals. By others of the defendants, they were said to have been made for that purpose, and to pay for "repairing the temples of the idols." The Subordinate Judge decided in favour of the plaintiff on all the issues, and gave him a decree for possession of the property claimed. Two

separate appeals against this decision, on behalf of different defendants, were heard together by the High Court, who were of opinion that the property had not been proved to be debutter, and held that the alienations were valid. Both [344] appeals were, accordingly, decreed against the plaintiff, who then brought the present appeal to Her Majesty in Council.

Mr. Leith, Q. C., and Mr. G. Williamson for the Appellant.

Mr. T. H. Cowie, Q. C., and Mr. Joseph Graham for the Respondents.

The following cases were cited in the course of the argument:—*Maharance Shibessourcee Debia v. Mothooranath Acharjo* (13 Moore's I. A., 270); *Juggut Mohinee Dossee v. Sookheemonee Dossee* (10 B. L. R., 19; s.c., 14 Moore's I. A., 289; 17 W. R., 41); *Prosunno Kumari Debya v. Golab Chand Baboo* (14 B. L. R., 450; s.c., 1. R., 2 Ind. Ap., 145); *Bragosondery Debya v. Raneec Lachmee Konwarce* (15 B. L. R., 176, note; s.c., 20 W. R., 95); *Hunooman Pershad Panday v. Mussamut Babooee Munraj Koonweree* (6 Moore's I. A., 398).

The facts of the case and the arguments relied on by the parties, fully appear in their Lordships' **Judgment**, which was delivered by

Sir M. E. Smith.—This is a suit brought by the appellant Konwar Doorganath Roy to set aside certain alienations of two-thirds of an ancestral mehal called Gopeejan, made by his grandmother Rani Rashmoni, on the ground that the mehal had been dedicated to the worship of an idol Radha Mohun Thakoor. The respondents are the successors of the original grantees, or persons deriving title from them. To show the position of Rashmoni at the time she made the alienations in question, and that she may have acted not merely as the widow and heiress of her deceased husband Roy Bijoy Krishna, an anumati-patra has been put in, which gave her, undoubtedly, special powers. The anumati-patra, or so much of it as is material is as follows:—"You are my wife. You have no children born to you. I am now very ill in body. I have no hope of life. On my death there will be no one to perform the ancestral deb-kirti (worship of the gods), &c., and offer the jalpinda (funeral cake and libations of water) of [345] my ancestors. For the observance of all these rites, and of the jalpinda to the ancestors, as well as the preservation of the zamindaris, lakhiraj, debutter, &c., I, in my sound mind, give you permission, on my death, to keep possession of my zamindaris, debutter, &c., recording your own name in the Collectorate sherishta, to remain in enjoyment of the profits, and to defray the expenses of the deb-kirti during your lifetime, and to adopt one or two sons born in the family of true Brahmans. On your death, that adopted son will succeed to all properties; and on the said adopted son attaining his majority, you will, if you should desire it, get his name recorded in the zamindari tahut, and surrender the entire management to him." And then there is this statement: "Now I am a debtor to mahajans (creditors). Some mehals of the zamindari are in mortgage on account of those debts. If there should be no other means of liquidating the debts, you will either sell a small portion of the zamindari or make conditional sale of it, as appears necessary, and liquidate the debts."

Now, undoubtedly, there is a reference to debutter property in this document, but this document itself creates no endowment; and it is necessary for the plaintiff to show *aliunde* that there was an existing endowment in favour of this particular idol to which the word debutter may be referred.

With regard to the position of Rashmoni under the anumati-patra, it would seem that she took a life interest in the properties, and that power was

given to her by it to adopt a son. It must, of course, be admitted that this document gave no authority to Rashmoni to alienate the estate ; but she had, as the manager of the estate, power, if it were debutter dedicated to the idol, to alienate so much of it as was necessary to keep up the temple and worship of the idol ; and if it were secular, to alienate it if it became necessary to do so to preserve the rest of the family estate.

That being her position, she made the two alienations in question. The first is a maurasi mokurari patta, which she granted to two persons, Nimai Soondur Roy and Ram Soondur Sen. This patta describes the estate thus : "Tarraf Wargopjan *alias* Goaljan," which is admitted to be the estate [346] Gopeejan, "the patrimonial debutter rent-free land of Bijoy Krishna Roy, my late husband, the boundaries of which are on the east of the Ganges," and so on, "is the debutter property of the Sri Sri Iswar Radha Mohun Thakoor of Raninuggur, which is in my possession and enjoyment as shebait of the idol." Then the grantor notices the fact that 120 bigas, or one-third of that mehal, had been decreed to Bhagiruthi Debi, the widow of one of her husband's brothers, Ram Krishna Roy. "With the exception of 120 bigas of mathan land decreed in the suit of Bhagiruthi Debi, widow of the late Ram Krishna Roy, the eldest brother of my late husband, the remaining lakhiraj lands," and so on. The document proceeds : "Now the temple of the Sri Sri Iswar being broken, and necessary repairs and various other things being requisite for the service of the idol, I have given you a settlement as a maurasi mokurari talook of the entire lakhiraj zamindari rights in the said mauza at a fixed jamma of Rs. 325, for a consideration of Co.'s Rs. 1,900, which I have received in cash and in full weight." That is the substance of the document.

The other document is executed by Rashmoni in favour of Soondur [Soodha ?] Krishna Sen, one of the family of one of the grantees of the mokurari. It is a bill of sale of the proprietary right to the extent of Rs. 300 of the mokurari rent, and it says : "Deducting the land of the said decree, the remainder is my own right," referring to the decree in favour of Bhagiruthi, "a maurasi and mokurari talook, representing the entire right in the lakhiraj zamindari, was given in settlement of Nimai Soondur Roy, inhabitant of Naharpara, and Ram Soondur Sen, inhabitant of Koridha, at an annual jamma of Rs. 325, exclusive of collection charges, on the 18th of Cheyt of the year 1254. They hold possession of the property as a maurasi and mokurari talook, and are paying the fixed jamma. I, agreeably to the instructions of my late husband, have commenced building the temples of Sri Sri Iswar Radha Mohun Thakoor Jeo, and others, but being in want of means, am unable to carry out the instructions of my husband. I have voluntarily, in my sound senses, sold to you for Co.'s Rs. 1,700 my own entire share of 14 annas, 15 gandas, 1 cowri, [347] 2 kags, out of 16 annas of the said maurasi mokurari mauza, the jamma of which is Rs. 300."

Mr. *Leith*, on the part of the appellant, undertook to satisfy their Lordships that this mehal of Gopeejan had been dedicated to the idol, and, therefore, it was incompetent for Rashmoni to make these alienations.

Now, apart from the admissions contained in the maurasi patta and the bill of sale themselves, their Lordships are clearly of opinion, in accordance with the view of the High Court, that the evidence fails to show that this land was so dedicated.

Mr. *Leith* opened his case by an endeavour to show a deed of foundation or endowment of the idol by the gift of this estate from Rajah Mahanund, who was the father of Rajah Bijoy Krishna, the husband of Rani Rashmoni.

It may be convenient to state here the position of the family so far as it is material to the present case. Rajah Mahanund, who, it is said, was the founder of this endowment, died in 1805 or 1806. He had a son Bijoy, who left a widow, Rashmoni, giving her the *anumati-patra*, to which reference has already been made. She, it appeared, lived until February, 1870. She exercised the power of adoption given to her by her husband, and adopted Krishna Chunder, who married Rani Prosunnomoyi Debi. He also had no son; and he also gave to his wife a power of adoption, which she exercised in favour of the appellant, Konwar Doorganath Roy. It appears that Rajah Bijoy had two brothers, and one of them married a lady of the name of Bhagiruthi Debi, who, in the year 1855, brought a suit against Rashmoni, and obtained the decree already mentioned, to recover one-third of the mehal of Gopeejan.

If the deed of endowment from Rajah Mahanund were satisfactorily proved, and it were an endowment which dedicated this mehal to the service and worship of a particular idol, then, though the idol were a family idol, the property would be impressed with a trust in favour of it. Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction. No question, however, of that kind arises in the present case.

[348] The proof of this deed of endowment, which is said to have been executed by the Rajah Mahanund, when it comes to be investigated, is of the most unsatisfactory description. First, the existence of such a deed at all is not clearly made out; and so far as the document, the *rubokari* of a former suit, is relied upon as showing its contents, the description there given is so obscure that it is impossible to say whether the whole of the mehal of Gopeejan was included in the supposed dedication or not.

(After going into the evidence in proof of the deed his Lordship continued)—

In that state of things their Lordships think it is very doubtful whether secondary evidence of the deed should be permitted at all; but if it be allowed, then they are to judge of the effect of the secondary evidence, and to determine in the first place whether it satisfies them that such a deed really existed at all. Now, from the circumstances which have been already pointed out, they are by no means satisfied that such a deed ever did exist. That a document of the kind was put forward by Bhattacharjya on behalf of Rashmoni in the creditor's suit is proved by the *rubokari*; but whether it was a genuine deed, or one put forward to meet the purposes of that suit, is left in doubt and obscurity.

But, assuming that a deed did exist, and that it was to the effect which is referred to in the *rubokari*, their Lordships find that the question what property was included in it is left in considerable obscurity. (His Lordship then went through the terms of the *rubokari* and continued).

Therefore, in addition to the insufficiency of the proof to satisfy their Lordships with reasonable certainty that such a document really existed, there is so much obscurity in the language that it is impossible to say that if it did exist it included the whole of this mehal.

If that document is out of the case, there is very slight evidence indeed of any such endowment. The case then rests, independently of the admissions in the deeds, upon the evidence of the dewan and muktear, and one or two other witnesses, that the rents of this mehal, Gopeejan, were applied to the worship of [349] this idol. But that evidence is extremely vague and extremely loose. The muktear says in several places, that the rents were applied to the worship of the idols, and it is plain from all the evidence in the case that there were several idols belonging to this family, and no doubt the rents of some of the family mehals were applied to sustain their temples and worship. But supposing it to be taken that the rents of this mehal were applied during the period that the witnesses speak of to the worship of the idol Radha Mohun, that fact is by no means sufficient to establish the *onus* which lies upon a party who sets up the case that property has been inalienably conferred upon an idol to sustain its worship. Very strong and clear evidence of such an endowment ought to exist. In the present case there is no proof that priests were appointed. If any had been appointed, they might have been called. There is no production of accounts showing that the rents were separately collected and applied for the worship of this idol. For anything that appears the rents may have gone into the general body of the accounts relating to the estates of this family, and there is really no document whatever upon which the finger can be placed to show that an endowment was made, other than that rubokari to which reference has already been made.

Besides the weakness of the proof of endowment on the part of the plaintiff strong presumptions that there was none arise from other facts and circumstances in the case. It is said that the application of the rents of this particular mehal for a certain period to this idol is some evidence that the family were aware that the rents were properly and by right so to be devoted; but if the conduct of the family is to be regarded, there is, on the other side, the strongest indication, from what occurred in the suit brought by Bhagiruthi, the widow of the eldest brother of Bijoy, that the family understood that there was no such endowment. That suit was brought by Bhagiruthi to recover from Rashmoni one-third of the mehal in question. She did not claim it as property to which she was entitled as joint shebait, but she claimed it as one-third of the family estate to which she, as widow of one of the brothers, was entitled. That is her claim. Rashmoni does not set up as a defence that the [350] mehal was debutter property devoted to this idol, that she was the shebait, and entitled, at all events, to the possession and the management of it; she sets up no case of that sort, but allows a decree to be passed against her in favour of Bhagiruthi to recover one-third of the mehal, and in that decree the property is described, not as debutter, but as brammottar property.

Now if this mehal had been really dedicated to the idol, it would no longer have been a partible estate. Rashmoni would, as shebait, have been entitled to the possession of it and to the management and disposition of the revenues; and all that Bhagiruthi could have been entitled to would have been a share in the surplus revenues, if there should have been a surplus, after due provision had been made for the worship of the idol.

Therefore, there is not only weakness of proof on the part of the plaintiff, but a very strong presumption, arising from the conduct of the parties in the suit in question, that this was not debutter property such as it is alleged to be on the part of the plaintiff.

Supposing the case had rested there, their Lordships feel no doubt whatever that the judgment of the High Court was perfectly right. But it does not rest there, and it now becomes material to consider the terms of the maurasi patta and of the bill of sale. Mr. *Leith*, in his reply, very properly relied on them as being the strength of his case. If they are to be used as evidence only, then this evidence must be weighed with all the other evidence in the case, and so weighing it, their Lordships are not satisfied that it turns the scale in favour of this property being debutter. But the statements in these deeds are relied upon by the plaintiff as an admission which estops the parties to them from asserting that these lands were not debutter. But if the statements are relied on in this way, they must be taken as a whole; and so taking them, it would appear that, granting the lands were debutter, the sale would be justifiable, the statement being that the sale was made for the purpose of the repair of the temple of the idol. The mokurari was granted, according to the statement, because the temple was out of repair, and money was wanted to restore it. The sale of part [351] of the mokurari rent was granted in consideration of money stated to be required for the completion of the temple, which it was stated was already in course of erection. If, therefore, the statements in these deeds are taken as a whole, the alienations they contain were justifiable, assuming the property to have been debutter land.

What, then, is the plaintiff's position? These deeds are thirty years old, and he comes into Court to set them aside upon the ground that they were collusive; and if he could have shown that the representation, although made, was not believed by the grantees, and that they colluded with Rashmoni to put a pretended consideration on the face of the deeds, he might have succeeded. But there is no evidence whatever of any such collusion. There is nothing to show that the original grantees did not believe the statements appearing upon the face of the deeds; indeed, if they had made inquiry, they would have found that the fact agreed with the statement, for it appears upon the evidence and upon the finding of the Subordinate Judge that the temples were out of repair. If, then, the temples were out of repair, and if Rashmoni offered this mokurari patta to raise money for the purpose of doing the repairs that the temple required, the purchaser, who *bond fide* took it upon that representation, would clearly be entitled to keep his purchase. It may be that Rashmoni did not intend to apply the money to the purpose for which she professed to require it. It may be that she always intended to apply it to the payment of the Government revenue, as it appears that in point of fact she did. But unless the purchaser was aware at the time he made the purchase that that was her intention, and that the statement in the deed was a colourable one, he could not be injured by her concealment of her true object, or by her having subsequently applied the money to a different purpose. She, as the manager of this estate, had the same right, or an analogous right to that of the manager of an infant heir; and that was defined in very plain language in the case of *Hunooman Persaud Pandag v. Mussamut Babooe Munraj Koonveree* (6 Moore's I. A., 393, see at p. 423): "The power of the manager for an infant [352] heir to charge an estate not his own is, under the Hindu law, a limited and a qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bond fide* lender is not affected by the precedent mismanagement of the estate; the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises, or

has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that with better management the estate might have been kept free from debt. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself, as much as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge; and they do not think that, under such circumstances, he is bound to see to the application of the money." That passage was adopted in a very late case before this board, *Prosunno Kumari Debbya v. Golab Chand Baboo* (14 B. L. R., 450, at p. 469; s.c., L. R., 2 In. App., 145, at p. 151). In that case a shebait had incurred debts, and mortgaged the property of the idol for the purpose of the necessary sustentation of the worship of the idol;—and this tribunal held that the position of the shebait was analogous to that of a manager of an infant, and that he had the same authority, which in both cases arises from the necessity of the case, to raise money for the benefit of the estate. Here it cannot be said the grant of a mokurari patta was an improvident way of raising money, if it were necessary to do it at all. It still left a rent for the [333] sustentation of the idol; and if the transaction be *bona fide*, the subsequent sale of a part of the rent was justified by the imperious necessity of finishing the temple which had been commenced.

On these grounds, therefore, their Lordships think that, assuming the purchasers to be bound by the representations in the deeds, there being no evidence that they did not put entire faith in them, the grants cannot now be impeached.

It was objected on the part of the plaintiff that this answer had not been put forward by the defendants, and, undoubtedly, they have relied more strongly upon the defence that the land was not debutter land at all. But several paragraphs in the written statements were pointed out, in which the case was made. It is no doubt alleged in these paragraphs that the money was wanted for two purposes—for the sustentation of the worship of the idol and the repairs of the temple, and also for the payment of Government revenue. But their Lordships think that there is enough in those statements to allow of the present answer to the estoppel being made on the part of the respondents, and it is to be observed that in the suit brought by Prosonnomoyi during the lifetime of Rashmoni, in which the original grantee, Sen, was a party, he there set up the defence in a perfectly correct form,—namely, that the representation made was that the money was wanted for the repairs of the temple, and that he advanced it for that purpose.

But assuming the facts to be as alleged in the statement of defence, their Lordships are still of opinion that the plaintiff could not succeed on this point in setting aside the deeds; because, if part of the money only was required for the repairs of the idol, or was represented to have been so required, and this was *bona fide* believed in by the grantees, the deeds would not be wholly void by reason that some of the money was raised for another purpose. It would then come to this, that too much of the idol's property may have been granted, and that a less quantity of land than that included in the grants would have

sufficed to raise the money, required for the temples. But that would not be a sufficient ground for setting aside the deeds altogether. The plaintiff in that case should have offered to [354] reimburse the *bonâ fide* purchasers so much of the money as had been legitimately advanced.

Their Lordships, in making these last observations, do not wish it to be understood that this is the case which appears upon the facts; they make these observations with reference only to the pleadings, and to indicate that, supposing that technical objection could have been made to the pleadings, it still would not have availed the appellant in the present appeal, because even so his suit in the present form could not have been sustained.

On the whole, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

Appeal dismissed.

Agents for the Appellant: Messrs. *Watkins and Lattey*.

Agents for the Respondents: Messrs. *Rogers and Judge*.

NOTES.

[SHEBAIT—POWERS OF POWERS OF ALIENATION—

(a) *Generally not allowed to alienate—*

In (1881) 5 Bom., 393, it was held that on account of the declaration of the law under sec. 8, cl. 3 of Bombay Act II of 1863, alienation of endowed property was held invalid, but see (1903) 25 All., 296, where it is doubted.

In (1902) 27 Bom., 363, the general inalienability of trust property was recognized, but the suit to recover the property was held barred under art. 134 of Act XV of 1877.

See on the point of limitation (1899) 23 Mad., 271; 4 Bom. L. R., 743.

(b) *Cases where alienation upheld—*

1. *Of endowed property—*

(a) In (1890) 17 Cal., 557, gift of an idol and the lands with which it was endowed with the concurrence of the whole family, to another family for the regular worship of the idol was held valid.

(b) In (1894) 19 Bom., 271, permanent under-tenures granted by the then manager of endowed property were held not void as they were granted for necessary purposes.

(c) In (1903) 25 All., 296, it was held that the manager of debutter property can not only make the rents and profits derivable from that property liable, but also the property itself. Their Lordships observed: "There is no absolute prohibition against the alienation of the endowed property by the manager for the time being, but, on the contrary, for the purposes of preserving or maintaining the endowment, alienation of the endowed property by the manager is lawful" (p. 311).

2. *Of religious offices—*

(a) In (1882) 6 Mad., 76, alienation of religious office to a person *not in the line of heirs*, though otherwise qualified for the performance of the office, "is not one which should be excepted from the general rule against alienation of hereditary religious trusts and offices."

(b) In (1898) 23 Bom., 131, a gift of a *vritha*, a priestly office, in favour of a stranger was held not invalid if custom and practice are in favour of it.]

[2 Cal. 353]
APPELLATE CRIMINAL.

The 4th May, 1877.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

The Empress
versus
Charu Nayiah.*

* *Criminal trespass—Infringement of exclusive right of fishery in public river—Penal Code, s. 447.*

The unlawful infringement of a right of exclusive fishery in a part of a public river is not an offence which can be brought within the definition of criminal trespass in the Indian Penal Code.

THIS case was referred to the High Court by the Civil and Sessions Judge of Backergunge, under s. 296 of the Criminal Procedure Code.

The accused Charu Nayiah, together with several other fishermen, were charged with having thrown their nets and fished in a certain river in which the complainant claimed an exclusive [353] right of fishery. The case was tried in the first instance by the Deputy Magistrate, who convicted the prisoner Charu Nayiah under s. 447 of the Indian Penal Code of criminal trespass, and sentenced him to pay a fine of Rs. 50, or in default to suffer simple imprisonment for one month. The Magistrate of the district upheld the order of the Deputy Magistrate.

The Civil and Sessions Judge referred the case to the High Court, on the ground that the offence alleged to have been committed by the prisoner did not fall within the definition of criminal trespass in the Penal Code. The Sessions Judge, in his letter of reference, called the attention of the High Court to the following cases:—*Khetter Nath Dutt v. Indro Jalia* (16 W. R., Cr., 78), *Sristeedhur Parooe v. Indrobhoosun Chuckerbutty* (18 W. R., Cr., 25), *Kashi Chunder Dass v. Hurkishore Dass* (19 W. R., Cr., 47), *Bhusun Parui v. Denonath Banerjee* (20 W. R., Cr., 15).

The Judgment of the Court was delivered by

Markby, J.—We agree with the Sessions Judge in thinking that the prisoner was wrongly committed [convicted?]. It was proved that the prisoner fished in a public river at a place where the prosecutor had the exclusive right of fishery. The Deputy Magistrate held that this constituted criminal trespass; but we do not think so. The law provides that whosoever enters into or upon property in the possession of another with a certain intent, is guilty of criminal trespass. But though a fishery is property, we do not think that a man who fishes in a public river enters upon property in the possession of another, though he may have no right to fish there. The river upon which the prisoner entered being a public one was not in the exclusive possession of any one, and a right of

* Criminal Reference, No. 31 of 1877.

fishery is not property of such a nature as that a man who unlawfully infringes that right can be said to enter upon property in the possession of another within the meaning of the section.

Conviction quashed.

NOTES.

[OFFENCES IN RESPECT OF FISHERY—

This case was followed in *Bhagiram v. Abai* (1888) 15 Cal., 388, where the right was an exclusive right of fishery in a public river.

Also in *Maya Ram v. Nichala* (1888) 15 Cal., 402, where the fishing was in tank connected with a running stream.

These cases were all distinguished in *Annakumar v. Pillai v. Muthupayal* (1904) 27 Mad., 551, where it was held that shell fish taken from beds in sea might be the subject of theft.]

[356] APPELLATE CRIMINAL.

The 3rd May, 1877.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

The Empress

versus

Joy Hari Kor.

*Lunatic—Security - Criminal Procedure Code (Act X of 1872), ss. 426, 432—
Jurisdiction of Criminal Courts.*

The authority of the Criminal Courts over an accused, declared under s. 426* of the Criminal Procedure Code to be of unsound mind, ceases after the transmission of such accused to the place of safe custody appointed by the Local Government, and such authority can only be revived under the circumstances mentioned in s. 432.

ON the 29th of June 1869, one Joy Hari Kor, a native of Munshigunge, Dacca, was tried before the Deputy Commissioner of Cachar on a charge of an attempt to commit suicide. The Court found him to be of unsound mind and incapable of making a defence, and procured his transfer to the Dacca Lunatic Asylum. Subsequently an application was made by a brother of the lunatic, under s. 426 of the Criminal Procedure Code, to the Magistrate of Dacca, offering the security required by the Act, and demanding that the lunatic be entrusted to his care. A reference was made to the High Court asking for the transfer of the case of the lunatic, originally tried at Cachar, to the file of Magistrate of Dacca, in order that such Court might the more conveniently deal with the application made under s. 426 of the Criminal Procedure Code.

* [Sec. 426 :—Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court of Session, as the case may be, if the offence of which such person is accused be bailable, may release such person on sufficient security being given that he shall be properly taken care of and shall be prevented

from doing injury to himself or to any other person, and for his appearance when required.

If the offence be not bailable, or if the required bail be not given, the accused person shall be kept in safe custody in such place as the Local Government to which the case shall be reported shall direct.]

The Judgment of the Court was delivered by

Markby, J.—We think that we ought not to make the order asked for, because, even if the case were transferred to the Magistrate of Dacca, we do not think he would have power to release the lunatic upon taking security. The authority of the Magistrate appears to us to cease when the lunatic is handed over to the care of the local Government, and it does not revive until the prisoner is sent back to the Magistrate under s. 432 on a certificate that he is capable of making his defence. The Deputy Commissioner can, if he thinks proper, bring the matter to the notice of the Government.

Application refused.

[357] ORIGINAL CIVIL.

The 12th April and 2nd May, 1877.

PRESENT :

MR. JUSTICE MACPHERSON.

In the matter of Bittan (an Infant).

*Guardian, Appointment of—Infant—Power of High Court—Application by
Petition without Suit.*

On an application made on petition without suit for the appointment of a guardian of the person and property of an infant, the Court Receiver was appointed Receiver, and the property was ordered to be handed over to him with liberty to him to sell it and invest the proceeds in Government paper, and the matter was referred to the Judge in Chambers for enquiry as to the proper person to be appointed guardian.

APPLICATION on petition for the appointment of a guardian.

The petition of Diljan Bye, described as the head of the Mahomedan dancing girls or Byes in Calcutta, and Bebeejan Bye, one of the dancing girls or Byes, stated that Suddun Bye, the mother of the infant, died, about four years ago, in Calcutta, leaving the said infant, a sister named Byjan, and also certain personal property; that up to the time of her death she and her sister lived in the same house as members of a joint family, and both of them were unmarried and carried on the profession of Byes or dancing girls; that on the death of Suddun Bye, her sister took possession of all the property, and supported the said infant up to the time of her death; that the sister died on 20th May 1876 in Calcutta, leaving the said infant, and an aged grandmother, Chotti Bebee, and also leaving property and effects within the local limits of the jurisdiction of the High Court to be administered to; that on the death of Byjan, Chotti Bebee, her grandmother, took possession of all her estate and effects, and the estate and effects left by Suddun Bye, and took charge of the infant, and fed and clothed her up to the time of her death in October 1876; that the infant, on the death of her mother and aunt, became entitled to certain personal property of the value of about Rs. 4,000 or Rs. 5,000, which, at the death of the said Chotti Bebee, came into the possession of the petitioners, who, since the [338] death of Chotti Bebee, had maintained the infant; that the said infant was of the age of four years, and had no relatives or next-of-kin whatever; that being of tender years, the said infant could not take charge of or

manage her property, and that the petitioners were not willing to take upon themselves any further risk by taking charge of the property without an order of Court appointing them guardians of the person and property of the said infant.

The petitioners prayed for an order appointing them guardians of the infant's person and property.

Mr. Trevelyan for the Petitioners.—[MACPHERSON, J.—There being no suit, has the Court power to make such an order?] It is submitted it has. The power which the Court has under the Charter of 1865, s. 16, is the power which the Supreme Court had. That Court had the power of the Court of Chancery in such matters; see Simpson on Infants, 223; Daniel's Chancery Practice, 1189 and 1190. It appears from these authorities that the Court of Chancery has power to appoint a guardian on petition without suit. The rules of the Supreme Court on the matter refer to petitions generally without any reference to any suit; see Smoult and Ryan's Equity Rules, 170. [MACPHERSON, J.—The question is what was the practice of the Supreme Court at the time the High Court was instituted.] See *In the matter of Ann Butler* (Morton's Dec., 262), and *Ex parte Lokecaunt Mullick* (Morley's Dig., Vol II, 42).

Cur. adv. vult.

The Court mentions that the order should be to refer it to the Judge in Chambers to enquire whether the petitioners, or any other person to be named, are proper persons to be guardians of the child; and that the petitioners do hand over the property in their hands to the Court Receiver, who is appointed the Receiver in this matter, with liberty to the Receiver to sell the property and invest the proceeds in Company's paper. Costs to come out of the estate.

[359] ORIGINAL CIVIL.

The 26th April and 2nd May, 1877

PRESENT:

MR. JUSTICE MACPHERSON.

In the matter of Bungseedhur Khettry, an Insolvent.

Claim of Ramlall Budree Doss.

Insolvent Act (11 and 12 Vict., c. 49), s. 24—Order and Disposition.

On the night previous to B's being adjudicated insolvent, about 10 p.m., the firm of R B D, at their place of business, promised to give B a loan of Rs. 5,000 if he would the next morning deliver to them goods to that amount, and would, in the meantime, satisfy them that he had sufficient goods in his godown, and allow the firm of R B D to put their lock on the door of the godown to secure the goods until they had received the value of the loan. Thereupon B took the gomasta of the firm of R B D to his godown, let him see that it contained goods worth more than Rs. 5,000, and allowed him to put a lock on the door, B at the same time replacing his own locks. The gomasta and B then returned to the office of R B D, where Rs. 5,000 were paid to B, who promised to deliver the next morning Rs. 5,000 worth of goods out of the godown which had been locked up. Having received the money, B absconded from Calcutta that same night and never returned to his place of business. The next day he was adjudicated an insolvent. *Held*, that the goods in the godown were not in the order and disposition of B within the meaning of s. 24 of the Insolvent Act.

THIS was a claim by the firm of Ramlall Budree Doss, carrying on the business of bankers in Calcutta, to the sum of Rs. 5,680-10, being the proceeds of certain goods which were in the godowns of Bungseedhur Khettry wher he was adjudicated insolvent, but which the claimants alleged were made over to them previous to the insolvency. The goods had been sold and the proceeds were in the hands of the Official Assignee.

The circumstances under which the goods were alleged to have been made over to the claimant were set out as follows in the affidavits.

The affidavit of Moteeram and Buldeo Doss stated that Moteeram was, on the 20th December 1876, the head gomasta of the banking firm of Ramlall Budree Doss in Calcutta, and that Buldeo Doss was at that time the cashier of that firm; that about 10 o'clock on the night of the 20th December, Bungseedhur Khettry called at the place of business of Ramlall Budree Doss, and said he was in great need of money and asked for a [360] loan from the firm, which, he stated, he wanted to meet a certain hundi held by Ramlall Budree Doss and drawn on himself, which was due on that day, and for other pressing demands; that Moteeram told him he could have a loan if he could give security, to which he replied that he had goods in his godowns which he promised to make over to Ramlall Budree Doss in the morning, but he wanted a loan of Rs. 15,000 at once, which Moteeram refused; that Bungseedhur then requested Moteeram to send some person to take charge of a godown in which, he said, he had goods of considerable value, and place a lock upon it, and asked for an immediate loan of Rs. 5,000 to save his credit, promising to make out a full list and valuation of the goods he had available to give as security in the morning, when he would sign a proper writing to secure repayment of any advances, including the said hundi; that Moteeram knowing that the firm of Ramlall Budree Doss had had other transactions in hundis with Bungseedhur, and being willing to save his credit, directed Buldeo Doss to go with Bungseedhur to ascertain if the godown contained sufficient goods to cover the required advance; that Buldeo Doss taking a lock and key with him accompanied Bungseedhur to his place of business, and Bungseedhur opened the door of a certain godown in which were boxes of cloths, and Buldeo Doss believing and being assured by Bungseedhur that the godown contained goods of considerable value, placed the lock he had brought with him on the door and locked up the godown, and went back to his place of business; that by order and direction of Moteeram the sum of Rs. 5,000 was then paid to Bungseedhur, it being agreed that a full list of the contents of the boxes in the godown should be made in the morning and a further advance made to Bungseedhur according to the amount of security found in the godown, and a proper writing taken from him to secure the same and the amount of the said hundi; that Buldeo Doss, after sending a jemadar, who failed to find Bungseedhur, went later on the same night to Bungseedhur's place of business to get the hundi accepted by him, and he then examined the lock he had put on the godown door and found two other locks there which were not there when he put the lock on as aforesaid; that proceedings were about being [361] taken to bring a suit against Bungseedhur, who had absconded, in respect of these transactions, but he was adjudicated insolvent, and no suit was therefore instituted; and that the proceeds of the sale of the goods in the godown in the hands of the Official Assignee amounted to Rs. 5,680-10.

The affidavit of Bungseedhur stated that, on 20th December, he was the managing partner of the business then being carried on, under the style of Nanoo Mull, in Calcutta; that he went, as stated, on the 20th of December, to

the firm of Ramlall Budree Doss, but the transactions took place not with Moteeram, but with Shah Muttra Doss, the proprietor of the business, and the loan asked for was Rs. 5,000, not Rs. 15,000; that on asking for the loan he offered to hypothecate to Muttra Doss' firm by actual delivery (without writing of any kind) on the following morning such a portion of the goods then in the godown as would be sufficient to cover the loan; that Buldeo Doss went with him to the godown to satisfy himself of the goods being there, and in Buldeo Doss' presence Bungseedhur left his own two locks, which were on the door when it was opened to allow Buldeo Doss to see the goods, on the door, in addition to the one put on by Buldeo Doss; that it was not contemplated that Ramlall Budree Doss were to have exclusive charge of the godown, or that a list would be made out and a writing signed the next morning to secure repayment of any advance, and that there were goods in the godown of the value of Rs. 10,000, and Bungseedhur never intended to withdraw his own possession of the goods in the godown or any separate and distinct part thereof for the loan of Rs. 5,000; that he obtained the Rs. 5,000, and was then obliged to abscond to avoid his creditors.

Bungseedhur was adjudicated insolvent on the 21st December, the day after the above transaction was alleged to have taken place; and the question in this matter was whether the goods were in the order and disposition of the insolvent so as to pass to the Official Assignee, the claimants contending that the goods, or at least a sufficient portion of them to cover the loan, were, under the circumstances, actually delivered to them and for *bona fide* consideration, and that therefore they had a lien on the proceeds of sale in the hands of the Official Assignee.

[362] Mr. Ingram for the Official Assignee.—At most the transaction amounted to a mere promise to execute a mortgage of a portion of the goods; no portion of the goods was actually separated specifically. They were still left in the possession of the insolvent, who says that he never made any mortgage of them on that night, and that his own two locks, which had previously been on the door, remained there. Under the circumstances they were in the order and disposition of the insolvent, and the alienation, therefore, is void as against the Official Assignee. The cases on the question of order and disposition are of two classes,—first, where the property was originally that of the insolvent; second, where property of another person is in possession of the insolvent. This is a case of the first kind. The principles are laid down in the following cases and authorities: *Lingard v. Messiter* (1 B. & C. 308); *Knowles v. Horsfall* (5 B. & Ald., 134); *Ex parte Staner* (33 L. T., 244); see Tudor's Leading cases at page 462; *In re Agabey* (2 I. J. N. S. 340); *Ex parte Marjoribanks* (1 De Gex, 466); *Darby v. Smith* (8 T. R., 82); and Vol. I, Griffiths on Bankruptcy, ch., 8, s. 5, pp. 444—480. The general rule is that when property is vested in the insolvent, he will be the reputed owner, unless a change of possession be made in as clear and distinct a manner as possible so as to be notorious to the world. Here the transfer was not so made, and, it is submitted, was not sufficient to take the property from the Official Assignee.

Mr. Jackson for the claimant.—The validity of the alienation does not depend on its notoriety; it would be impracticable in many cases, as here where it took place at midnight, to make the transfer public: it depends on its being made *bona fide*. The test is whether there was any improper dealing or want of *bona fides* in leaving the goods in the insolvent's possession, as by letting him have false credit: *Hamilton v. Bell* (10 Exch., 545). This test distinguishes *Lingard v. Messiter* (1 B. & C., 308) and *Knowles v. Horsfall* (5 B. & Ald., 134). The principle is the same in both classes of cases mentioned—

Reynolds v. Bowley (L. R., 2 Q. B., 474), *Harman v. Fisher* (Tudor's Leading Cases, 525). [363] As to *Ex parte Staner* (33 L. T., 244) it is contrary to the case of *Ex parte Marrable* (1 Glyn and Jamieson, 402). On the facts of this case as appearing in the affidavits, the learned Counsel submitted that the goods were not in the order and disposition of the insolvent.

Mr. Ingram in reply.—The case of *Hamilton v. Bell* (10 Exch., 545) is distinguishable as applying to the second class of cases referred to by me. *Reynolds v. Bowley* (L. R., 2 Q. B., 474) is not in point in this case; it refers to the liability of a dormant partner, inasmuch as he is just as much in possession, as any other partner. In the case of *Ex parte Marrable* (1 Glyn and Jamieson, 402), the property was set apart and specified so that the bankrupt could not have dealt with it, and the purchaser could have made a good title. It is, moreover, contrary to subsequent authorities. Here neither party could have dealt with the goods.

Cur. adv. vult.

Macpherson, J.—On these affidavits I find the facts to be, that, about 10 P. M., on the 20th of December, the firm of Ramlall Budree Doss, merchants in the Baira Bazar, promised at once to give Rs. 5,000 to the insolvent if he would next morning deliver to them goods to that amount, and would in the meantime satisfy them that he had sufficient goods in his godown and would allow them (Ramlall Budree Doss) to put their lock on the door of the godown so as to secure the goods therein until they had received the value of their Rs. 5,000. Thereupon the insolvent took the gomasta of Ramlall Budree Doss to his godown, let him see that it contained goods worth more than Rs. 5,000, and allowed him to put his master's lock on the door, while the insolvent, at the same time, replaced his own locks.

The gomasta and the insolvent then returned to Ramlall Budree Doss' kotli, where Rs. 5,000 were at once paid to the insolvent, who promised to deliver in the morning Rs. 5,000 worth of goods out of the godown which had been locked up. Having got the money, the insolvent absconded from Calcutta that same night, and never returned to his place of business.

Next day he was adjudicated insolvent, and the question [364] now is, whether the goods in that godown passed to the Official Assignee, as being in the order and disposition of the insolvent.

* I have considered the cases to which I was referred in the course of the argument, and certain other cases also, in particular that of *Ex parte Watkins* (8 L. R., Ch., 520); and I think I am bound to hold that the goods did not remain in the order and disposition of the insolvent within the meaning of the statute.

The goods which were to be given to Ramlall Budree Doss in return for the Rs. 5,000 were, it is true, not actually set apart on that night, and the agreement was that they should not be formally set apart and delivered until next morning. But the godown containing the goods was secured by the lock of Ramlall Budree Doss, and was no longer under the control of the insolvent; and the Rs. 5,000 were paid in consideration of the godown having been so secured. After the locks were put on, the goods could not be dealt with save through the joint action of Ramlall Budree Doss and the insolvent, and they were in fact no longer in his order and disposition, but were subject to the lien of Ramlall Budree Doss. As to the notoriety of the transfer of possession or of the creation of the lien, the transaction was conducted with as much notoriety as was under the circumstances possible.

* On the whole, I think that Ramlall Budree Doss have established their claim, and are entitled to be paid out of the proceeds of the sale of these goods the sum of Rs. 5,000 and their costs of this application.

The matter is one of some doubt, and the Official Assignee was clearly right in resisting the claim and having the question inquired into and discussed, and his costs must be borne by the estate.

Claim allowed.

Attorney for Ramlall Budree Doss: Mr. *Palchokus*.

Attorneys for the Official Assignee: Messrs. *Dignam and Robinson*.

[365] APPELLATE CIVIL.

The 29th January, 1877.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE R. C. MITTER.

Janokee Debea.....Plaintiff

versus

Gopaul Acharjea and another.....Defendants.*

Hindu law — Eldest son, Adoption of — Shebaitship — Succession of a Hindu widow as shebait — Special custom.

In a suit by a Hindu widow to recover possession of certain property dedicated to idols, as heir to her deceased husband, the last shebait, it appeared that the plaintiff's husband was an adopted son of his predecessor in office, and that he was the eldest son of the first defendant who was the nearest male cognate of the adoptive father. On behalf of the defendant it was contended (1) that the adoption of an eldest son was invalid, and that consequently plaintiff's husband did not succeed rightfully to the shebaitship; and (2) that the right of succession to a shebaitship was not governed by the ordinary rules of inheritance, and that the plaintiff had no title thereto. *Held*, that the adoption of an eldest son, where there are several sons, was not invalid by Hindu law. *Held* also, that a Hindu widow could not succeed to a shebaitship as heir to her husband without proof of special custom. In this case there was no sufficient proof of such custom.

THE facts and arguments in this case are sufficiently stated in the judgment of the Court.

The following authorities were cited on both sides:—

Dattaka Mimansa, s. 4, vv. 1, 2 and 3; Dattaka Chandrika, s. 4, vv. 29 and 30; Mitakshara, chap. I, s. 11, vv. 11 and 12; 3 Colebrooke's Digest Bk. V, s. 8, v. 273; 1 Strange's Hindu Law, chap. iv, pp. 73—75; *Chinna Gaundan v. Kumara Gaundan* (1 Mad. H. C. Rep., 54); *Raja Opendur Lal Roy v. Raneer Bromo Moyee* (10 W. R., 347); *Seetaram v. Dhunnook Dharce Sahye* (1 Hay's Rep., 260); *Sonatin Bysack v. Sreemutty Juggutsoondree Dossee* (8 Moore's L. A., 66); *Rajah Chundernath Roy v. The Collector of Moorsshedabad* (11 B. L. R. 86);

* Regular Appeal No. 12 of 1875, against a decree of Moulvi Khudem Hossain, Subordinate Judge of Zilla Manbhoom, dated the 31st August 1874.

Basoo Dhul v. Kishen Chunder Geer Gosain (13 W. R., 200); *Maharajee Shibessource Debia v. Mothooranath Acharjo* (13 Moore's I. A., 270); *Jugbundo Run Singh v. Radasham Narendro Makapattur* (S. D. A. for 1859, p. 1556).

[366] Baboos Mohini Mohan Roy, Aushootosh Dhur, and Bama Churn Banerjee for the Appellant.

Baboos Srinath Das, Gopal Lal Mitter and Kally Kishen Sen for the Respondents.

The Judgment of the Court was delivered by

Markby, J.—This suit was brought to recover possession of certain properties which the plaintiff alleged to be partly brohmuttur and partly debuttur, the latter being dedicated to certain deities of the names of Keshub Roy, &c., and also for the possession of the deities themselves from the hands of the first defendant, Gopaul Acharjea Gossami. Although the plaintiff described a part of the claim as her own brohmuttur properties, which have devolved upon her by right of inheritance, yet it appears from the judgment of the Court below that it was admitted by both parties that the whole of the claim consisted of properties which, without, a single exception, belong to the aforesaid deities. The witnesses of the plaintiff also described them as debuttur properties belonging to those deities. We shall, therefore, consider that the plaintiff in the Court below abandoned her claim upon her own title, and was satisfied to rest the whole suit upon her right to recover possession of the disputed properties as shebait, or manager, on behalf of the aforesaid idols.

It was alleged that the properties were in the possession of one Luckun Acharjea Gossami as shebait of these idols; that Luckun Acharjea Gossami having no son of his body, took the plaintiff's husband, Bejoy Luckee Acharjea, in adoption, and died in the month of Kartick 1266 (October—November 1859); the plaintiff's husband being then a minor, her mother-in-law took possession of the properties on behalf of her minor son, the right of shebaitship having devolved upon him in the same way as any other property of the deceased would have devolved upon him by right of inheritance. The plaintiff's case was that the idols were established by a remote ancestor of her husband, and the right of shebait had devolved from one person to another following the same rule of succession as that which governs the succession of an ordinary heritable property.

[367] It was further alleged that her mother-in-law thus remained in possession of the properties in suit on behalf of her minor son up to the 24th Bhadro, 1270 (8th September 1863), when her husband died and the right of shebait devolved upon her as his widow. But she being then a minor, her mother-in-law managed the sheba for her till the time of the death of her mother-in-law, which event occurred in the month of Falgoun (March 1864) of the same year.

Upon the death of her mother-in-law the defendant No. 1, the father of her husband, attempted to take possession of the disputed properties along with the debsheba. He was opposed on her behalf by her maternal uncle and father, the second and third defendants.

At this time, there having been a number of documents relating to some of the debsheba properties in the Income Tax Office of the district, the first defendant, as the shebait of the idols, applied to get them back. This application was opposed by a counter-petition by the plaintiff's father on

behalf of the plaintiff. While this matter was pending decision by the Income Tax authorities, a compromise was effected between the plaintiff's father and maternal uncle on her behalf on the one side, and defendant No. 1 on the other. By this compromise a portion of the disputed properties, yielding an annual profit of Rs. 3,000, was set apart and made over to the plaintiff for the purpose of defraying the expenses of morning sheba of the deities, which by the terms of the ruffanamah she would be bound to perform; the remaining properties were to be in the possession of defendant No. 1, who was to be considered the chief shebait.

The plaintiff, on attaining majority, demanded from the first defendant restoration of the properties left in his possession, and on his refusal to restore them the present suit has been brought.

The first defendant alleged that the plaintiff's suit was barred by the law of limitation, and that the plaintiff's husband's adoption was not valid according to the Hindu law; first, because he was the eldest son of the defendant; secondly, because the relationship between him and the adoptive father was such as would render an adoption invalid in him (*law?*); thirdly, because the necessary [368] ceremonies of adoption were not duly performed; and fourthly, because the adoptive father was afflicted with certain incurable diseases which rendered his body impure, and made him incompetent to perform the necessary ceremonies of adoption.

The defendant further alleged that the plaintiff, being a female, was not competent to perform those duties which ordinarily devolve upon a shebait; and that the succession of a female to shebaitship was opposed to the custom of their family; that the plaintiff, therefore, being not entitled to succeed as a shebait, he, the defendant, as the nearest male cognate relation of the last shebait, was entitled to succeed; that originally this debsheba was founded by an ancestor of the present Rajah of Pauchkote, and that the title of a shebait was not complete unless confirmed in his appointment by the Rajah of Pauchkote for the time being; that Rajah Nilmoney Singh Deo, the present Rajah, had made the necessary confirmation in his favour. Rajah Nilmoney Singh Deo, who has been added as a defendant, put in a written statement in support of the defendant's allegations.

The lower Court overruled the plea of limitation, finding that the present suit had been brought within twelve years from the death of the last shebait, who was admittedly in possession, and through whom the plaintiff professes to make her title.

The lower Court further found that the plaintiff's husband was duly adopted by Luckun Acharjea, and that the necessary ceremonies of adoption were performed; but that the plaintiff's husband was the eldest son of Gopaul Acharjea, and that, according to the Hindu law, the adoption of the eldest son being not legal, his adoption by Luckun Acharjea was invalid. As regards the rule of succession to this estate, the lower Court found that it was admittedly a debuttur property; that the ordinary law of inheritance did not regulate the succession of one shebait to another; that the object for which the sheba was established, and the duties devolving upon the shebait, were such that a Hindu widow under the law would be incompetent to fulfil; that the ruffanamah, far from being injurious, was highly beneficial to the interests of the plaintiff; that although the defendant had in a petition admitted that [369] the plaintiff's husband was the adopted son, yet he was not estopped from questioning the validity of the adoption.

Upon these grounds the lower Court dismissed the plaintiff's suit with costs.

In appeal, the first question raised before us is, whether the decision of the lower Court upon the validity of the plaintiff's husband's adoption is correct in law, or not.

That Dattaka Chandrika and Dattaka Mimansa are works of paramount authority on the Hindu law of adoption, is admitted on all hands. Referring to them we find the contention of the appellant is fully borne out. Paras. 29 and 30, s. 1 of Dattaka Chandrika are to the following effect:—"29. In answer to the question by whom is a son to be given, Saunaka declares: 'By no man having an only son is the gift of a son to be ever made. By a man having several sons such gift is to be anxiously made.' 30. The author, apprehending an extinction of lineage in case of the gift of a son by one even having two sons, says—"By one having several sons."

On the same subject the following rules are laid down in Dattakā Mimansa (Para 1, s. iv.):—"1. Next, in reply to the question as to the qualification of the person to be affiliated, Saunaka declares: 'By no man having an only son (ekaputra) is the gift of a son to be ever made. By a man having several sons (bahuputra) such gift is to be made on account of difficulty (prayatnatos).' 2. He who has one son only, is ekaputra, or one having an only son; by such a one the gift of that son must not be made; for a text of Vasishtha declares, 'an only son let no man give,' &c. 3. Since the word 'gift' means the establishing another's property after the previous extinction of one's own, and another's property cannot be established without his acceptance, the author (Saunaka) implies this also in his text in question. Therefore, prohibition likewise against acceptance is established by that very text. Accordingly, Vasishtha: 'An only son let no man give or accept,' &c., &c. 4. To this he subjoins a reason, 'for he is (destined) to continue the line of his ancestors.' His being intended for lineage, [370] being thus ordained, in the gift of an only son, the offence of extinction of lineage is implied. Now this is incurred by both the giver and adopter also. For the (reason in question) is subjoined after both (verbs, viz., 'give and accept'). 5. As for another text of recorded law: 'In instruction, the father is absolute over a son and sons' wives, but not so with respect to the son in sale and gift'; and the text of the holy saint, 'Except a wife and a son other things may be given.' These texts regard the case of an only son. 6. ('Ever') in a time of calamity, accordingly, Narada says: 'A deposit, a son, and a wife, the whole estate of a man who has issue living, the sages have declared unalienable, even by a man oppressed by grievous calamities, although the property be solely that of the man himself.' This text also regards an only son, for it is declaratory of the same import as the texts of Saunaka and Vasishtha. 7. Next, the author replies to the question—By whom is a son to be given? 'By one having several sons.' He who has several sons, is 'bahuputra,' or 'one having several sons.' 8. 'By no man having an only son.' From this prohibition, the gift by one having two sons being inferrible. This part of the text ('by one having several sons, &c.') is subjoined to prohibit the same by one having two sons also; for the speech of Santanu to Bhishma expresses: 'He who has only one son is considered by me as one destitute of male issue,' oh! descendant of Kuru, one who has only one eye is as one destitute of both; should his only eye be lost he is absolutely blind."

From these passages it is clear that the gift and acceptance of an only son are strictly prohibited, but there is no prohibition against the gift of the eldest son. On the other hand, the text—"by a man having several sons such gift

is to be anxiously made,"—clearly implies the validity of the adoption of the eldest out of several sons.

The only authority relied upon by the other side is to be found in paragraphs 11 and 12 of s. 11, chapter 1, Mitakshara, which are to the following effect: "11. So an only son must not be given (nor accepted), for Vasishtha ordains [371] 'Let no man give or accept an only son.' 12. Nor, though a numerous progeny exist, should an eldest son be given; for he chiefly fulfils the office of a son as is shown by the following text: 'By the eldest son, as soon as born, a man becomes the father of male issue.'"

Comparing these paragraphs with the rules laid down in Dattaka Chandrika and Dattaka Mimansa quoted above, we do not think that paragraph 12 of chapter 1, s. 11 of the Mitakshara ought to be construed so as to render an adoption of the eldest son out of several sons invalid in law. It only repeats a doctrine well established amongst the Hindu lawyers that amongst several sons of a Hindu father, the eldest born occupies the first rank. The prohibition is only admonitory, if I may so express myself, and not mandatory; that this is the correct construction of the paragraph in question is also clear from the preceding verse. There the prohibition is clear, the text quoted distinctly declaring—"Let no man give or accept an only son." It is not so in paragraph 12, which, on the other hand, has a tendency to indicate that the prohibition as to the gift of the eldest son is not intended to be regarded as a legal prohibition.

Only two decided cases from Bengal have been quoted before us—*Saetaram v. Dhunnook Dharee Sahye* (1 Hay's Rep., 260) and *Jughundo Run Singh v. Radasham Narendro Mahapattur* (2 S. D. A., 1859, p. 1556; see p. 1560)—the former supporting the contention of the appellant, and the latter taking an opposite view. For the reasons given above, we are inclined to follow the High Court ruling, which, as far as we have been able to ascertain, is fully supported by decisions of the Bombay and Madras Courts. We are, therefore, of opinion that the lower Court was not right in holding that the adoption of the plaintiff's husband was invalid by reason of his having been the eldest son of his natural father.

Another contention has been made in this Court on behalf of the respondent regarding the invalidity of the plaintiff's husband's adoption, which was not raised in the Court below. It has been argued that at the time of the adoption, the plain-[372]tiff's husband was one of two sons of his natural father, and that the texts from Dattaka Chandrika and Mimansa, quoted above, established that an adoption under such circumstances is invalid in law.

We do not think that we ought to entertain this objection. This question of law can only arise upon the establishment of a particular fact, which was never alleged in the Court below nor any issue raised upon it. We, therefore, abstain from discussing it any further.

Then we come to the most important question in the case,—namely, who upon the death of the plaintiff's husband, was entitled to succeed as shebait to the debuttur properties in dispute in this case.

There are certain peculiarities in the history of this office which render it necessary to approach the consideration of this question with very great

caution. But finding as we do the defendant Gopaul in possession of the office and the objects of the endowment being carried out under an arrangement undoubtedly made in good faith by the members of the family for that purpose, we feel the greatest unwillingness to disturb that arrangement. Without, therefore, saying that there is anything in the nature of this office which would prevent its being confined to the members of a particular family and being regulated by the ordinary rules of inheritance, and without accepting the view taken by the Subordinate Judge that females would by reason of their sex be excluded from the succession, we still think that the plaintiff ought to make out clearly that (as she asserts) she is entitled as heiress of her husband to succeed to the office, and to turn out the defendant Gopaul. The presumption in her favour from her husband having been in possession would not apply in this case in the same way and with the same force as if the question were—who was to succeed to her husband's private estate. There the ordinary rule of inheritance must prevail unless displaced by some special rule. Here the very question at issue is whether the rule of inheritance prevails at all. It is, therefore, necessary to look into the history of the endowment since its establishment to see how the office of shebait has in fact devolved [373] from one holder to the other. We may say at once that there is, in our opinion, no satisfactory evidence before us that the appointments have been made by the Rajah of Pauchkote. The attempt, to base the claim of the defendant Gopaul to be shebait upon his appointment by the Rajah, and the claim of the Rajah to the right to appoint, have therefore failed. Then what is the evidence that the office descends in the family of the plaintiff's husband according to the rules of inheritance under Hindu law? The first shebait, Rungraj, left only a daughter, Auchuma, who married, and the issue was again an only daughter, Benconna. This daughter also married and a third time the only issue was a daughter, Lukhipria. And according to the plaintiff's case, this curious coincidence was again repeated by Lukhipria having an only daughter called Kedroo Bibee, who married Lukun Acharjea, the great-grandfather of the plaintiff's husband. There has been much contention whether (as the plaintiff asserts) these four daughters succeeded each other as shebait, or whether, as the defendant Gopaul asserts, their husbands were the shebait. The Subordinate Judge takes the latter view. He thinks that, in each case, the shebait for the time selected his successor, and married his daughter to him. On the other hand, there is, undoubtedly, evidence that the daughters in some cases continued to hold possession of the guddee after the death of their husbands. This was certainly so in the case of Lukhipria, who is said to have held the guddee nearly 60 years : and this seems inconsistent with the notion that the daughters had no independent title. But this at least is certain, that the succession has not followed the ordinary rules of inheritance under Hindu law. Whether the husbands or the wives were shebait, neither after the first generation could claim by inheritance. There is no pretence that the husbands were heirs to each other or to Rungraj, and the daughter of a daughter is not an heir except in certain classes of *stridhun*. Lukhipria herself was no heiress ; nor was her mother Benconna ; nor was her daughter Kedroo Bibee. The Hindu law of inheritance, for which the plaintiff contends, does not explain the devolution of the office in either of the two lines contended for.

[374] There is no doubt very considerable difficulty in ascertaining what is the true rule of succession to this office. Probably it has hitherto been disposed of in a manner which has been generally approved of by all parties concerned. It is sufficient for us to say that the evidence does not in our opinion, establish the plaintiff's right to succeed under the Hindu law of inheritance.

The decree of the lower Court was, therefore, right, and this appeal must be dismissed. The plaintiff, appellant, will pay the costs of the defendant, respondent, Gopaul Acharjea; the Rajah will pay his own costs.

Appeal dismissed.

NOTES.

[I. THE ADOPTION OF AN ONLY OR THE ELDEST SON—

Such adoptions have been declared to be valid by the Privy Council :—(1899) 21 All., 460; (1899) 22 Mad., 398. The case of (1878) 3 Cal., 443 is no longer law. The case of (1883) 7 Bom., 221 was a case recognising the validity of adoption of an eldest son.

II. ADOPTION OF A SISTER'S SON, ETC.—

Invalid :—(1899) 21 All., 412 P. C., reversing 17 All., 294 F. B.]

[2 Cal. 374]

APPELLATE CIVIL.

The 25th April, 1877.

PRESENT:

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Kishen Gopaul Mawar.....Defendant

versus

Barnes.....Plaintiff.*

*Beng. Act VIII of 1869, ss. 2, 21, 22, and 52—Ejectment—
Arrears of Rent—Bhaoli Rent.*

Under the provisions of Beng. Act VIII of 1869 a suit in ejectment will lie for arrears of rent due on a bhaoli tenure.

A suit which is in reality a claim for compensation for use and occupation of lands, cannot be described as a suit for arrears of rent under s. 52 of Beng. Act VIII of 1869.

THIS was a suit for the recovery of Rs. 550 and 4 annas principal, with interest, on account of arrears of rent due (after giving the defendant credit for certain moneys paid into Court) in respect of 69 bigas and 6 cottas of nagdi lands, at different rates together with certain bhaoli lands. The plaintiff also prayed that the defendant be dispossessed from such lands under s. 52 of Beng. Act VIII of 1869. The plaint further stated that 69 bigas 6 cottas of nagdi land was made up of 67 bigas 6 cottas originally leased to the defendant, and 2 bigas of land brought into cultivation by the defendant during the term of his lease, and on which the plain-[375]tiff had assessed a rent of Rs. 5 a biga, agreeably to the rate prevailing in the village. In the Munsif's Court the plaintiff obtained a decree for the whole of the arrears of rent due on the nagdi and bhaoli lands comprised in the original lease. With respect to the two bigas originally brought into cultivation by the defendant, the Munsif modified the rate of rent according to the rate of certain of the nagdi lands in the defendant's occupation. There

* Special Appeal, No. 1391 of 1875, against a decree of R. Towers, Esq., Subordinate Judge of Zilla Bhagulpore, dated the 25th March, 1875, affirming a decree of Babu Gopee Nath Matey, Sudder Munsif of that district dated the 8th December, 1874.

was also the usual decree for ejectment on failure of satisfaction being entered into within fifteen days of the date of decree. On appeal the Judge upheld the decision of the Munsif, and the defendant preferred a special appeal to the High Court.

Baboo Hem Chunder Banerjee and Mr. Younan for the Appellant.

Baboos Bhyrab Chunder Banerjee and Bama Churn Banerjee for the Respondent.

The Judgment of the Court was delivered by

Markby, J.—The question between the parties in this special appeal is, whether or no the decree passed under s. 52, Beng. Act VIII of 1869, by which the defendant was directed to pay a certain amount as arrears of rent within fifteen days, otherwise he was to be ejected, is good in law.

It appears that the Court below has held that the land to which the suit relates consisted of two portions,—one of which is nagdi land, and the other bhaoli land. There was an objection taken in special appeal that the Court below was wrong in treating any of these lands as bhaoli. But we expressed our opinion in the course of the argument yesterday that there was nothing in that objection. No doubt there was evidence that, for some time, the land had been in possession of a person under the present plaintiff, between whom and the defendant the rent was treated as all payable in money: but that could not alter the terms of the tenancy as between the plaintiff and the defendant, and when that intermediate interest terminated, the land was held partly as bhaoli as before.

Then arises the important question in this case, whether the provisions of the law in respect of ejectment upon non-pay-[376]ment of arrears of rent can be applied to bhaoli land. I admit that, on first reading these sections of the Act relating to this matter, I was under the impression that they did refer only to rents reserved in money. But, on further consideration, I think that the construction of the sections is that they cover not only rent reserved in money but rent reserved in kind. S. 52 provides for ejectment for non-payment of arrears of rent. An arrear of rent is defined by s. 21. It says: "Any instalment of rent which is not paid on or before the day when the same is payable according to the patta or engagement, or if there be no written specification of the time of payment, at or before the time when such instalment is payable according to established usage, shall be held to be an arrear of rent under this Act, and, unless otherwise provided by written agreement, shall be liable to interest at twelve per centum per annum." Now the word 'rent' may, undoubtedly, include both rent in kind and rent in money. But the word 'paid' does at first sight suggest rent reserved in money. But when we turn to s. 2, it is clear from that that the Legislature did not use the word 'paid' in reference to rent reserved in money only, because in s. 2 we find the expression "if the rent is payable in kind," thereby clearly showing that the Legislature at any rate considered that the word 'paid' or 'payable' was a proper expression for the proportionate produce which had to be delivered in kind, or a bhaoli tenure. No doubt there are also the words at the end of s. 21 which provide for interest on an arrear of rent. But then I think those words may be applied to a case of arrear of rent which is payable in kind, because, as we know, those arrears, though originally reserved in kind, are ultimately, as between the parties, almost always payable in money. There is, therefore, nothing in the words of the law which is inconsistent with the term "arrears of rent" including arrears of rent in kind as well as arrears of rent in money; and I think the reasonable construction to put upon the Act is, that both kinds of arrears are included. I cannot see any

reason why a landlord whose rent is payable in kind should not have the same remedies as a landlord whose rent is payable in money. There being nothing in the Act which is in any way [377] inconsistent with this reasonable construction, I think we ought to put that construction upon it.

Then this further objection is raised to this decree by the appellant, that the plaintiff's (respondent's) own jamma-wasil-baki papers show that there had been a full payment of all that was due upon the nagdi portion of the tenure. Now the only evidence before us upon that point is the jamma-wasil-baki paper. No doubt those two tenures are distinct. But then we find in making up the account, following out the custom to which I have already alluded, after the proprietor's share upon the bhaoli portion of the tenure has been ascertained, that is turned into money, and one lump sum is found to be due from the ryot to the landlord. The sum which has been paid on account is credited not to the nagdi tenure in particular, but the total sum found to be due by adding the two rents together. There is no evidence that the ryot himself appropriated this payment to the nagdi tenure. All that we have is this document, and on this document we are bound to treat it as a general payment on account. On that objection, therefore, the special appeal has failed.

Then there is another objection which it is more difficult to get over. It appears that the ryot has, in addition to the original 67 bigas and odd cottas of land, of which the nagdi portion of the tenure consisted, taken into his possession two bigas more. Now, in suing the tenant in respect of the rent of these two bigas, the landlord does not treat these two bigas as an addition to the nagdi tenure held upon the same terms as the rest of the nagdi tenure. He chooses to place on those two bigas a rent of Rs. 5, which is more than the rate at which the nagdi tenure is assessed. It is not shown that that rent has ever been paid by the tenant. The suit, therefore, in reality, so far as it relates to those two bigas, is a suit to recover compensation for the use and occupation of those two bigas. And the question then arises whether that can be an arrear of rent to which the provisions of s. 52 can be applied.

In order to decide that question, we must, as in deciding the other question upon the construction of the Act, go back to [378] s. 21 and see what an "arrear of rent" is. That section speaks of an arrear of rent as "any instalment of rent which is not paid." Now I do not think it possible to say with regard to those two bigas that there was any instalment of rent which remained unpaid. No doubt there had been for a considerable time something due from the ryot to the landlord for the occupation of this land, but I think the words "instalment of rent which is not paid" assume a rent which has been fixed, which has become due at the expiry of certain recovering periods, and which had not been paid by the tenant. I think, therefore, it is impossible to say that, as regards those two bigas, there was an arrear of rent due which remained unpaid when the suit was brought. Although that is a small portion of the tenure in respect of which the suit was brought to recover rent, still, according to the decisions of this Court, that error will vitiate the whole decree. The tenant is to be ejected under s. 52 if he does not pay the amount of rent specified in the decree. But the amount specified in the decree must consist entirely of arrears of rent due. And if it turns out that there was not really so much arrears of rent due, the tenant never has had the opportunity, which the law gives him, to pay within fifteen days that which he is liable to pay as arrears of rent.

The result is, that we must set aside the decree of the Court below, and we must make the decree which the Court below ought to have made. There will be a decree as for arrears of rent for the amount found to be due, minus the rent of those two bigas, and for ejectment from all but those two bigas. And if that amount, together with interest and costs in proportion, be paid into Court within fifteen days from the date of the decree, execution of the decree for ejectment will be stayed. There will also be a further decree for the amount fixed by the Court below in respect of those two bigas; but that [not?] being arrear of rent will not be included in the decree which directs the defendant to pay the money into Court.*

Appeal allowed.

[379] FULL BENCH.

The 10th April, 1877.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE KEMP,
MR. JUSTICE MACPHERSON, MR. JUSTICE MARKBY AND
MR. JUSTICE AINSLIE.

Bhimul Doss *alias* Lall Baboo.....One of the Defendants

versus

Choonee Lall.....Plaintiff.†

Hindu law—Inheritance—Brother—Nephew—Mitakshara—Joint undivided Family.

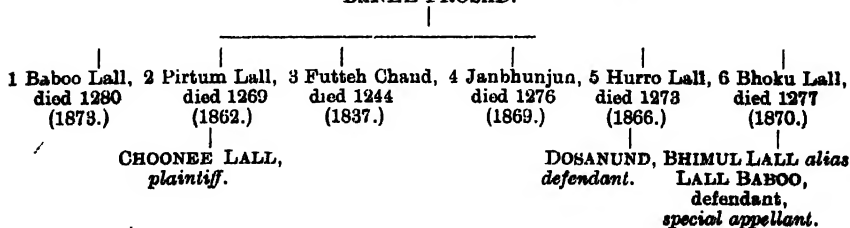
Where, in an undivided Hindu family living under the Mitakshara law, a person dies without leaving issue, but leaving a brother, and a nephew, the son of a predeceased brother, the latter is not excluded from succession by the former.

Debi Prashad v. Thakur Dial (I. L. R., 1 All., 105) followed.

THIS case was referred by GARTH, C.J., and MITTER, J., to a Full Bench in the following ORDER of reference:—

• **Garth, C.J.**—The plaintiff and the defendant, special appellant, are related to each other as first cousins, and the following family tree will materially assist the Court in understanding the question of law raised between them:—

BANEE PROSAD.



* The plaintiff withdrew his claim for ejectment, and a decree was made for the arrears with interest and costs.

† Special Appeal No. 770 of 1875, against a decree of A. J. Elliot, Esq., Judge of Zilla Shahabad, dated the 18th of February, 1875, affirming a decree of Moulvi Mahomed Nurul Hossein, Munsif, Subordinate Judge of that district, dated the 21st of September 1874.

The plaintiff's case is this. The six sons of Baneé Prosad lived as members of a joint Hindu family till the death of the fourth son, Janbhunjun Doss, which took place in 1276 (1869) ; Baboo Lall, Futteh Chahd, and Janbhunjun died without issue, and upon these facts the plaintiff contends that he is entitled to one-third share of the family property.

[380] The respective years of death of the several sons of Baneé Prosad as given in the above tree being not disputed, the defendant, special appellant, contends that the plaintiff's father, Pirtum Lall, having predeceased Janbhunjun, the plaintiff is not entitled to the one-third share of the family property which he claims. The date of separation was disputed in the Courts below, but it has been found as a fact that it took place after the death of Janbhunjun. The defendant, special appellant, contends that, on the death of Janbhunjun, his interest in the joint family property devolved upon the surviving brothers Bahoo Lal and Bhoku Lal alone, to the exclusion of the plaintiff and Dosanund, sons of Pirtum Lall and Hurro Lall, who had predeceased Janbhunjun.

The contention of the plaintiff on the other hand is, that, on Janbhunjun's death, his interest in the joint family property passed to all the surviving members of the joint family. This contention is supported by a Full Bench decision of the Allahabad High Court in the case of *Debi Parshad v. Thakur Dial* (I. L. R., 1 All., 105), and also apparently by an important passage which occurs in the judgment of the Privy Council in the well-known Shivagunga case, upon which the above Full Bench decision appears mainly to be founded.

We entertain grave doubts whether the passage in the judgment of the Privy Council justifies the decision of the Allahabad High Court, and whether that passage is in accordance with the Mitakshara law; and as the question raised is one of great importance, and of very general application, we think it right to refer it to a Full Bench.

The question referred is, whether, in an undivided Hindu family governed by the Mitakshara law, if a brother dies leaving no issue, but leaving brothers and orphan nephews, who are members of the joint family, his interest in the family property passes on his death to his surviving brothers alone, or to all the surviving members of the joint family; and in case of a partition, is that the principle according to which the respective shares of the persons entitled to succeed to that interest are to be apportioned?

[381] Baboo Mohesh Chunder Chowdry and Moonshi Mohammed Yusuff for the Appellant.

Mr. C. Gregory for the Respondent.

Baboo Mohesh Chunder Chowdry.—The simple question involved in this case is whether, in a joint Mitakshara family, a brother or a nephew is a preferable heir to the estate of a deceased. Under the Dayabhaga, no doubt a brother would succeed. If succession in the present case is to be regulated by the usual principles which govern inheritance, the brother being nearer to the deceased would be preferred; the Mitakshara (Chap. II, s. 4, paras. 5—9,) specially provides for the succession of brothers in preference to nephews. Those provisions are applicable equally to joint and separate property. The Allahabad High Court has restricted their application to separate property only, relying apparently on the case of *Katama Natchiar v. The Raja of Shivagunga* (9 Moore's I. A., 539). That case, however, does not bear out the position taken up by the Allahabad Full Bench. On the contrary, it supports the present contention that the principle is the same, whether the property be

joint or separate. It speaks of descent both in cases of a divided as well as an undivided family. No doubt, the Judicial Committee say that property obtained by partition comes within the category of acquired property, and acquires a separate character. But it cannot be argued on that basis that joint property which has not been subjected to partition would follow a different order of succession from property which has acquired a separate character by partition. Unless it is made out positively that there is something in the law itself by which a separate order of succession is provided for joint property, it is submitted that it should follow the same rules as in cases of separate property. The following cases were also cited: *Chowdry Chintamun Sing v. Mussamul Nowlukho Konwari* (L. R., 2 Ind. App., 263; s.c., I. L. R., 1 Cal., 153), *Mussamut Golab Koonwur v. The Collector of Benares* (4 Moore's I. A., 246), *Tara Chand Ghose v. Pudum Lochun Ghose* (5 W. R., 249), *Rajkishore Lahoory v. Gobind Chunder Lahoory* (I. L. R., 1. Cal., 27).

[382] Mr. C. Gregory, for the respondent, contended that the ruling in the case of *Debi Parshad v. Thakur Dial* (I. L. R., 1 All., 105) had definitively settled the question, that, in an undivided Hindu family living under the Mitakshara, the sons of a predeceased brother take by representation the inheritance which their father would have taken in the estate of their uncle, had he survived the period of distribution. The case of *Duljeet Sing v. Sheemunook Sing* (1 Sel. Rep., 59) also supports this position; see also 2 West and Bühler. p. 34.

Baboo Mohesh Chunder Chowdry in reply.

The following **Opinion** was delivered by the Full Bench:—

Garth, C. J.—This case raises precisely the same question which was decided by a Full Bench of the Allahabad High Court in the case of *Debi Parshad v. Thakur Dial* (I. L. R., 1 All., 105), and we feel bound, having regard to the weight of authority, to decide in accordance with that decision, that, under the circumstances stated in the case, the interest of the deceased brother in the family property ought, in the event of a partition, to be divided between his nephew and his two brothers in equal shares.

This point was distinctly decided by the Sudder Dewanny Adawlut in the year 1802 in the case of *Duljeet Sing v. Sheemunook Sing* (1 Sel. Rep., 59), and Mr. Colebrooke was one of the Judges who decided it. The same rule has been laid down since by other authorities, and is recognized by the Lords of the Privy Council in the case of *Katama Natchiar v. The Rajah of Shivagunga* (9 Moore's I. A., 539, at p. 611).

We do not find any authority conflicting expressly with those decisions; and we are, therefore, of opinion that the judgment of the Lower Court is right, and that this special appeal should be dismissed with costs.

Appeal dismissed.

NOTES.

[This case was followed in (1878) 5 Cal., 142, where it was held that the principle of survivorship obtains until partition and on partition the division is *per stirpes*.]

[383] APPELLATE CRIMINAL.

The 7th May, 1877.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

The Empress

versus

Halodhur Poroe and others.*

Penal Code, s. 277—Public Spring Reservoir.

The words "public spring or reservoir" used in s. 277 † of the Indian Penal Code do not include a public river. The strewing of branches in a river for fishing purposes held, therefore, to be no offence under that section.

THE accused and six other fishermen were tried summarily under s. 227‡ of the Criminal Procedure Code by the Deputy Magistrate of Jhanedah, in the district of Jessore, for voluntarily corrupting the Nobogunga river by strewing branches therein for fishing purposes. The offence was laid under s. 277 of the Indian Penal Code. The accused were all found guilty and fined respectively.

The defendants thereupon petitioned the High Court.

Markby, J.—I think we must hold that this is not a case under s. 277 of the Indian Penal Code. The water which is said to have been fouled was certainly not the water of a reservoir, nor, in my opinion, was it the water of a "public spring." The judgment of the Magistrate shows that it was the water of the river Nobogunga. I do not think by the use of the words "the water of any public spring" the Legislature intended to include the water of a river. On that ground we quash the order and direct the fine, if paid, to be refunded.

Conviction quashed.

NOTES.

[The fouling of the running water of a continuous stream may be an offence under sec. 290 I. P. C., if not under sec. 277 :—6 Bom., L. R., 52.]

* Criminal Motion No. 68 of 1877, against the order of W. G. Deare, Esq., Deputy Magistrate of Jhanedah, dated the 5th January 1877.

† [Sec. 277 :—Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it unfit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees or with both.]

‡ [Sec. 227 :—In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses nor the reasons for passing the judgment, nor draw up a formal charge, but he or they shall enter in the register, to be kept for the purpose, the following particulars :—

[384] APPELLATE CRIMINAL.

The 19th June, 1877.

PRESENT :

MR. JUSTICE AINSLIE AND Mr. JUSTICE McDONELL.

The Empress
versus
Dedar Sirkar.*

Security for good behaviour—Criminal Procedure Code (Act X of 1872), s. 505.

On a requisition from the High Court a Magistrate is bound to state the grounds upon which he fixed the amount of security.

A person from whom security for good behaviour is demanded should have a fair chance afforded him to comply with the required conditions of security.

UNDER s. 506 † of the Criminal Procedure Code, the Magistrate of Dinapore required nine persons to furnish "two respectable and sufficient sureties for their good behaviour, each in the sum of Rs. 1,000," and in the case of another person, Dedar, in the sum of Rs. 5,000. The aggrieved parties petitioned the High Court, whereupon MARKBY and PRINSEP, JJ., called upon the Magistrate to state the grounds or information on which the amount of the respective securities had been fixed. The Magistrate furnished the information required, but took occasion to question the authority upon which he had been called upon to state the grounds upon which he has fixed the various amounts. The case ultimately came before AINSLIE and McDONELL, JJ.

Baboo *Indro Nath Banerjee* for the Petitioner.

The Junior Government Pleader (*Baboo Jugadanund Mookerjee*) for the Crown.

The Judgment of the Court was delivered by

* **Ainslie, J.**—We think that, under the circumstances stated by the Magistrate, it is not desirable that the Court should interfere in the present case. In the 4th paragraph of his letter the Magistrate expresses a doubt whether the High Court is competent to call upon him to state the grounds upon which

* Criminal Motion No. 64 of 1877, in the matter of the decision of E. V. Westmacott, Esq., Magistrate of Dinapore, dated the 20th January 1877.

† [Sec. 506 :—Whenever it appears to such Magistrate from the evidence as to general character adduced before him, that any person is by habit a robber, house-breaker or thief,
or a receiver of stolen property, knowing the same to have been stolen,

or of a character so desperate and dangerous as to render his release, without security, at the expiration of the limited period of one year, hazardous to the community,

he shall record his opinion to that effect, with an order specifying the amount of security which should, in his judgment, be required from such person, as well as the number, character, and class of sureties, and the period, not exceeding three years, for which the sureties should be responsible for such person's good behaviour, and if such person does not comply with the order, the Magistrate shall issue a warrant directing his detention pending the orders of the Court of Session.]

[385] he fixed the amount of security. * With reference to this, we desire to call his attention to a ruling of the Madras High Court, at page 450 of Mr. Prinsep's edition of the Code of Criminal Procedure (4 Mad., H.C. Rep., App. 47), an expression of opinion in which we entirely concur. It is there said: "The imprisonment is provided as a protection to society against the perpetration of crime by the individual, and not as punishment for a crime committed, and being made conditional in default of finding security, it is only just and reasonable that the individual should be afforded a fair chance at least of complying with the required conditions of security." If the Magistrate declined to furnish a statement of the grounds upon which he fixed the amount of security, this Court would have been unable to say that he had fixed it on just and reasonable grounds, and probably the result would have been that we should have felt bound to modify the order as *prima facie* unreasonable and unsupported by anything before us.

NOTES.

[Grounds of fixing the amount may be required to be stated and the High Court can interfere when the amount is excessive:—(1892) 16 Bom., 372; (1900) 23 All., 80.]

[2 Cal. 385]

ORIGINAL CIVIL.

The 21st and 23rd May, 1877.

PRESENT:

MR. JUSTICE MACPHERSON.

Roychurn Dutt

versus

Ameena Bibi.

*Sheriff—Right to Poundage—satisfaction of Decree after attachment,
but before sale.*

Certain immoveable property of the defendant was attached in execution of a decree which had been partly satisfied by the proceeds of a previous sale in execution. Before any proceedings for sale were taken under the attachment, the defendant paid the balance and satisfied the plaintiff's claim in full. *Held*, that the Sheriff was entitled to poundage upon the amount so paid in satisfaction of the debt, and satisfaction of the decree was ordered to be entered, and the attachment withdrawn, subject to the payment of such poundage.

THIS was an application on notice on behalf of the defendant in the above suit for an order that satisfaction of the decree [386] made in the suit be entered on the record, and that the attachment of the properties of the defendant be withdrawn without payment of poundage to the Sheriff.

The decree in the suit, which was on a mortgage, was made on the 28th of June 1875, and default having been made in payment of Rs. 29,991, the sum found due by the Registrar on taking the accounts, the mortgaged properties were sold; and a sum of Rs. 17,070 was received by the plaintiff in part satisfaction of his decree and costs. For the realization of the balance a prohibitory order was issued on 29th June 1876, under which certain immoveable property of the defendant was attached by the Sheriff of Calcutta. On the 10th May 1877, before any proceedings for sale were taken by the plaintiff, the defendant paid the balance and satisfied the plaintiff's claim in full.

The Sheriff claimed his poundage on the whole debt, but his right thereto was disputed by the parties, and the question was brought before the Court on motion.

Mr. Stokoe for the Defendant, in support of the application, referred to s. 201, Act VIII of 1859, *In the matter of the Bombay Joint Stock Corporation; In re Sheriff of Bombay* (6 Bom. H.C., O.C., 22), *Rex v. Robinson* (2 Cr. M. & R., 334), and *Vinayak Vasudev v. Ritchie Stewart* (4 Bom. H.C., O.C., 139), and contended that the Sheriff was only entitled to poundage on the amount actually levied by him in execution, not on the amount afterwards received from the defendant in satisfaction of the debt.

Mr. Jackson for the Sheriff contended, that the Sheriff was entitled to poundage on the whole amount of the debt: his right accrued on the execution of the writ. He referred to *Miller v. Abbott* (1 Str. Mad. Cas., 182), *Miles v. Harris* (12 C. B., N. S., 550), and to the following cases in which orders had been made on the present question in favour of the Sheriff,—*Nittianund Paul v. Nobin Chunder Ghose*, 10th July 1876; *In re Brojonath Chowdhry*, 22nd May 1875; *In re Jodunath Shaw Chowdhry*, 29th July 1876; *Kheradmony Dossee v. Nobin Cunder Ghose*, 14th December 1875; *Indra [387] Chand Johurry v. Suruth Chandra Ghose*, 6th July, 1876; and *Pearson v. Madhub Chunder Ghose*, 18th April, 1872.

Mr. Stokoe in reply.

Cur. adv. vult.

* This case came before the Court (MACPHERSON, J.) on the 18th of April 1872, in the form of a motion, objection being taken to the following ruling of the taxing officer of the Court in the taxation of the costs of the suit.

“ In this case the Sheriff's claim to poundage on the amount endorsed on the warrant of arrest, which was executed by him against the defendant Madhub Chunder Ghose in execution of the decree in this suit, is contested on the ground that no portion of the amount endorsed on the writ was levied, the defendant having been discharged from custody by the Court under the provisions of s. 273 of Act VIII of 1859 and s. 8 of Act XXIII of 1861.† In the table of fees the entry as to poundage is:—“Poundage on sums levied under a writ of execution against the effects, or for taking the defendant in execution, for the first

† [Sec. 273:—Any person arrested under a warrant in execution of a decree for money may, on being brought before the Court, apply for his discharge on

On what grounds application for discharge may be made.

the ground that he has no present means of paying the debt, either wholly or in part or, if possessed of any property, that he is willing to place whatever property he possesses at the disposal of the Court. The application shall contain a full account of all property of whatever nature belonging to the applicant, whether in expectancy or in

[388] The Court was of opinion that the Sheriff was entitled to poundage upon the sum actually compromised for, and granted the application subject to such payment of poundage to the Sheriff. The Sheriff to have the costs of the application.

Attorney for the Defendant : Mr. *Graham*.

Attorney for the Sheriff : Mr. *Morgan*.

1,000 rupees at 5 per cent., and for the rest at 2½ per cent.' It refers to two classes of execution, namely, execution against the effects, and execution against the person. The word 'levied,' as used in the entry, applies only to executions of the former class. It stands connected with the words 'under a writ of execution against the effects,' but not with the words which follow, 'for taking the defendant in execution.'

"The Sheriff has always, both before and since the establishment of the High Court charged poundage as if his right thereto had accrued on his executing the warrant of arrest, irrespective of the ultimate result as regards the realization of the amount endorsed on the writ.

"In the table of fees of the High Court of Bombay the entry as to poundage is 'poundage on every debt levied by execution, on every sum not exceeding 1,000 rupees, 5 per cent., on every other sum exceeding Rs. 1,000, 2½ per cent.' There can be no question that the word 'levied,' as used in that entry, applies to executions generally. Yet, in deciding at Bombay the question, now raised for the first time here, it was held by Sir RICHARD COUCH (then the Chief Justice of the High Court at Bombay) that, in order to satisfy the word 'levy' it is not necessary that the debt should have been paid, and that the words in the table of fees must be construed as entitling the Sheriff to poundage upon his executing a warrant of arrest in execution of decree—*Vinayak Vasude v. Ritchie Stewart* (4 Bom., H. C., O. C., 189). The facts of that case are similar to those in the present case, except that, whereas at Bombay the practice of claiming poundage, when the party under arrest had been liberated without any part of the debt being paid, was discontinued by the Sheriff after the year 1859, the same practice here has continued uninterruptedly up to the present time; and except also that the entry as to poundage in the Bombay table of fees is less favourable to the claim of the Sheriff than the corresponding entry in the table of fees of this Court.

"I shall follow the decision in that case, but inasmuch as that decision is not binding

Form of application.	possession, and whether held exclusively by himself or jointly with others, or by others in trust for him (except the necessary wearing apparel of himself and his family and necessary implements of his trade, and of the places respectively where such property is to be found, or shall state that with the exceptions above-mentioned, the applicant is not possessed of any property, and the application shall be subscribed and verified by the applicant in the manner hereinbefore prescribed for subscribing and verifying plaints. (Amended and supplemented by Act XXIII, 1861, s. 8.))
Verification.	

[Sec. 8:—When a person arrested under a warrant in execution of a decree for money shall, on being brought before the Court, apply for his discharge on either of the grounds mentioned in section 273 of Act VIII of 1859, the Court shall examine the applicant in the presence of the plaintiff or his pleader, as to his then circumstances, and as to his future means of payment, and shall call upon the plaintiff to show cause why he does not proceed against any property of which the defendant is possessed and why the defendant should not be discharged and should the plaintiff fail to show such cause, the Court may direct the discharge of the defendant from custody. Pending any enquiry which the Court may consider it necessary to make into the allegations of either party, the Court may leave the defendant in the custody of the officer of the Court to whom the service of the warrant was entrusted, on the defendant depositing the fees of such officer, which shall be as the same daily rate as the lowest rate charged in the same Court for serving process; or if the defendant furnish good and sufficient security for his appearance at any time when called upon while such enquiry is being made, his security or sureties undertaking in default of such appearance to pay the amount mentioned in the warrant the Court may release the defendant on such security.]

[389] APPELLATE CIVIL.

The 18th April, 1877.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Chunder Mohun Roy and others.....Defendants

versus

Bhubon Mohini Dabee.....Plaintiff.*

*Limitation—Petition in forma pauperis—Act IX of 1871, s. 4 explanation—
Act VIII of 1859, s. 308.*

A put in a petition to sue *in forma pauperis* for possession of certain foreclosed property within the time specified by the Limitation Act, but on her failing to appear on two occasions when called upon to give evidence of her pauperism, the case was struck off so far as the application to sue *in forma pauperis* was concerned. At the instance of A the case, however, was again reopened, and a date fixed for her appearance. Two days prior to this date, but at a time beyond the limit fixed by the Limitation Act, A put in a petition asking that the petition which she then made to have her suit proceed as an ordinary suit might be joined with her application to sue *in forma pauperis*, and the suit be duly tried in the ordinary way. She on this Court, it will be open to the plaintiff to have the question decided by this Court on any objection which he may be advised to make to my taxation."

Mr. Marindin appeared in support of the application.

Notice of the application was given to the Sheriff, but he did not appear.

Mr. Marindin contended that nothing having been levied, the Sheriff was not entitled to poundage; the bringing up of the debtor was not a levying of the debt, as under certain circumstances the debtor could be discharged by the Court. Under the table of fees in the old Supreme Court, it was held that the Sheriff was entitled to poundage immediately he took the debtor in execution: See *Miller v. Abbott* (1 Str. Mad. Cas., 182). But the position of the Sheriff has been entirely altered since the passing of Act VIII of 1859: see *In re Sumbho Chunder Holder* (Bourke's Rep., 59). This alteration was not brought to the notice of the Bombay Court, and that decision consequently loses a great deal of its weight. The words moreover of the rules relating to fees at Bombay are different from those at Calcutta, which further distinguishes the case. The Calcutta rule—see Broughton's Civil Procedure Code, 741,—is also different from the old rule: see Smoult and Ryan's Rules and Orders, vol. ii, p. 234. The Sheriff does not act now as the agent of the parties, but as the Officer of the Court; his duty is only to execute the warrant of the Court, and either bring the debtor before the Court at once, or make him over to the superintendent of the jail. That officer was formerly the Sheriff, so that then the debtor remained in the custody of the Sheriff, who was responsible. In his present position he is not responsible, at any rate when he has delivered the debtor to the superintendent of the jail. By Act XII of 1865, s. 3, no one is to be committed to the custody of the Sheriff, nor are writs for arrest to be issued to him. This is re-enacted by Act XII of 1867.

Macpherson, J.—I do not see that the difference between the old and the new rules would justify me in putting a different construction on the new rule to that which was always put on the old one. I think I must decide as the Bombay Court did. The order of the taxing officer is therefore upheld.

* Special Appeal No. 1333 of 1875, from the judgment of the Second Subordinate Judge of Burdwan, reversing a decree of the Munsif of that district, dated 1st December 1874.

also paid in the regular amount^d of stamp duty for an ordinary suit. On the point of limitation, *held*, that the plaint must be considered as filed not on the day of filing the application to sue *in forma pauperis*, but on the day on which the stamp duty was paid and application made to have the suit tried in the ordinary way.

The explanation to s.4 of the Limitation Act only applies in cases where, under s. 308 of the Civil Procedure Code, the application for leave to sue *in forma pauperis* is granted, and the application is numbered and registered as a suit (See *Skinner v. Orde*, 1 L. R., 1 All., 230).

SUIT for possession of foreclosed lands. The plaint stated that three of the defendants, Modhu Sudun, Madhab Chunder, and Seta Nath Roy, by a deed of conditional sale, dated the 24th September 1850, sold to the mother of the plaintiff the properties, the subject of the present suit, for a consideration of Rs. 200, on a verbal condition that the said properties should be released on payment of the purchase-[390]money within four years. On failure by the defendants to pay the money within the said period, the mother of the plaintiff foreclosed the mortgage on the 7th February 1860. Subsequently, the father of one of the defendants in the present case intervened on the allegation that part of the lands foreclosed belonged to him by purchase. The foreclosure suit was, thereupon, struck off on the 26th June 1861; leave, however, was reserved to the then plaintiff to bring a regular suit. On the 6th February 1873, the present plaintiff presented a petition to be allowed to sue *in forma pauperis* for the possession of the said lands, on the ground that her mother, the original mortgagee, had granted the said lands to the petitioner in November 1866. The petitioner was thereupon ordered to appear and depose as to her pauperism on the 1st of March, but she failed to appear; and again on the 15th of June she was ordered to appear, but she again failed to put in an appearance before the Court. The case was thereupon struck off the file. Subsequently the petitioner applied for a review, which was granted, and she was ordered to appear on the 9th of August for the purpose of deposing to her pauperism. Before that date, on the 7th of August, she paid stamp duty sufficient for a suit in the ordinary form, whereupon the application was registered for hearing as an ordinary suit.

For the defendants it was contended that the suit was barred.

The Court of First Instance held that the suit was instituted on the date when the plaintiff paid the stamp for the suit, and not from the date of filing the original petition to sue *in forma pauperis*. The suit was, therefore, barred.

On appeal the Judge remanded the case, being of opinion that the plaintiff's claim would not be barred if she was actually a pauper on the 6th of February 1873, and that the plaintiff had had no sufficient opportunity afforded her to prove this fact.

The Munsif, therefore, took fresh evidence on the point, and decided the question of limitation in favour of the defendant: he also found for the defendant on the facts.

The lower Appellate Court reversed the decision of the Munsif on the merits, but expressed no opinion on the question of limitation.

[391] From this decision the defendant appealed to the High Court.

Babu Hori Mohun Chuckerbutty for the Appellants.

Babu Nolit Chunder Sen for the Respondent.

The following **Judgments** were delivered :—

Markby, J.—We think on the face of these proceedings we must hold that the suit is barred by limitation. The mortgage is dated the 24th of September 1850 ; the default was made on the 24th of September 1854 ; notice of foreclosure issued on the 7th February 1860. It is not shown on what date the notice was served, but the foreclosure must have become absolute some time before the 26th June 1861, because the case was struck off on that date with permission to bring a regular suit, as appears from the plaint. Therefore, the title of the plaintiff must have become absolute at least as early as the 26th June 1861, and the suit would be barred on the 26th June 1873.

Now, on the 6th February 1873, the plaintiff presented a petition to be allowed to sue *in forma pauperis* to recover possession. She was ordered to appear on the 1st March, and she did not do so. She was again ordered to appear on the 15th June, and she did not do so ; and the case was struck off so far as the application to sue *in forma pauperis* was concerned. The matter was reopened, and she was ordered to appear on the 9th August. On the 7th August, that is, two days prior to the date on which she was ordered to appear, she put in a petition asking that the petition which she then made might be joined with her application to sue *in forma pauperis*, and a number given to the suit, and the suit tried on the civil side of the Court. With that petition she paid in the regular amount of stamp fees as in an ordinary suit. The order was that the suit should be registered and proceeded with in the usual way. The question we have to decide is, whether we are to reckon the plaint in this suit as filed on that date, namely on the 7th August, or whether the plaintiff can take advantage of the clause in the explanation of s. 4 of the Limitation Act, which says that a suit in the case of a pauper is instituted when his application for leave to sue as a pauper is filed. It is, I think, clear that that provision in favour of a pauper only [392] applies in cases where, under s. 308 of the Civil Procedure Code, the application for leave to sue *in forma pauperis* is granted and the suit is numbered and registered. In that case, by the provisions of that section, the application becomes the plaint in the suit, and the suit is considered as having commenced when the petition, which has subsequently been turned into a plaint, was filed. But in this case, in consequence of the second application made by the plaintiff herself, enquiry into her pauperism was stopped, and she elected to proceed in this case as an ordinary suitor and not as a pauper. I think we must take it that she having put in that petition stood merely in the same position as if she had filed her suit on that date. The District Judge seems to think that she will be entitled to the benefit of the explanation of s. 4 of the Limitation Act, if she was in fact a pauper when the original application to sue as a pauper was filed. I think he had no right to reopen that matter at all when it was closed on the application of the plaintiff herself. In order to give her the benefit of that explanation it was necessary that her application should be granted, in which case only her original application for leave to sue as a pauper could be treated as a plaint. Therefore, the date on which the present suit was filed being the 7th August 1873, and the date on which she was entitled to possession being on some day prior to the 26th June 1861, the suit is necessarily barred. The decision of the Court below will be reversed and the suit dismissed with costs.

Prinsep, J.—I wish to add only a few words. The decision of this Court will proceed on the point of limitation on the facts which are most

favourable to the plaintiff. * The point now under decision depends entirely upon the question as to whether the application to sue as a pauper is to be treated as a plaint. The application can be treated as a plaint only when the leave to sue as a pauper has been granted. In its present state, it is, therefore, incomplete. It is only made complete so far as the present suit is concerned by the payment of fees; and, therefore, it became a plaint on the 7th August 1873, on which date it was clearly barred.

Appeal allowed.

NOTES.

[LIMITATION IN RESPECT OF SUITS IN FORMA PAUPERIS—

I. from the date of application.

(a) when it is granted and registered :—(1876) 1 All., 230 ; (1879) 2 All., 241 ; See also (1881) 4 All., 37.

(b) when before the disposal of the application, Court fee is paid :—(1900) 28 Cal., 427.

II. from the date of filing the plaint.

(a) when the application is refused; but otherwise when leave having been given, the applicant is subsequently dispauperised .—(1895) 17 All., 526 ; (1896) 18 All., 206.

(b) even when extension of time was granted for paying in the Court fees :—(1895) 20 Bom., 508.

III. As for the legal representative's position when the applicant dies pending disposal, see (1906) 33 Cal., 1163 ; 4 C. L. J. 234.]

[393] APPELLATE CIVIL

The 23rd April, 1877.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Raghunoni Audhikary.....one of the Defendants

versus

Nilmoni Singh Deo..... Plaintiff.*

Limitation—Act (IX of 1871), sch. II, art. 60—Money obtained by Collusion and Fraud.

A suit for the recovery of money obtained by fraud and collusion is a suit for money received by a defendant for the plaintiff's use, and, therefore, under art. 60 of the second schedule of Act IX of 1871 is barred unless brought within three years of the date when the money was received.

SUIT for the recovery of Rs. 507-6. The plaint stated that one Prankisto Mitter had deposited the sum claimed in the collectorate in the name of the plaintiff, and that the first defendant, in collusion with the second defendant, on the 13th of January 1869, without the knowledge or consent of the plaintiff, took out the said sum of money from the collectorate. The plaint was filed on the 21st January 1874. The defendants pleaded limitation.

* Special Appeal No. 1610 of 1875, from the decision of J. S. Davies, Esq., Judicial Commissioner of Mambhoom, dated the 29th March 1875.

The lower Appellate Court held that the suit came under arts. 48 and 90 of Act IX of 1871. The period of limitation was, therefore, to be computed from the date on which the money was demanded by the plaintiff. Such demand having been made within three years of the filing of the plaint, the suit was not barred.

Against this decision the first defendant preferred a special appeal to the High Court.

Baboos *Hem Chunder Banerjee* and *Tarruck Nath Sen* for the Appellant.

Baboo *Bhobany Churn Dutt* for the Respondent.

The **Judgment** of the Court was delivered by

Markby, J.—It seems to us that the decision of the lower Appellate Court is wrong. The suit is brought to recover a [394] specific sum of money which the plaintiff says the defendant No. 1, in collusion with defendant No. 2, without his knowledge and consent, had obtained from the collectorate. The defendants pleaded limitation. The Court below thinks that the case is governed either by art. 90 of the 2nd schedule of the Limitation Act or by art. 48. Art. 90 provides for a suit by a principal against his agent for moveable property received by the agent and not accounted for. The plaintiff does not sue the defendant as his agent, he does not admit that the defendant was his agent. On the contrary, he denied that the defendant was his agent, and the Court below does not find that the defendant was so. Therefore it cannot possibly be brought under that head. Art. 48 clearly provides for a case in which a suit is brought to recover moveable property acquired by means of a criminal offence. The words used are: "For moveable property acquired by theft, extortion, cheating, or dishonest misappropriation, or conversion," following exactly the language of the Penal Code. Now the plaintiff in this case does not allege that the defendant committed either of those criminal offences. He does not sue the defendant on the ground that he had committed a criminal offence, but that by means of some fraud in combination with another person he got possession of the plaintiff's money. Now, that is exactly the case which would be covered by art. 60 of the schedule of the Limitation Act, if we read that article as we think we ought to do in connection with the English law. A suit for money received by the defendant for the plaintiff's use evidently points to the well-known English action in that form, and it appears from two cases quoted in *Bullen and Leake on Pleading*, 3rd edition, page 47,* that that form of action is appropriate to the recovery of money under such circumstances as these. It is said there that where the defendant has wrongfully obtained the plaintiff's money from a third party, as by a false pretence, it may be recovered in this Court. So, where defendant wrongfully obtained from the plaintiff's debtors the [395] payment of their debts under a fraudulent misrepresentation that he had an authority to collect them, the plaintiff was held entitled to recover the amount under this count. We think, therefore, that art. 60 of the 2nd schedule of the Limitation Act contains the law which ought to govern this case, and that the limitation ought to run not from the time when the money was demanded but from the time when the money was received. The money in the present case was received so long ago as January 1869, and this suit

* The cases alluded to by the learned Judge are *Tilt v. Martin*, 18 C. B., 314; and *Andrews v. Hawley*, 26 L. J., Ex., 323.

was not brought until 1874. Therefore the claim is clearly barred. The decision of the lower Appellate Court is reversed, and the suit dismissed with costs in all the Courts.

Appeal allowed.

NOTES.

[See (1905) 32 Cal. 527 at 533 : 1 C. L. J., 167 where all the cases have been collected and reviewed by MOOKERJEE, J.]

[2 Cal. 395]

APPELLATE CIVIL.

The 31st March, 1876.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRCH.

Hendry.....One of the Defendants.

versus

Mutty Lall Dhur and others.....Plaintiffs.*

Sale in execution of decree against representative of deceased Mahomedan — Mahomedan law—Debts—Purchaser of share of estate, Right of.

B R, a Mahomedan, had incurred debts for repairs to a house of which he owned an 8-anna share, and after his death his daughter S, who was entitled to a 5-anna share of his estate, and who had taken charge of his property and obtained a certificate under Act XXVII of 1860, directed further repairs to be done to the estate. The debts then incurred by B R and S not having been paid, the creditor brought a suit against S, as representing her father's estate to recover them, and having obtained a decree, the house was sold in execution thereof, and purchased by H in May 1874. B R at his death left also a sister, who was entitled to a 3-anna share of his estate, but who had been for some years absent on a pilgrimage to Mecca. On her return she in January 1874 sold her interest in the house to M. In a suit by M against S and H for possession of the share so purchased by him—*Held*, that S did not represent the whole estate of B R, and the share purchased by the plaintiff did not pass under the execution sale to H; the plaintiff, therefore, was entitled to recover.

THIS was a suit to recover possession after partition of a share in a certain dwelling-house and land in Sealdah, which [396] the plaintiff had purchased under a kobala, dated 2nd January, 1874.

One Buzloor Rohim died on 13th January, 1871, leaving a daughter Surfurunnissa Begum, a widow Fatima Khanum, and a sister Sadurunnissa. Buzloor Rohim, at the time of his death, was owner of an 8-anna share in the house and land in Sealdah; the other 8-anna share belonged at the time of this suit to one Khodejannissa, who acquired it by purchase. Of the 8-anna share owned by Buzloor Rohim, Surfurunnissa was entitled to a 5-anna share (to a 4-anna share by right of inheritance from Buzloor Rohim and to a 1-anna share under a kobala executed in her favour by Fatima Khanum), and the remaining 3-anna share belonged to Sadurunnissa Bibi. During his lifetime and at his death Buzloor Rohim was indebted to Messrs. Anderson, Wallace,

* Special Appeal No. 1200 of 1875, against the decree of Alex. J. Maclean, Esq., Judge of Zilla 24-Pergannas, dated the 4th of June 1879, reversing a decree of Baboo Mohendro Nath Bose, first Subordinate Judge of that district, dated the 5th of April 1875.

& Co. for repairs done by them, and after his death they filed a suit against Surfurunnissa Begum, who had obtained a certificate and taken charge of Buzloor Rohim's property, styling her the daughter and representative of Buzloor Rohim, to recover that debt, and a further sum for repairs which had been executed at Surfurunnissa's direction since Buzloor Rohim's death. That suit was undefended, and a decree was made against Surfurunnissa, in execution of which Surfurunnissa's interest in the house and land was sold, and purchased by certain persons—Hendry and Hubbard—in May, 1874. For some time before Buzloor Rohim's death, Sadurunnissa was absent on a pilgrimage to Mecca, and did not return till 1873. In January, 1874, she sold her interest in the dwelling-house and land to the plaintiff, who, possession being refused him, accordingly brought this suit for possession of his vendor's 3-anna share, making Khodejannissa, Hendry, Hubbard, and Surfurunnissa, defendants.

The defendant Hendry defended the suit and submitted in his written statement that the decree in execution of which he and Hubbard purchased was passed against Surfurunnissa as representative of Buzloor Rohim; that the interest of the latter passed by the sale, and that, consequently, nothing was left for the plaintiff's vendor to transfer, and the plaintiff had no title on which to found his suit. The Subordinate Judge, referring to [397] the case of *Ishan Chunder Mitter v. Buksh Ali Soudagur* (Marshall, 614) was of opinion that the right and interest of Buzloor Rohim passed by the sale in execution of the decree in the suit against Surfurunnissa, who had been sued as his daughter and representative. He, therefore, dismissed the suit.

The Judge on appeal was of opinion that the present case was distinguishable from that referred to by the Subordinate Judge, inasmuch as the debt was principally incurred after Buzloor Rohim's death; and as Sadurunnissa was not a party to the suit against Surfurunnissa, the estate of the deceased was not fully represented. He, consequently, held that the sale in execution against Surfurunnissa could not bind the share of the estate to which Sadurunnissa was entitled, and gave the plaintiff a decree for the share sued for.

The defendant Hendry preferred a special appeal to the High Court, on the ground (among others) that by the sale in execution all the rights of Buzloor Rohim became vested in him, and Sadurunnissa, as the sister and one of the heirs of Buzloor Rohim, could not have any rights in the property in dispute as heir till the debts of the estate were paid.

The *Advocate-General*, Offg. (Mr. Paul), for the Appellant.

Baboo Mohini Mohun Roy for the Respondents.

The Judgment of the Court was delivered by

Garth, C. J.—In this case the plaintiff claims a three-sixteenth share in a dwelling-house at Sealdah, one half of which is admitted to have belonged to the late Buzloor Rohim, who died in 1871.

Buzloor Rohim, in his lifetime, had employed Anderson, Wallace, & Co., in Calcutta, to do some repairs to the house; after his death his daughter Surfurunnissa Begum, who was entitled to five-sixteenth of the whole property, employed them to do further repairs. The price of these repairs not having been paid, Anderson, Wallace, & Co. brought an action [398] against Surfurunnissa Begum, as representing her father's estate, to recover the sum due to them; and having obtained a decree, the house was sold in execution under the decree, and was purchased by the defendants Hendry and Hubbard.

Meanwhile, a sister of Buzloor Rohim, Sadurunnissa Bibi, who had been for some time past on a pilgrimage to Mecca, and who was entitled to a three-sixteenth share of the property, returned, and she sold her interest to the plaintiff, who brings this suit to establish his right, insisting that the three-sixteenths which he purchased could not legally be sold, and were not in fact sold to Hendry and Hubbard under the decree.

The defendants contend that Surfurunnissa Begum represented the whole estate of Buzloor Rohim, and that, therefore, his sister's share was liable for the repairs and was properly sold under the execution. The learned Judge in the Court below has found that Surfurunnissa Begum was not legally authorized to represent the whole estate of her father, and that, consequently, the decree and the execution sale which took place under it only affected her five-sixteenths of the property.

Under these circumstances the three-sixteenth share which belonged to Sadurunnissa Bibi being duly conveyed to the plaintiff, became his property, and the learned Judge in the Court below was, in our opinion, perfectly right in making a decree in his favour.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

NOTES.

[Sale in execution of decree against one of the representatives of a deceased Mahomedan, or the rights of other heirs, see (1886) 7 All., 822 : 23 All., 263.]

[399] FULL BENCH.

The 22nd January, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE KEMP,
MR. JUSTICE MACPHERSON, MR. JUSTICE MARKBY
AND MR. JUSTICE AINSLIE.

The Empress

versus

Dwarkanath Chowdhry and another.

*Stamp Act (XVIII of 1869), s. 29, and sch. II art. 38—Instrument of
Transfer—Prosecution by Collector—Intention
to evade payment of stamp duty.*

The accused was prosecuted under Act XVIII of 1869, s. 29, for executing a document on insufficiently stamped paper. The document recited that, "whereas A and B have sold to me 2 gandas 3 cowries of land under a kobala, dated the 9th of Jeyt 1283 in lieu of a consideration of Rs. 695, and whereas I have returned to the vendors in all 4 cottas of land worth about Rs. 25, and whereas in lieu of the said land the said vendors have given me 4 cottas of zerait land held by them, now I or my heirs shall have no objection or contest whatever in regard to the mutual exchange of lands between the vendors and me, the purchaser; hence I have executed

* Reference in Criminal Motion No. 1112 of 1876, by Mr. Justice AINSLIE and Mr. Justice MORRIS, dated the 6th September 1876.

this chitti by way of conveyance or deed of exchange, which may be of service when required." This document bore a stamp of eight annas, and it was executed only by the accused and presented by him for registration. *Held*, that the document was an instrument of transfer within the meaning of art. 38, sch. II, Act XVIII of 1869. *Held* also, that a Magistrate is bound, for the purpose of ascertaining whether any and what penalty should be imposed, to consider, whether a person prosecuted under s. 29, Act XVIII of 1869, had any intention to defraud by evading payment of stamp duty.

THE accused Dwarkanath Chowdhry employed the accused Chotay Lall, a mooktear and revenue agent of the Darbhanga Court, to prepare for him a document which was to be registered in the Darbhanga Sub-Registrar's office. Chotay Lall, accordingly, prepared the document, and Dwarkanath executed it and presented it for registration. The document bore a stamp of eight annas. It recited that "whereas Inderman Chowdhry and Mon Chowdhry, sons of Baktwar Chowdhry, residents and shareholders and nialiks of mouzah Pauchole [400] Kris, pergannah Ramchowand, have sold to me 2 gandas 3 cowries, being a quarter share of 11 gandas 2 cowries of the entire 16 annas of a certain estate under a kobala, dated 9th Jeyt, 1283, F. S., in lieu of a consideration of Rs. 695; and whereas out of that share covered by the said deed of sale I have returned to the vendors in all 4 cottas of land, worth about Rs. 25; and whereas in lieu of the said land the said vendors have given me 4 cottas of zerait land held by them situated in mouzah Pauchole Kris, pergannah Ramchowand aforesaid, now I or my heirs shall have no objection or contest whatever in regard to the mutual exchange of lands between the vendors and me, the purchaser. Hence I have executed this chitti by way of awazanama, or deed of exchange, which may be of service when required." The document was signed only by Dwarkanath Chowdhry. The document being found to be insufficiently stamped was impounded by the Sub-Registrar and sent by him to Mr. A. P. Macdonell, the Officiating Magistrate in his capacity of Collector, by whom the accused were prosecuted under s. 29, of the Stamp Act, XVIII of 1869. The defence of Chotay Lall was, that he merely copied out the document from a draft, and was unaware at the time that the paper was insufficiently stamped, and that he could not be convicted under s. 29. Dwarkanath stated that he did not know what stamp was necessary, and that he had no intention to defraud the Government.

* • The Deputy Magistrate, Baboo Gobind Mohun Ghose, acquitted Chotay Lall on the ground that he could not be legally convicted under the section. As to Dwarkanath, he referred to the Government Order, 2857 of 4th December 1875 (15 B. L. R., Rev. Cir., 59), and held that proof of fraudulent intention was unnecessary, and the offence was complete when the terms of s. 29 were contravened, and it was no defence to say there was no intention to evade the law. Dwarkanath was, accordingly, convicted and sentenced to pay a fine of Rs. 20. The Officiating Magistrate was of opinion that Chotay Lall had been illegally acquitted, and that he ought to have been found guilty of 'making' [401] the document under s. 29 of Act XVIII of 1859. He, therefore, referred the case to High Court.

The case came before AINSLIE and MORRIS, JJ., who referred it for the orders of the Chief Justice, with the following remarks.

AINSIE, J.—The Officiating Magistrate of Darbhanga (who is also the prosecuting Collector) has made a reference to this Court in respect of the acquittal of Chotay Lall, which he holds to have been illegal. As to this it is

sufficient to say that unless the Government sees fit to appeal against the sentence of acquittal under s. 272 of the Code of Criminal Procedure this Court cannot interfere in any way.

The record has been sent up, and on inspecting it several questions of considerable importance appear to arise; and as the propriety of the conviction of Dwarkanath depends upon the solution of the first two of these questions, it appears to us necessary to consider them.

In the first place there is the question whether the instrument on which this prosecution is founded is an instrument of transfer within the meaning of art. 38, Schedule II of the Stamp Act, or whether that article is not restricted to instruments by which a complete transfer binding on all parties thereto is effected. In the present case the instrument is only executed by Dwarkanath Chowdhry and not by Inderman and Mon Chowdhry, the other parties to the alleged exchange, nor are the latter in any way bound by it.

Secondly, there is the question whether a Magistrate is not bound to consider the intention of the persons prosecuted. There is no evidence against Dwarkanath of an intention to defraud the Government, and he states in his answer that he had no such intention, and believed that the instrument was properly stamped as a conveyance of property of less value than Rs. 50 (the value stated in it is Rs. 25). The Deputy Magistrate does not base the conviction on an inference of guilty intention deduced by himself from the facts, but on a ruling contained in an order of the Government of Bengal, No. 2857, dated 4th December 1875 (15 B. L. R., Rev. Cir., 59), to the effect that the question [402] of fraudulent intention is to be considered and determined by the Collector and not by the Magistrate.

Thirdly, there is a question (which, however, rather arises upon the reference in respect of Chotay Lall, but which it would be well to express an opinion upon) whether a mooktear who writes out a fair copy of an instrument on a stamped paper of insufficient value can be said to 'make' the instrument within the meaning of s. 29 of the Act.

Considering the importance of the questions arising in this case, we think it desirable that it should be considered (as if it were a reference from the Board of Revenue under s. 41) by a Bench of at least three Judges.

Let this be submitted to the Chief Justice for orders, and notice of this order be given to the Government Pleader.

The case came on before a Bench of five Judges.

The Legal Remembrancer (Mr. H. Bell) for the Crown.—It is not necessary to support a conviction under the Stamp Act that the prosecution should show that the accused had an intention to evade the law. The offence under s. 29 of Act XVIII, 1869, is complete irrespective of intention—see Maxwell on Statutes, p. 80. There are many instances in which a guilty intention is not a necessary ingredient in the offence: offences for instance under the Cotton Frauds Act—*Reg. v. Premji Bhagvan* (10 Bom. Rep., 295), or under the English Adulteration Act—*Roberts v. Egerton* (L. R., 9 Q. B., 494), and under the Statute for the protection of those entitled to shoot game—*Watkins v. Major* (L. R., 10 C. P., 662). For the mitigation of the fine the question of intention can of course be considered, but it is for the accused to show that he had no intention to evade the law.

The Opinion of the Court was delivered by

Garth, C.J.—On the first question raised in this reference, we are of opinion that the instrument on which this prosecution is founded is an instrument of transfer within the meaning of art. 38, schedule II of Act XVIII of 1869.

On the second question we hold that a Magistrate is bound, for the purpose of ascertaining whether any and what penalty should be imposed, to consider the question whether a person prosecuted under s. 29 of the Stamp Act had an intention to defraud the Government by using a stamp of less value than that required by law.

A Collector has power to prosecute in every case coming within the provisions of s. 24, but he is not to do so unless he shall have reason to think that there has been an intent to evade payment of stamp duty. If he does prosecute, the Magistrate is bound, under the terms of s. 29, to record a conviction, provided that it is proved that there has been a making, &c., of an unstamped or insufficiently stamped instrument: but the amount of fine to be imposed is left altogether to the discretion of the Magistrate, a maximum limit only being fixed by the law. It is impossible for the Magistrate to exercise any discretion in fixing the fine, or to say what fine ought in any particular case to be imposed, unless he is at liberty to determine whether the person prosecuted has used no stamp or an insufficient one from a *bona fide* mistake, or from carelessness, or with intent to evade payment of the stamp duty.

It may be true that the Collector is not bound to offer any evidence of intention, or even to state the reasons which induced him to prosecute; but the question of intention is, nevertheless, one which the Magistrate is bound to consider, and he must hear the statement of the accused and any evidence which he may offer in reference to it.

A Collector may have formed his conclusion on insufficient grounds, or have ordered a prosecution without due consideration: and the Magistrate is not bound to be guided so far as the question of penalty is concerned by the mere fact of the prosecution having been instituted. The present case shows that a person who enquires as to the proper stamp to be affixed to an instrument may be misled, and so become liable to prosecution even if he makes his enquiry at a place where [404] he may confidently expect correct information: for the registering officer who sent this document to the Collector has himself made a mistake as to the proper stamp to be used. He certified it as liable to a 4-rupee stamp, whereas the stamp prescribed by art. 38, Schedule II, is Rs. 16. Had the accused enquired at the Registry Office, and used a 4-rupee stamp, he would still have been liable to conviction on prosecution; but if a Collector were so unreasonable as to prosecute in such a case, a Magistrate would clearly be bound to consider the facts put forward by the defendant, and to give effect to the defence of *bona fides* by discharging the accused with a nominal fine.

A *bona fide* mistake may not be a *complete* defence, even if proved beyond a doubt; but it cannot be said that it is *no* defence.

As it appears that the judgment of the Deputy Magistrate was arrived at without duly considering the merits of the case before him, so much of that order as imposes a fine must be quashed. The Legal Remembrancer has stated that the Government has determined that the fine realised from Dwarkanath Chowdhry shall be refunded, whatever the merits of this case; it is, therefore unnecessary to direct the Deputy Magistrate to reconsider his order.

The sentence passed upon Dwarkanath Chowdhry on the 4th July 1876, by the Deputy Magistrate of Darbhanga is set aside, and it is ordered that the fine of Rs. 20 imposed on him, if realised, be refunded:

NOTES.

[See *Queen-Empress v. Venkatrayadu* (1888) 12 Mad., 231, where it was held that this case had no application in cases within sec. 63 of the Stamp Act 1 of 1879.]

[406] APPELLATE CRIMINAL.

The 16th, 18th and 21st June, 1877.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

The Empress
versus
Donnelly.

In the matter of the Petition of Donnelly.

*Criminal Procedure Code (Act X of 1872), s. 215—Discharge of
accused—Revival of proceedings—Evidence—
Magistrate—Competent witness.*

It is illegal and *ultra vires* on the part of a Magistrate to revive before himself criminal proceedings against an accused who has already been discharged under s. 215 of the Criminal Procedure Code where no further evidence is procurable than that which was before the Court on the first occasion. *Per* MARKBY, J.—When the discharge has been improper, the only proper course open to a Magistrate is to report the case to the High Court for orders, and that Court, if of opinion that the accused has been improperly discharged, will order a retrial.

Per Curiam.—A Magistrate cannot himself be a witness in a case in which he is the sole Judge of law and fact. *Per* MARKBY, J.—Where in such a case he has given his evidence and convicted the accused, his having so acted makes the conviction bad. *Per* PRINSEP, J.—The conviction is not absolutely bad. It is open to the Court to uphold the conviction, if it is of opinion that, after rejecting the Magistrate's evidence, there is other evidence sufficient, if believed, to support the conviction.

This being a proceeding under s. 297 of the Criminal Procedure Code, the Court refused to go into the evidence.

THE facts of this case were as follows. On the 7th of April Baboo Hem Nath Bose, the postmaster of Howrah, preferred a complaint to the Magistrate, that a letter bearing an obliterated or twice-used stamp had been detected among the letters posted in his district. The suspicious letter was handed over to the Magistrate, who, on the following day, took the evidence of the Postmaster and some of his subordinates. On the 13th April, Mary Donnelly, the writer of the letter, appeared on a summons, and was examined by the Magistrate. She acknowledged that the letter was in her handwriting, but denied having affixed the stamp; in explanation she stated that she had given [406] a cook named Ismail two pice to purchase a stamp and put upon the letter. Robert Inglis, the step-father of the accused, was also examined. The

District Superintendent of Police, under the direction of the Magistrate, made a further investigation, and examined afresh the accused and her step-father; two young brothers of the accused were also examined, as also the cook Ismail, who asserted that the accused had never given him any letter to post. By a letter dated the 28th of April, Mr. Pellow, the Magistrate, informed the Postmaster that, on a consideration of the evidence as taken by him, and also from the facts stated in the Police report, he considered it hopeless to bring home the case to the accused, and he thereupon discharged her. The discharge order was endorsed at the back of the Police report. On the next day the Postmaster in reply to the Magistrate's letter called his attention to the fact that the word 'stamped' had been written across the suspicious stamp, and asserted it as his opinion that the woman herself knowingly used the defaced stamp, and concluded by asking the Magistrate to try the case. On receipt of this letter, Mr. Pellow issued a warrant for the arrest of the accused, and on the 4th of May began a second proceeding against the accused. So much of the evidence of the Postmaster as is material was as follows: "I saw clear marks of defacement not by the stamp of my office. I observed also the word 'stamped' written over the stamp. It appears to be in the same handwriting as the address. I noticed this at the time I first saw the letter. I did not mention this in my deposition, because I was not asked by the Court. I brought the letter personally to the Magistrate, and did not submit a written report. I mentioned the fact then that the word 'stamped' was written over the stamp." The former witnesses from the post office were again examined as in the first proceeding. Mr. Pellow, the Magistrate, also examined himself as a witness. His deposition was as follows:

"I recognize this letter: it was given me by the Postmaster of Howrah on the 6th or 7th April last. He personally showed me the defaced stamp, and spoke to me a few minutes on the subject. I ordered a prosecution, and took up the case myself. I opened the letter, and took evidence as Magistrate. I then referred the matter to the Police. Mary Donnelly, the present [407] defendant, was summoned and made defendant after the Police inquiry. * Believing that there was no evidence to prove who affixed the defaced stamp, I discharged Mary Donnelly on the 27th of April. The Postmaster then wrote a letter, No. 142, on the 29th April, pointing out that the word 'stamped' was written over the stamp, and I in consequence took up the case again. The letter has never been out of my custody since the 6th or 7th of April when first made over to me, except to show parties in the course of the trial. It has been always left locked up in my box. I don't recollect the Postmaster pointing out the word 'stamped' written over the stamp, but he may have done so.

The cook Ismail was also examined, who repeated his previous story. The Magistrate thereupon drew up a charge against the accused under s. 262 of the Indian Penal Code, and having taken the defence and examined the witnesses produced on her behalf, found her guilty of the charge, and sentenced her to two months' rigorous imprisonment. The accused appealed to the Sessions Judge of Hooghly, who, however, confirmed the decision and sentence of the Magistrate. On an application by the petitioner to the High Court, under s. 297, the record of the case was sent for from the Court below.

Mr. Jackson for the petitioner.—There is no evidence in this case to uphold the conviction. The conviction is also bad on the ground that the Magistrate could not appear as a witness in a case in which he was sole judge. In *Queen v. Mukta Singh* (4 B. L. R., A. Cr. 15), NORMAN, J., has collected the English cases on this point, which are all in favour of this contention. The

English law on the point only goes to the extent of permitting a Judge to be a witness in a case where he is not the only Judge trying the case; Bacon's *Abridgment*, Tit. Evidence, p. 206; see also *Hackers' case* (Kelyng's Rep., 12). The Magistrate further had no power to revive the prosecution against the petitioner after she had been discharged. Sections 142 and 215 of the Criminal Procedure Code may be supposed to confer this power; but ss. 295 and 296 clearly show that it was the intention of the Legislature to reserve the exercise of this power to the High Court alone. The point has already been decided in *In re Mohesh Mistree* (I. L. R., 1 Cal., 282). *Jint Sahoo v. Bheekon Roy* (18 W. R., Cr., 39) may be referred to as supporting the opposite contention, but there COUCH, C. J., points out that the Magistrate had, on the second occasion, some fresh evidence before him, which is not the fact in this case; see also *Kistoram Mohara v. Anis* (20 W. R., Cr., 47).

The Legal Remembrancer (Mr. H. Bell, with him the Junior Government Pleader, Baboo Juggadanand Mookerjee) for the Crown.—In this case there was no necessity for the Magistrate to have made himself a witness. He might have taken judicial cognizance of every fact stated by him as witness. The evidence is immaterial, and there is sufficient on the record independently of the Magistrate's evidence to support the conviction. The action of the Magistrate cannot, therefore, be a ground for reversing the orders of the lower Courts; see s. 167 of the Evidence Act. *Hurpurshad v. Sheo Dayal* (L.R. 3 Ind. App., 259, 286) and *Kishore Singh v. Gonesh Mookerjee* (9 W. R., 252) are cases in favour of the power of a Judge to examine himself as a witness. An American case, *Ross v. Bühler* (2 Martin, N. S., 312), referred to by Taylor in his work on Evidence, p. 1173, seems to decide that a sole Judge cannot depose as a witness, but the author does not approve of that case; see also Best on Evidence, 3rd ed., 260. [MARKBY, J.—Mr. Best is there referring to trial by jury, and not to cases where a Judge tries the facts.] In England and America there would be no appeal from the facts. In this country, appeals are permitted; and, therefore, the same objection does not apply. Under s. 118 of the Evidence Act, a Judge is not precluded from giving evidence—*Queen v. Tarapersaud Bhuttaoharjee* (N. A. Rep., 1857, pt. II, p. 83). [MARKBY, J.—There is no reason at all given for that decision.] The decision of NORMAN, J., in *Queen v. Mukta Singh* (4 B. L. R., A. Cr., 15) distinctly holds that a Judge is a competent witness, and can give evidence in a case tried before himself. *Queen v. Bholanath Sen* (I. L. R., 2 Cal., 23) does not apply, because there it was held that the Magistrate had a personal interest in the case tried. No authority has been shown making it imperative that the Magistrate should have fresh evidence before him before he can try a case a second time. The Magistrate was competent, under s. 464, to withdraw the order of discharge. The evidence on the second proceeding was given much more in detail; there was, therefore, fresh evidence sufficient to bring the case within *Hari Singh v. Danish Mahomed* (20 W. R., Cr., 46). Fresh evidence was not absolutely necessary—*In re Ramjoi Mozoomdar* (14 W. R., Cr., 65). *In re Mohesh Mistree* (I. L. R., 1 Cal., 282) does not apply; all the Court there ruled was that a Magistrate cannot order a Subordinate Magistrate to proceed with a case under s. 142; see also *Queen v. Tilkoo Goala* (8 W. R., Cr., 61), *Jint Sahoo v. Bheekon Roy* (18 W. R., Cr., 39), *Kistoram Mohara v. Anis* (20 W. R., Cr., 47), *Sidya bin Satya* (unreported, see Prinsep's Cr. Pro. Code, 5th ed., 163). The record shows that the alleged first and second proceedings of the Magistrate were in fact one proceeding,—the second proceeding was only a continuation of the first.

Mr. Jackson in reply.

Cur. adv. vult.

The following **Judgments** were delivered :—

Markby, J. (after shortly stating the proceedings before the Magistrate continued) :—The petitioner appealed to the Sessions Judge of Hooghly, who on the 28th of May affirmed the conviction and sentence. The petitioner then applied to this Court to set aside the conviction as illegal : *first*, because the Magistrate had no power to revive the prosecution against the petitioner after she had been discharged ; and, *secondly*, because the Magistrate could not appear as a witness in a case in which he was the sole judge. On the argument of the case, it was also contended that there was no evidence which would support a conviction.

[410] As regards the last point, we intimated at the close of the argument for the petitioner, that there was some evidence. Of course we express no opinion whatever as to the sufficiency or otherwise of that evidence ; that is a matter into which this Court does not enter upon an application of this kind, nor is it desirable to comment upon this evidence ; but I may say with reference to an argument used by Mr. Jackson, that, in my opinion, that evidence does not consist solely of the comparison of handwriting made by the Magistrate.

I proceed now to examine the grounds of law taken in the petition.

With regard to the power of the Magistrate to revive proceedings against an accused person who has been discharged under s. 215, the law provides by that section that a discharge under it is not equivalent to an acquittal, and does not bar the revival of the prosecution for the same offence. By s. 142, also, any Magistrate duly empowered in any case which he is competent to try or commit for trial may, without any complaint, take cognizance of any offence which he suspects to have been committed, and may issue process to compel the suspected persons to appear. These two sections appear, no doubt, to leave the Magistrate, if properly qualified, free to revive any case he likes, whether the discharge be illegal, whether it be improper upon the evidence, whether it appears to the Magistrate that another offence has been committed than that charged, or whether fresh evidence which was not previously forthcoming has come to his knowledge. And the Magistrate could, under the sections, revive not only any case heard by himself, but any case heard by another Magistrate subordinate to himself : and having revived it, he could, under s. 44,* send it

* [Sec. 44 :—The Magistrate of the district or any Magistrate of a division of a district, may make over any criminal case taken up by him on suspicion, or brought before him on complaint, or on report by the Police, for inquiry or trial to any Magistrate subordinate to him to be dealt with to the extent of the powers with which the Subordinate Magistrate may have been invested under the provisions hereinbefore contained.

The Magistrate making the reference may, if the case was brought forward on complaint, before such reference, examine the complainant as prescribed in this Act ; but if he does not do so, the Magistrate, to whom the case is referred, shall proceed as if the complaint had been made to him.

The order of reference shall be recorded in a proceeding, and, if the case has been brought forward on the report of a Police Officer, shall be recorded on such report ; and all processes issued for causing the attendance of the accused person or the witnesses shall direct them to attend before the Magistrate to whom the case has been referred.

The Magistrate making the reference may, if he thinks proper, retransfer to his own file the case referred under paragraph one of this section, and when he has done so, and not before, may proceed therein.]

back to the Magistrate who ordered the discharge for enquiry or trial. And this is precisely the same where there is a discharge under s. 195 * upon an enquiry by a Magistrate with a view to commitment to the Sessions or to the High Court. For all cases of discharge, therefore, the Magistrate would, under the section, appear to have the most absolute and uncontrolled power of reviving the proceedings against the accused.

That this, however, was not the intention of the Legislature [411] is obvious from the provisions of ss. 295 and 296. A special proceeding is provided by s. 295 for the case in which an order (which in my opinion includes an order of discharge) is found to be illegal. All that the Magistrate can then do is to report the proceeding for the orders of the High Court. So by s. 296, if it appears to the Magistrate that some other offence has been committed than that of which the accused person has been discharged, he may direct the Subordinate Magistrate to enquire into that offence; but this he can only do in a case which, when before that Magistrate, was a sessions case. If the Magistrate at the same time possessed the unlimited power of reviving proceedings in all cases of discharge and sending them down to his subordinates for further enquiry, which ss. 44, 142, 195 and 215 at first sight appear to give him, these provisions would be wholly meaningless.

It is this difficulty of reconciling the provisions of ss. 295 and 296 with the extensive powers conferred by the earlier sections that seems to me to render it necessary to put some restriction upon the literal meaning of those earlier sections; and taking the whole Act, the only conclusion I can come to is, that the Legislature did not intend that the Magistrate should, as a general rule, have any power at all of revision over the proceedings of Subordinate Magistrates in cases of discharge. S. 296 gives that power in one special case only. If a Magistrate, therefore, thinks a discharge illegal or improper, it must be brought before the High Court; in the first case, by a report of the Magistrate under s. 295; in the second case, by an application under s. 297; when the High Court will, if the discharge was improper, order the accused to be tried or committed for trial. On the other hand, if there is any fresh evidence forthcoming, which was not before the Court when the first enquiry was held, then there is no necessity to revive the previous proceedings at all, and the Magistrate can proceed without any reference to the High Court. This seems to me to be a reasonable construction of the Act, and it is the only way in which I can reconcile all its provisions: That distinction was, I believe, first suggested in a reference by the Officiating Sessions Judge of Sylhet in the case *Har Singh v. [412] Danish Mahomed* (20 W. R., 46). The learned Judges of this Court do not there say whether they approve of that distinction, but they affirm the

*[Sec. 195 :—When a Magistrate finds that there are not sufficient grounds for committing the accused person to take his trial before the Court of Session

When accused person to be discharged.

or High Court, or for remanding him, he shall discharge him, unless it appears to the Magistrate that such person should be put on his trial before himself, in which case he shall proceed

under chapter XVI, XVII or XVIII of this Act.

Explanation I.—The absence of the complainant, except when the offence may lawfully be compounded, shall not be deemed sufficient ground for a discharge, if there appear other evidence of a nature rendering a trial desirable.

Explanation II.—A discharge is not equivalent to an acquittal and does not bar the revival of a prosecution for the same offence.

Explanation III.—An order of discharge shall not ordinarily be made until the evidence of the witnesses named for the prosecution has been taken.]

order of the Magistrate who had remanded the case for a fresh enquiry upon the ground of there being "further evidence procurable which was not before the Court when the order of discharge was given," and not as the Sessions Judge points out on the ground of there being a "failure of justice." But in a subsequent case (I. L. R., 1 Cal., 282) three Judges of this Court held that a Magistrate could not, of his own motion, revive a case where the accused had been discharged without examining all the witnesses for the prosecution. I was a party to this judgment, and of course it was not our intention to overrule the decision of the late Chief Justice and Mr. Justice GLOVER in 20 Weekly Reporter. We could not do so; and it seems to me that these decisions are reconcilable in the way I have mentioned. I, therefore, hold that a Magistrate cannot, by his own order, revive proceedings where no further evidence is procurable which was not before the Court on the first occasion.

The only question, therefore, is, whether in this case there was, on the second occasion, any such further evidence. I think there was not. Indeed, I confess I have great difficulty in understanding what the first evidence is said to be. The petitioner was charged with using a defaced stamp; the envelope of the letter upon which the stamp was, was before the Court on the first occasion, and it is not denied that the stamp was also before the Court on that occasion; but it is said that a certain word, which was at that time written partly upon the stamp and partly upon the letter, was not before the Court as evidence. How that is possible I really cannot understand. I agree with the Sessions Judge entirely that this evidence was before the Magistrate on the first occasion, but its effect had been overlooked.

As to the second point, whether the conviction is illegal because the Magistrate himself gave evidence, that question seems to me to resolve itself into this. Is a sole Judge of law and fact competent to decide a case in which he has himself given evidence?

[413] It has been strongly contended on the part of the Crown that he is so, and that there is no impediment in law to a Judge giving evidence, and then disposing himself of the case by his sole opinion. No instance of this kind has, however, been found, and no authority of any Judge or text-writer has been cited in support of such a proposition. The English cases (they are very few and very old) do not go further than to establish that a person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and must be submitted to the independent judgment of other persons, exercising similar judicial functions, sitting with him at the same time [*per* NORMAN, J., in *Queen v. Muktu Singh* (4 B. L. R., A. Cr., 15)]. No case in England is cited in which even under these circumstances a Judge has been called as witness in a trial on which he was sitting later than the trial of Lord Stafford.

Two cases are cited as having occurred in this country—one, the case of *Queen v. Tarapersaud Bhattacharjee* (N.A. Rep., 1857, pt. ii, p. 83), and the other, the case before Mr. Justice NORMAN above referred to. That learned Judge went into the matter on that occasion very fully; and having carefully considered his judgment, I have come to the conclusion that he did not intend to carry the law beyond that which he lays down as the result of the English cases. He is very careful to point out that, in the case before the late Nizamut Adawlut, the trial took place with the assistance of a Muhammadan law officer, who might have given a *futwa* acquitting the prisoner, and that if he had done so, the Judge who gave that evidence could not have convicted him, but could

only have referred the matter to the Nizamut Adawlut. Then he says at p. 19 : "Prior to the enactment of the Code of Criminal Procedure, when a Sessions Judge was trying a case with the assistance of a Muhammadan law officer, it would seem from the case cited and from the analogy of the English cases referred to, that the Judge might have given evidence in a case tried before himself. By the substitution of a system of trial with assessors, a different species of check was introduced. The assessors give their opinions, which the Judge is bound to record. The Judge [414] must transmit an abstract of a trial to the High Court, and on perusal of such abstract the Court may call for the record."

The learned Judge seems, therefore, to think that the presence of the assessors brings the cases within the rule which he had derived from the English cases. Whether this is quite correct is, I think, open to some question ; and it is not quite consistent with what the learned Judge had himself asserted in an earlier part of his judgment. But that appears to me to have been the view at which the learned Judge ultimately arrived.

In the absence, therefore, of any authority for the position that a sole Judge of law and fact may give evidence, and then decide a case in which he has been a witness, I refuse to give any countenance to what appears to me to be a most objectionable proceeding. Every one admits that it is highly objectionable for a Judge to give evidence even when there are other Judges besides himself. For my own part, I consider these objections so formidable that I would gladly see the practice of calling a Judge as a witness abolished in all cases. But these objections are greatly increased when the Judge who testifies is a sole Judge. The case is entirely in his hands. He has no one to restrain, correct, or check him. If he gives evidence upon any matter of importance, the party against whom his evidence tells could not venture to test his credibility either by cross-examination, or contradict it by other testimony. I need say nothing of the indecency of such a proceeding ; no one dare venture to defend it. The Judge would therefore give his evidence without the usual safeguards against false testimony—a position which has been over and over again repudiated.

It was contended by Mr. *Bell* that the appeal to a higher Court was a check upon the Judge. To some extent it may be so, but not a sufficient one. The Appeal Court would deal with the evidence including that of the Judge. But, in my opinion, the evidence of the Judge being practically incapable of challenge or contradiction ought not to be even taken. Moreover, a Court of Appeal is not a check in the same way that Judges sitting together are a check upon each other. I am, therefore, of opinion that a Judge who is a sole judge of law and fact [415] cannot give his own evidence, and then proceed to a decision of the case in which that evidence is given, and that upon this ground, also, the conviction is bad ; but as Mr. Justice PRINSEP has some doubts about quashing the conviction on this ground, it is better that our judgment should proceed upon the first ground only.

The conviction and sentence are set aside. No application has, however, been made to us to order further proceedings, and we do not consider it necessary, of our own motion, to direct any further proceedings against the accused.

Prinsep, J.—It is unnecessary to repeat the facts connected with the case now before us, as they have been already fully stated.

It is sought to set aside the conviction passed by the Magistrate on three grounds : *first*, because the evidence is not sufficient in law ; *secondly*, because the Magistrate, being a witness for the prosecution, is not, competent to try it as

the sole judge of law and fact ; *thirdly*, because, having discharged the accused under s. 215 of the Code of Criminal Procedure, the Magistrate was not competent to revive the proceedings and try the accused.

On the first point, I entirely agree with my learned colleague that there is evidence which, if believed, is sufficient for the conviction of the petitioner. That evidence, as pointed out by Mr. Justice MARKBY, does not consist solely of a comparison of handwriting, and I am not prepared also to assent to the proposition contended for by Mr. Jackson, that to establish an inference from a comparison of handwriting the evidence of an expert is absolutely necessary. Of course it is most desirable ; but to lay this down as an absolute rule would, in nearly every case in this country, exclude such evidence because experts are not procurable. The powers given to Appellate Revisional Courts are sufficient to correct any misapplication of such evidence.

But before leaving this part of the case, I desire to state emphatically that I express no opinion on the value of that evidence or on the guilt or innocence of the petitioner.

[416] On the second point, I consider that the authorities quoted in the judgment of Mr. Justice NORMAN in *Queen v. Mukta Singh* (4 B. L. R., A. Cr., 15) are conclusive that one who is sitting as a sole judge is not competent also to be a witness. No case has been quoted in which this has ever occurred, and the inexpediency of such a rule as well as its possible evil results, are too obvious to call for explanation. The case cited by Mr. Bell does not establish this rule, or go further than to state that a Judge is not competent to state in the judgment or to consider facts which can only come from the mouth of a witness.

But in the present case I am not inclined to set aside the proceedings on this ground, because it seems to me that Mr. Pellow's evidence was immaterial, and that if it be put out of consideration, there is evidence which, if believed, would be sufficient for the conviction of the petitioner.

On the last point as to the competency of a Magistrate to revive a case after he has passed an order of discharge under s. 215, I find that several decisions of this Court restrict this power to cases in which there may be some fresh evidence forthcoming. Had this point been before us for the first time, I should not be disposed to question a Magistrate's competency provided that he is invested with the power described in s. 142 ; but I do not feel justified in the present case in adhering to that opinion, which is opposed to that of so many Judges of matured experience.

That there is no evidence which can properly be called fresh evidence is to my mind clear. The Magistrate considers that on the definition of 'evidence' and 'document' in the Evidence Act, he is entitled to consider the word 'stamped' written across the obliterated stamp to be fresh evidence, because his attention was not directed to it ; but I find it impossible to disconnect the word 'stamped' from the actual stamp which admittedly was in evidence, or to hold that anything which a Magistrate or Judge may accidentally overlook, and which it is difficult to understand how he could not have seen, can be deemed to be fresh evidence when his attention is especially [417] directed to what is practically a part of it. In this case, also, the Magistrate's own statement as a witness leaves it in doubt whether his attention was not drawn by the Postmaster to the word 'stamped.'

Then the statement of the cook recorded only after the order of discharge, is, it is contended, fresh evidence. But even if it was not previously recorded, it is clear that the nature of that statement was known to the Magistrate from the Police report on which he discharged the accused. He alludes to that statement in his letter to the Postmaster reporting the result of the case, and he did not think it necessary to examine that witness, who had been bound over by the Police to appear before him.

Under these circumstances, I concur in quashing the conviction and proceedings taken subsequent to the order of the Magistrate discharging the accused, holding that, under the rulings of this Court, the Magistrate was not competent to revive the case; and I further am of opinion that we should not, on our own motion, direct the proceedings to be revived.

The order will render it unnecessary to consider the propriety of the sentence passed.

Conviction quashed.

NOTES.

[I. JUDGE BEING WITNESS IN THE SAME CAUSE—

Applied to mamlatadar who had taken part in the negotiations and been witness as to valuation, acting as assessor :—(1892) 17 Bom., 299.

Magistrate collecting evidence on local enquiry and being witness :—(1894) 21 Cal., 920.

Where the Magistrate directed and initiated proceedings against certain persons in respect of offences under I. P. C., ss. 143 and 150, and had taken an active part in dispersing the unlawful assembly, it was held that he was incompetent to try the accused himself :—(1893) 20 Cal., 857.

"Personally interested" in sec. 555 of the Cr. P. C., 1882, includes such interest as the District Magistrate must have had :—(1893) 20 Cal., 857.

II. DISMISSAL OF COMPLAINT—

It was held in two cases, the case of *Mohesh Mistri* (1 Cal., 282) and the case of *Donnelly* (2 Cal. 406) that if the District Magistrate was of opinion that further proceedings should be taken upon the evidence on the record, he must refer the case for the orders of the High Court. The District Magistrate had at the same time the power of directing a further enquiry in one particular case, that is, where a complaint had been made, and such complaint had been summarily dismissed without the examination of witnesses (see s. 298 of the Code of 1872 as amended by s. 31 of Act XI of 1874). Section 437 of the present Code extends this power to the case of any accused who has been discharged (see the last ten words of the section), and it is very reasonable to suppose the Legislature in conferring upon the District Magistrate a new power, a power, that is, which he was not competent to exercise under the law of 1872, considered it proper that this power should be exercised by him over those Magistrates only who are subject to his appellate jurisdiction :—(1884) 10 Cal., 268 dissented from 8 Mad., 18.

Revival of proceedings when further evidence is forthcoming :—(1878) 4 Cal., 16.

Dismissal of a complaint under Cr. P. C., Act V of 1898, s. 203, is no bar to the Magistrate rehearing complaint :—(1905) 29 Mad., 126 F. B.—16 M. L. J., 79—1 M. L. T., 81.

See also (1900) 28 Cal., 211.

See also (1901) 28 Cal., 652 F. B.]

[418] APPELLATE CIVIL.

The 24th April, 1887.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Shiro Kumari Debi.....Defendant

versus

Govind Shaw Tanti.....Plaintiff.*

Declaration of title—Adverse possession—Case made in plaint—Issues.

A declaration of title may be made upon proof of twelve years' adverse possession. Such declaration cannot, however, be given on a title not distinctly stated in the plaint or in the issues.

Tirumalasami Reddi v. Ramasami Reddi (6 Mad. H. C. Rep., 420) dissented from.

Ram Lochun Chuckerbutty v. Ram Soondur Chuckerbutty (20 W. R., 104) followed.

THIS was a suit for the confirmation of possession of, and the establishment of the plaintiff's jamai right in, 7 bigas of kheraji jamai lands, and for the setting aside an order and subsequent sale made in an execution-proceeding under s. 246 of the Code of Civil Procedure. The plaintiff stated that the lands in question were portion of an estate which originally belonged to one Ram Dhoba, and that the said Ram Dhoba sold them under a khosh-kobala to one Lochunkali, from whom the plaintiff purchased the said lands under a kobala on the 14th Joist, 1269 (27th May 1862), since which time the plaintiff had been in possession of the said lands through bhag tenants, by annually paying Rs. 7-14-15 as the rent thereof to the maliks. The second issue fixed by the Munsif, and the only one now material, was, "whether the disputed land was held by Lochunkali by virtue of purchase, and is held by the plaintiff as alleged by him." The Munsif held the plaintiff entitled to the relief sought for, on the ground that he had proved his own possession, and that of his predecessor Ram Dhoba, for twelve years before the institution of the present suit. The Civil and Sessions Judge, after remanding the case for further evidence, dismissed the appeal by the defendant, on the ground that the [419] plaintiff and his vendor Lochunkali had together enjoyed twelve years' actual possession of the disputed property before filing his present suit for the establishment of his right and title, and was, therefore, entitled to a decree.

The defendant preferred a special appeal to the High Court.

Baboo Rash Behary Ghose for the Appellant.—Mere proof of possession for twelve years will not justify the declaration the plaintiff asks for in this suit—*Tirumalasami Reddi v. Ramasami Reddi* (6 Mad. H. C. Rep., 420); *Umbika Churn Banerjee v. Digumburee Dabee* (12 W. R., 429); *Man Gobind Sircar v. Umbika Monee Dossee* (16 W. R., 218); and *Moulvi Abdoolah v. Shaha Mujee-sooddeen* (16 W. R., 27). If the plaintiff wished to rely upon adverse possession for the statutory period, such a case ought to have been set up in the plaint and raised by the issues—*Huro Soonduree Debia v. Unnopoorua Debia*

* Special Appeal No. 1678 of 1878 from the decision of J. Tweedie, Esq., Offg. Judge of Burdwan, dated the 9th June 1875, confirming a decree of Baboo Gobind Chunder Ghose, Munsif of Bishtopore, dated 30th May 1874.

(11 W. R., 550), *Bijoya Dēbia v. Bydonath Deb* (24 W. R., 444), and *Bhaygo Mutty Bibee v. Mahomed Wasil* (25 W. R., 315). The Munsif having raised all the material issues in the case, the Court of appeal had no right to remit the proceedings to the Munsif under s. 354 of the Code of Civil Procedure.

Baboo Nil Madhab Sen for the Respondent.—Proof of adverse possession for twelve years is sufficient to entitle a plaintiff to a declaratory decree—*Ram Lochun Chuckerbutty v. Ram Soonder Chuckerbutty* (20 W. R., 104). The question was sufficiently raised by the issues. Besides, the defendant never complained in the Court below that he had been in any way taken by surprise, and the objection must [not ?] be allowed in special appeal.

Baboo Rash Behary Ghose in reply.—There was no allegation in the plaint that the possession of the plaintiff and his vendor had lasted for twelve years, and the second issue does not, therefore, raise the question of title by adverse possession. The case of *Ram Lochun Chuckerbutty v. Ram Soondur Chuckerbutty* (20 W. R., 104) is distinguishable, there being nothing to show in the [420] report that title by adverse possession had not been alleged in the plaint or raised by the issues. That case, moreover, is contrary to the case of *Court of Wards v. Radhapershad Singh* (22 W. R., 238), where the Court refused to make a decree on the basis of adverse possession, that case not having been made either by the plaint or the issues.

The Judgment of the Court was delivered by

Markby, J.—This is a suit brought under the provisions of s. 246* of the Code of Civil Procedure for setting aside an order made in an execution-proceeding taken in respect of certain land, of which the plaintiff claims to be the owner. He put in a claim under s. 246, and failed; and thereupon he brought this suit, to use the words of that section, "to establish his right." He sets out his title saying that the land of which he claims to be the owner appertained to 23 bigas 11 cottas 7 chittaks of land which belonged to one Ram Dhoba; that out of the said land, Ram Dhoba sold 7 bigas, which are in dispute, to Lochunkali; that while Lochunkali was in possession of the said land; he sold it to the plaintiff under a kobala of the 14th Joist, 1269. "Since then I have

* [Sec. 246:—In the event of any claim being preferred to, or objection offered against the sale of lands or any other immoveable or moveable property which may have been attached in execution of a decree or under any order for attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in section 220. And if it shall appear to the satisfaction of the Court that the land or other immoveable or moveable property was not in the possession of the party against whom execution is sought, or of some other person in trust for him, or in the occupancy of ryots or cultivators or other person paying rent to him at the time when the property was attached, or that, being in the possession of the party himself at such time, it was so in his possession not on his own account or as his own property, but on account of or in trust for some other person, the Court shall pass an order for releasing the said property from attachment. But if it shall appear to the satisfaction of the Court that the land or other immoveable or moveable property was in possession of the party against whom execution is sought as his own property, and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him, at the time when the property was attached, the Court shall disallow the claim. The order which may be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order.]

been in possession of the same through bhag tenants, by annually paying Rs. 7-14-15 as the rent thereof to the maliks. To this there was no objection offered by anybody."

Various issues were raised; and one of those issues, or rather part of one of those issues, is this,—Is the disputed land held by the plaintiff as alleged by him? Ultimately, after a remand, the lower Appellate Court was not satisfied that the plaintiff had established the precise title which he had set up, but it was satisfied that he had been in possession for twelve years; and upon that ground gave him the declaration which he asked.

Now, in the first instance, it was broadly contended before us, that, in a suit of this kind, no declaration of the plaintiff's title can be made merely upon twelve years' possession; and in support of that, a decision of the Madras High Court, *Tiruma-[421]lasami Reddi v. Ramasami Reddi* (6 Mad. H. C. Rep., 420) was relied on. With the general proposition there laid down, I must say I am unable to agree; it is in direct conflict with a decision of this Court in *Ram Lochun Chuckerbutty v. Ram Soondur Chuckerbutty* (20 W. R., 104)—the decision of Sir RICHARD COUCH and Mr. Justice GLOVER, wherein it is laid down in the most distinct terms that a declaration of title may be made upon proof of twelve years' possession. Sir RICHARD COUCH says:—"What the plaintiffs sought was a declaration of title to this share in the land, and the first Court had given them that. They having been in possession of the land for more than twelve years, the title of any other person had been, to use the language of the Judicial Committee in the case of *Gunga Gobind Mundul v. The Collector of the 24-Pergunnahs* (11 Moore's I. A., 345), extinguished in their favour. The effect of their possession was to extinguish other titles, if any existed; and we think in a suit of this kind, although they failed to satisfy the Court that their title to the land had been acquired in the way they stated, if in fact they are entitled to it, they ought to have a declaration to that effect, and not be driven to bring another suit, in which they would omit any statement of the manner in which they became entitled, and simply say that they were entitled to it, and that they had been in possession of it for a greater number of years, more than sufficient to bar all other claimants by the law of limitation, and ask for a decree on that ground."

It appears to me that if we look to the reason of the thing, we could come to no other conclusion. The plaintiff comes into Court, as for this purpose we must assume that he has a right to come, to prove his title. There is no reason whatever why he should not prove his title by any mode which will show that he has a good title, and when once the law has declared that twelve years' possession is a good title by itself, I do not see how it is possible that the Court can refuse to recognize that, any more than it can refuse to recognize a conveyance from a previous owner.

[422] Then it is said that there are decisions of this Court in which a contrary view has been taken. The decisions relied on are: *Moulvi Abdoolah v. Shaha Majeedooddeen* (16 W. R., 27), *Court of Wards v. Radhapershad Sing* (22 W. R., 238), *Bijoya Debia v. Bydonath Deb* (24 W. R., 444), *Bhaygo Mutty Bibee v. Mahomed Wasil* (25 W. R., 315). Now it is possible that there may be some conflict between the two last of those decisions and the decision of Sir RICHARD COUCH, to which I have already referred, upon one point. Sir RICHARD COUCH clearly thought that if the question of twelve years' possession was properly raised in the issues, the suit ought not to have been dismissed although the title had not been based upon that ground in the plaint. Possibly, I do not say that it is so, possibly there may be a conflict between the two last

decisions and the decision of Sir RICHARD COUCH upon that point; but we need not consider that, because I do not think that, upon the two important points which arise in this case, there is any conflict between the decision of Sir RICHARD COUCH, in *Ram Lochun Chuckerbutty v. Ram Soondur Chuckerbutty* (20 W. R., 104), and the other decisions. I think, on the one hand, there is nothing which contradicts the decision of Sir RICHARD COUCH, that a possession for twelve years is a good title upon which a declaration may be based; and on the other hand, I think, Sir RICHARD COUCH clearly admits, what the other decisions expressly lay down, that the question of twelve years' possession must be raised in the issues. I think that appears from what Sir RICHARD COUCH says, when dealing with the judgment of Sir BARNES PEACOCK, in the case of *Ram Coomar Shome v. Gunga Pershad Sein* (14 W. R., 109). He says there: "The nature of the case, as appears from the papers" (that is, speaking of the papers of the case before Sir BARNES PEACOCK) "did not admit of the plaintiff's asking for what has been given to the plaintiff in this case by the first Court, namely, a declaration that he is the person entitled to the land."

It is precisely on that ground that the cases of *Bijoya Debia v. Boydonath* (24 W. R., 444) and *Bhaygo Mutty Bibee v. Mahomed Wasil* (25 W. R., 315), are distinguishable from the decision [423] in the case of *Ram Lochun Chuckerbutty v. Ram Soondur Chuckerbutty* (20 W. R., 104). In the case of *Bijoya Debia v. Boydonath Deb* (24 W. R., 444) Sir RICHARD GARTH says: "This decision," speaking of the decision of the Court below in that case, "appears to us to be entirely beside the plaintiff's real claim and the issues which have been raised, and properly raised, in the Court below," and so Mr. Justice MACPHERSON says in the case of *Bhaygo Mutty Bibee v. Mahomed Wasil* (25 W. R., 315): "The lower Appellate Court ought not to have given a decree in favour of the plaintiff upon a ground which is not suggested in the plaint, or in the issues tried." It is quite clear that when a plaintiff claims a title upon twelve years' possession, he must draw the attention of the defendant to the fact that he is going to claim a declaration upon that title, in order that the defendant may give his own evidence and scrutinize the evidence of the plaintiff upon that point, and see whether possession for twelve years is proved, and whether he can contradict it during any portion of that period. I think, therefore, it is clear how we ought to deal with this case. We ought, on the one hand, to hold that the plaintiff may have a declaration of his title based on twelve years' possession, but that if he wishes to claim a declaration upon a title of that kind, he must at least clearly raise that question in the issues in the case. Now, therefore, we must examine what are the issues raised in this case. Some issues were raised by the District Judge on appeal, and were remanded to be tried by the Munsif. I am not at all clear what new points the District Judge desired to have tried but this is immaterial, because the new issues contain nothing about twelve years' possession. We need only, therefore, look at the issues as settled in the first Court. As I have already shown, the form of the issue there was whether the disputed land was held by the plaintiff as alleged by him? The issue, therefore, refers us back to the allegations in the plaint, and no question can arise in this case as to what would be the result if the issues disclosed a new title.

Now let us turn to see what the allegation in the plaint is. When we come to look at the allegation in the plaint, I think [424] it is not sufficiently clearly stated that the plaintiff intended to rely upon twelve years' possession. In fact, the plaintiff says that he has not been himself in possession for much more than eleven years, and though he is, no doubt, entitled to join the

possession of his vendor to his own possession, yet he has not given the date when his vendor came into possession, nor does he even make the general allegation that the possession of his vendor, coupled with his own possession, would amount to a period of twelve years. It follows that the question of twelve years' possession has not been properly raised either in the plaint or in the issues in this case, and the defendant had no proper notice that such a point was going to be raised; therefore, it was not open to the lower Appellate Court, having negatived the title which had been alleged by the plaintiff, to declare in his favour a title which had not been alleged. For those reasons I think that the decision of the lower Appellate Court is wrong, and it ought to be reversed and the plaintiff's suit dismissed.

I only wish to add that it is not necessary for us now to consider whether we ought to interfere in this case on the ground that the suit ought not to have been remanded. But I think it right to say that, as far as I can see, there was no ground upon which a remand ought to have been directed in this case. The plaintiff had had an opportunity of proving his title, but he had failed to do so; and having failed to do so, I think the lower Appellate Court ought to have dismissed the suit, and not to have given the plaintiff an opportunity of producing any further evidence.

The suit will be dismissed, and the appellant will be entitled to her costs in this Court and in the Courts below.

I think it desirable to add that, in this judgment, I do not express any opinion as to whether a declaration can be given upon a title which appears in the issues but is not set forth in the plaint. I only say that a declaration cannot be given on a title not distinctly stated either in the plaint or in the issues.

Decree reversed.

NOTES.

[TITLE BY ADVERSE POSSESSION—

A distinction is drawn between the case where the suit is for a declaration of title and the case where possession is sought upon proof that the plaintiff is entitled to have the land. Where in the latter case the defendant had notice in the lower Appellate Court and no objection was there taken on the ground of want of opportunity to adduce rebutting evidence, the suit was decreed :—(1887) 14 Cal., 592.

Where a specific title has been alleged, but not proved, and the plaintiff endeavours to succeed in the first Court or second Court of Appeal upon a title by twelve years' adverse possession he must be prepared to show that this other title by twelve years' adverse possession was raised in the Court of First Instance with sufficient clearness to enable his adversary to understand that he claimed to succeed as well by twelve years' adverse possession as by the specific title alleged :—(1881) 7 Cal., 560.

This case was followed in (1908) 31 Mad., 581.]

[428] APPELLATE CRIMINAL.

The 21st June, 1877.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Empress on the prosecution of Jodoonath Ghose

versus

Brojonath Dey.*

*Beng. Act III of 1864, ss. 2, 10, 11, 13, 15, 16, 57 and 58—Public highways—
Municipal Commissioners, Power of, to close or divert a public
highway—Calcutta Municipal Act (Beng. Act VI
of 1863), ss. 109, 110.*

Beng. Act III of 1864, which vests public highways in Municipal Commissioners for the purposes of the Act, does not by so vesting them give power to the Municipal Commissioners, nor *a fortiori* to the Vice-Chairman alone, to stop up or divert such public highways.

THE facts of this case were as follows :—Within the jurisdiction of the Municipal Commissioners of the town of Serampore there was formerly a lane, called the Shudgoppara Lane, leading to the River Hooghly. This lane ran through the garden of one Brojonath Dey, the defendant in this proceeding. In the year 1869 this lane was stopped by persons acting on behalf of the defendant; these persons were convicted under the Indian Penal Code of obstructing a public highway. Proceedings were subsequently taken by the defendant in the Civil Courts with a view of establishing that the road was not a public highway, but these proceedings were unsuccessful; and in the present case it was admitted that the lane in question was a public highway. The litigation in the Civil Courts, ended in 1871. In August 1874, the present defendant presented a petition to the Municipal Commissioners of Serampore, which again sought to open the question whether the lane was a public highway, and also prayed for permission to close it under such conditions as the Municipal Commissioners might consider reasonable. On the back of the petition was written the following order, dated the 31st of December 1874 :

“ Application granted on condition that the applicant make at his own expense a road ten feet wide, round the south and [428] west side of his garden, so as to form a through communication between Distillery and Napitpara Lane.”

This order was signed J. E. B. Jeffery. It was admitted that Mr. Jeffery was at that time Vice-Chairman of the Municipality, and it was not contended that this order was not made by him in that capacity. Prior to January 1876, the said road was completely stopped up, and another road to the south and west of the defendant's garden was made. There was some doubt, however, whether this new road was really a new road, or whether it existed before, and was only widened. Applications, respectively made to the Municipal Commissioners and to the Chairman of the Municipality, who was also the Magistrate of the district, against the order of Mr. Jeffery, the Vice-Chairman, were refused on the ground that neither the Chairman nor the Municipal

* Revisional Proceedings from an order of H. Haggard, Esq., Magistrate of Serampore, under s. 521 of the Code of Criminal Procedure.

Commissioners had any power to interfere with the order of the Vice-Chairman. The matter was then, under s. 521 of the Code of Criminal Procedure, taken before the Joint-Magistrate of Serampore, who in October 1876 called upon the defendant to show cause why the obstruction to the Shudgoppara Lane should not be removed. The Joint-Magistrate ultimately held that the order of Mr. Jeffery was not illegal, and he refused to interfere further. The case then came before the High Court under s. 297 of the Code of Criminal Procedure, the question of law raised being whether the Joint-Magistrate was right in holding the order of Mr. Jeffery to be legal.

The Municipal Commissioners were unrepresented.

Baboo Troilokynath Mittra for the Complainant.—Under Beng. Act III of 1864 the Vice-Chairman of the Municipality had no authority to sell, divert, or close a public road. Section 13 only gave power to the Commissioners to sell land required for the purposes of the Act, and, therefore, did not apply to this case. Although the Commissioners had powers reserved to them under s. 58 of the Act to make alterations in fences, pavements, or posts of a highway, they could not obstruct or sanction an obstruction of the public roadway. The 10th section of the Dis-**[427]**trict Municipal Act (Beng. Act III of 1864), vesting the streets in the Commissioners, is in words precisely similar to s. 109 of the Calcutta Municipal Act (VI of 1863). Section 110 of the Calcutta Act, however, gives the Commissioners express power to divert and close up streets; it may, therefore, be assumed that the Legislature considered that, without such express permission, the Commissioners had no such power conferred on them by the words of s. 109. The District Municipal Act of 1864 does not contain such express permission as is found in s. 110 of the Calcutta Act of 1863. This omission was, no doubt, designedly made, and shows an intention* to withhold such powers from District Municipal Commissioners. The same distinction is preserved in the Calcutta Municipal Consolidation Act (Beng. Act IV of 1876) and the Bengal Municipal Act (Beng. Act V of 1876). The Commissioners could not, therefore, be supposed to have the power to close a road altogether without such express permission. Sections 12 and 15 of Beng. Act III of 1864 give no power to the Commissioners to substitute one public road for another. Under s. 213 of the Bengal Municipal Act of 1876, the Commissioners have power to close a road temporarily for certain purposes. The following cases were cited in the course of the argument: *Rex v. Justices of Worcestershire* (2 B. & Ald., 228), *Rex v. Justices of Surrey* (7 D. & Row., 857), *Rex v. Horner* (2 B. & Ad., 150), *Reg. v. United Kingdom Electric Telegraph Co.* (9 Cox, Cr. Ca., 137), *Reg. v. Train* (9 Cox, Cr. Ca., 180), *Rex v. Winter* (3 B. & C., 785), *Reg. v. Justices of Calcutta* (2 Ind. Jur., N. S., 182), and *Fowler v. Sanders* (Cro. Jac., 446).

Baboo Taraknath Dutt for the Defendant Brojonath Dey.—Section 10 of Beng. Act III of 1864 vested public roads in the Commissioners, and, therefore, gave them a right to close or divert such roads.

Baboo Troilokynath Mittra in reply.

[428] Markby, J. (after stating the facts of the case):—The question turns on the construction of Beng. Act III of 1864, which was in force when the order of Mr. Jeffery was made. The powers and duties of the Municipal Commissioners are defined in ss. 6 to 23. No power to stop up or divert public highways is anywhere in express terms given by the Act; but public highways not being the property of Government or private property are, by s. 10, vested in the Municipal Commissioners. By s. 9 the Municipal Commissioners are enabled to sue and be sued in their corporate name, to hold

properties, moveable and immoveable, and to convey the same, and to enter into all necessary contracts for the purposes of the Act. By s. 12, the Municipal Commissioners are required to apply all property vested in them for the purposes of the Act.

The argument is, that Shudgoppara Lane was a public highway vested in the Municipal Commissioners, and that, under the Act, the Municipal Commissioners may dispose of their property in any way they please, provided they do so for the purposes of the Act, which purposes it is further said, are defined in the preamble, namely, the 'conservancy, improvement and watching' the district where they have jurisdiction. The Commissioners, therefore, it is argued, had a right to stop up this road, if their doing so was for the improvement of the town, of which they are the sole judges. I am of opinion, however, that it was not the intention of the Legislature to give by implication these very wide powers to the Municipal Commissioners. I read the provisions of those sections of the Act which define the powers and duties of the Commissioners quite differently. I think the general words of ss. 9, 10 and 12 are controlled by the specific provisions of ss. 13, 14, 15, and 16. In regard to highways, which are the property of the Municipal Commissioners, I think that the only powers which Municipal Commissioners have over them is to make, repair, and keep properly cleansed such highways, and to do such things upon them as are necessary for conservancy (s. 15). If any more extensive works are necessary, then the consent of the Lieutenant-Governor must be taken (s. 16), and even with the consent of the Lieutenant-Governor there is no power to [429] stop up a road. It seems to me that if the mere fact of property being vested in the Municipal Commissioners for the purposes of the Act gave them the extensive powers contended for, those sections which define the powers of the Municipal Commissioners over their property would be meaningless.

This construction of the Act appears to me to be most in accordance with what is reasonable and proper. By s. 20, the Chairman or Vice-Chairman may make any order authorized by the Act unless it be expressly required to be made at a public meeting, and, therefore, if by the Act the Municipal Commissioners are authorized to make an order for the stopping up of a public highway, it would be very difficult to say that that order might not be made by the Chairman or Vice-Chairman acting alone, and the order in the present case was in fact made by the Vice-Chairman upon his sole responsibility. It is most improbable that the Legislature intended to confer such extraordinary powers upon a single individual.

The construction which I have put upon Beng. Act III of 1864 is further confirmed by a comparison of its provisions with those of Beng. Act VI of 1863, relating to the town of Calcutta, upon which the Act of 1864 was obviously modelled; s. 109 of Act VI of 1863 vests the streets of Calcutta in the Justices almost in the same words as s. 10 of Act III of 1864 vests public highways in the Municipal Commissioners. But by s. 110 of the former Act express power is given to the Justices, with the sanction of the Bengal Government, "to turn, direct, discontinue or stop up any public street." This, I think, shows that merely vesting highways in a Municipality does not *ipso facto* empower the Municipal body to stop them up, if they happen to consider that to do so is advantageous for the town. I may also observe that to hold that the Municipal Commissioners derive a power to stop up highways from the circumstances that certain highways of the town are vested in them would lead to this, that highways not vested in them could not be stopped up. This distinction would be reasonable enough as regards highways vested in Government, but quite unreasonable as regards highways which are the property of private individuals.

[430] I, therefore, consider that this order of Mr. Jeffery permitting Baboo Brojonath Dey, upon certain conditions, to stop up this lane, was an order which neither he, as Vice-Chairman, nor the Municipal Commissioners, had power to make; and that the order of the Joint Magistrate of 21st December 1876, holding Mr. Jeffery's order to be legal, was wrong in law, and ought to be set aside. The record of the proceedings against Brojonath Dey, under s. 521, will be returned to the Joint Magistrate, and he will finally dispose of those proceedings by such order as he thinks proper, treating Mr. Jeffery's order for the purpose of those proceedings as a nullity.

I am very glad to have arrived at a result which will probably have the effect of restoring to the inhabitants of the neighbourhood the use of the road of which they appear to me to have been very improperly deprived. I quite agree with the condemnation passed by the Magistrate and present Joint Magistrate upon Mr. Jeffery's order, by which the interests of the public seem to have been sacrificed to those of a single individual.

Prinsep, J.—I concur in holding that Mr. Jeffery, as Vice-Chairman of the Serampore Municipality, was not competent under Beng. Act III of 1864 to close the Shudgoppara Lane; that his order must be considered to be a nullity; and that the proceedings taken under s. 521 of the Code of Criminal Procedure, by the present Joint Magistrate of Serampore, should proceed.

Order set aside.

[431] ORIGINAL CIVIL.

The 29th May, 1877.

PRESENT :

MR. JUSTICE KENNEDY.

Kadumbinee Dossee

versus

Koylaash Kaminee Dossee and others.

Hindu widow, Suit by, as administratrix of husband leaving a minor son.

A Hindu widow, who has obtained letters of administration from the High Court of the estate of her husband who has left a minor son, is not entitled in such character to maintain a suit with respect to unmoveable property left by him. The Court refused to allow such a suit to proceed adding the son as a party, or to treat the plaintiff as manager of the infant, but dismissed the suit with costs.

THE plaintiff sued as the widow and administratrix of one Nundolal Paul, to recover possession of a piece of land in Calcutta, which formed portion of the estate of her husband, who died intestate in 1873, and from which she had been dispossessed by the defendants.

Letters of administration of the estate of her husband had been granted by the High Court to the plaintiff on the 26th of April, 1873.

Mr. Piffard and Mr. R. Allen for the Plaintiff.

Mr. Branson and Mr. Bonnerjee for the Defendants.

On cross-examination of the plaintiff's brother it appeared that the plaintiff's husband had left a son, who was a minor, and the defendant's counsel thereupon contended that the suit could not be maintained by the plaintiff, although she had taken out administration of her husband's estate. The Court, on the application of the plaintiff's counsel, then allowed him until the next day to look into the question.

Mr. R. Allen on the next day said, that he had been unable to find any authority for the contention that the present plaintiff as administratrix could maintain the suit. The power of the Court to grant letters of administration, which was derived through the Supreme Court (see Charter of 1774, s. 22) from the [432] original jurisdiction possessed by the Ecclesiastical Courts in England, would only enable such grants to be made respecting personality. The Succession Act, which related both to real and personal property, did not apply to Hindus; and in so far as it was made applicable to Hindus by the Hindu Wills Act, it did not provide for cases of intestacy; those cases, therefore, remained as before. Thus the same difficulty remained, that the grant of administration would not enable the administrator to deal with or represent real property. The learned counsel referred to the case of *Doe d. Savage v. Bancharam Tagore* (Montrieu's Morton, 105), in which it was held that although land was real property *sub modo*, yet it was an asset under the Charter for the payment of debts in the hands of an administrator: therefore, such administrator could maintain an action of ejectment in respect of the land. The case of *In the goods of Abdullah* (Morton, 19, at p. 22) and Act XXVII of 1860 were also referred to. The learned counsel asked, in case the Court should be against him, that the plaintiff's son might be added as a party-plaintiff, or the plaintiff be treated as the manager on behalf of the infant son, and the plaint amended accordingly.

Without calling on the defendant's counsel the following **Judgment** was delivered:—

Kennedy, J.—I cannot add the minor as a party-plaintiff, and I think I must dismiss the suit, for it appears to me that the plaintiff has no interest in the land and no right to maintain this proceeding. These are two reasons why the minor should not be joined as a party-plaintiff: first, because if he were made a party at this stage of the proceedings when several witnesses have already been examined, he would be bound by evidence given in his absence; and secondly, because his being made a party would, probably, expose him to an adverse decision which would be clearly binding on him; and I even think he would be incapacitated from hereafter seeking to disallow the plaintiff's costs of the suit from being paid out of his estate in administration. These costs would then be costs in a cause to which he would be a party, and specially made a party by order of Court. When I first heard of the existence of a son of Nundolal [433] it occurred to me, on general principles, that the suit could not be maintained. There is not much authority on the question, and though I have looked into it myself and been aided by Mr. Allen's research, I have not been able to discover any direct authority bearing on the point. It is clear, however, that, in respect to Hindus, letters of administration granted by the Supreme Court conveyed no more estate than what by the ecclesiastical law of England vested in the ordinary or the administrator,—that is to say, personal estate only. The Indian Succession Act and the Hindu Wills Act expressly exclude Hindus from the operation of the provisions in the first of these relating to administration, save those respecting administration with a will annexed: Act XXVII of 1860 goes even further to limit the effect of a certificate in the

nature of administration granted by the Mofussil Courts to Hindus under the provisions of that Act. And as regards Fergusson's Act, 9 Geo. IV, c. 33, that expressly excludes executors and administrators of Hindus and Mahomedans from the powers and provisions of the Act, and even in the cases where it did apply, it would seem that it did not vest the lands in the executors or administrators; it only conferred on them a power of sale. I, therefore, think that the plaintiff has no such estate in law as would entitle her to maintain this suit.

It has been urged that I might treat the plaintiff as manager on behalf of the infant, and as such allow her to proceed with the suit. I do not think I can let her do so. I do not think that the manager of a Hindu family, who has no interest in the estate at all, is entitled, by virtue of his managership, to sue in his own name. I am aware that, in the Mofussil Courts, plaints are constantly presented by *AB*, guardian of *CD*, against *EF*, as guardian of *GH*. I have grave doubts whether such suits are validly instituted; but the long course of practice may perhaps validate them, and the 4th schedule to the new Procedure Code, No. 11. seems to contemplate the existence of suits by a manager without bringing the actual party on the record. However, that Act is not yet in force, and I don't know of any instance in this Court in which such a plaint has been admitted, and I should be unwilling to introduce [434] here, save by express legislative direction, the mofussil form. But even in the mofussil the person really entitled is named in the title, and that has not been done here, so that even if I were inclined to do so, the frame of the plaint in this case would not allow me to treat it as being a suit of the description in the mofussil, which I have mentioned. I must, therefore, dismiss the suit with costs on scale 2.

Suit dismissed.

Attorney for the Plaintiff: Mr. Remfry.

Attorneys for the Defendants: Mr. Wheeler and Mr. Pittar.

NOTES.

[The observation that by letters of administration lands did not vest in the administrator was not adopted in:—(1880) 6 Cal., 483.]

[2 Cal. 434]

ORIGINAL CIVIL.

The 19th July, 1877.

PRESENT :

MR. JUSTICE KENNEDY

Khoblall Baboo

versus

Ramechunder Rose.

Suit on Decree of Small Cause Court.

A suit can be brought in the High Court on a decree of the Small Cause Court.

SUIT on decree of the Calcutta Small Cause Court for Rs. 297, dated the 18th March 1874. The case was, by order of the learned Judge, set down for settlement of issues in order to have the question raised whether the suit could be maintained. The suit was undefended.

Mr. Bonnerjee appeared for the Plaintiff.

Kennedy, J.—I had this case set down for settlement of issues, because one of the Judges of this Court has expressed an opinion that a suit on a decree of the Small Cause Court cannot be maintained in this Court. I knew that there had been decisions in cases in which the question was not argued, allowing such suits to be brought in this Court; and I applied to the Chief Justice to allow the case to be referred to a Full Bench. I came, however, to the conclusion that the course which had been allowed to prevail in this Court was a right one, and the Chief Justice thought that, under those circumstances, a Full Bench could not be granted. The difficulty has been raised by the decision of the Court of Queen's Bench in *Berkeley v. Elderkin* (1 E. & B., 805), in which it was held that no action could be maintained in the [438] Superior Courts on a judgment of a County Court in England. Lord CAMPBELL, the Chief Justice, gave a judgment in that case, in which he went into several reasons why such suits should not be allowed; the other Judges of the Court (WIGHTMAN, ERLE, and CROMPTON, JJ.) did not go so far with him as to assent to all his reasons, but there was one point on which the Court was quite unanimous,—viz., that, by s. 100 of the English County Courts Act, 9 & 10 Vict., c. 95, a judgment of a County Court is in fact never final.*

That case, and a case in which it was followed, *Austin v. Mills* (9 Exch., 288) were brought to the notice of the Court in two cases in Ireland, where there is a system of County Courts long established under an Act, which does not contain precisely the same provisions as those in the English County Courts Act; and the Judges there were of opinion that they would be bound to follow the decision of the Court of Queen's Bench if applicable. The Court, however, finally held, in *Cary v. Grispi* (9 Ir. Com. Law Rep., 25), that, in consequence of the absence from the Irish Act of the particular provisions which were in the English Act, the *ratio decidendi* of the Court of Queen's Bench did not apply in Ireland, and I think the same would be the case here. There were two cases,—one *Moffatt v. Burrowes* (4 Ir. Com. Law Rep., 297), in which the Court was divided in opinion; and another, *Cary v. Grispi* (9 Ir. Com. Law Rep., 25), in which the entire Court of Common Pleas was unanimous in holding that the reasons given by Lord CAMPBELL and the other Judges in *Berkeley v. Elderkin* (1 E. & B., 805), did not apply to the Irish Act. I think I may adopt, and for the sake of avoiding prolixity, I do adopt, the reasons which are put forward by Chief Justice MONAHAN, in *Moffatt v. Burrowes* (4 Ir. Com. Law Rep., 297), and in the judgment of KEOGH and CHRISTIAN, JJ., in *Cary v. Grispi* (9 Ir. Com. Law Rep., 25). I cannot add anything to those reasons, and I think I may safely adopt them.†

Attorney for the Plaintiff: Baboo Troyluckonath Royo.

NOTES.

[This case was **overruled** by the Calcutta High Court in (1879) 5 Cal., 294, where it was held that no suit would lie in the High Court on a decree of the Small Cause Court.]

A judgment-creditor in the Court of Small Causes had not before the 1st July 1882 the right to sue in that Court on his judgment:—(1883) 8 Bom., 1.]

* *Ed. Note.* The section quoted empowers the County Court Judge to rescind or alter any order as to payment by instalments or otherwise made against a defendant.

† The case came on for hearing as an undefended case on 23rd July, and a decree was given for the amount sued for, with costs after decree.

[436] FULL BENCH.

The 26th March, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE KEMP, MR. JUSTICE JACKSON, MR. JUSTICE MACPHERSON, AND MR. JUSTICE AINSLIE.

The Empress
versus
 Jyadulla.*

*Criminal Procedure Code (Act X of 1872), s. 272—Appeal—Acquittal—
 Limitation—Act IX of 1871, s. 5, cl. b, and Sched. II, Art. 153—
 Act XI of 1874, s. 23.*

An appeal by the Local Government under s. 272, Criminal Procedure Code, is within time if presented within six months from the date of acquittal. The sixty days' rule does not apply.

THE following case was referred to the Full Bench by MACPHERSON and BIRCH, JJ. :—

In this case the Local Government has appealed (under s. 272, Criminal Procedure Code) from a judgment of acquittal.

The acquittal was on the 29th of August 1876, and the appeal therefrom was not presented until the 6th of February 1877, i. e., after a lapse of about five months and seven days.

The Court (MARKBY and MITTER, JJ.) admitted the appeal "subject, however, to the consideration of the question whether the appeal has not been presented after the time allowed by law. . . . If the period of sixty days is the time allowed for an appeal by the Crown, as well as for an appeal by the prisoner, in that case we think the Crown ought to be held strictly to sixty days, because no ground has been shown to us for enlarging the time under s. 5, cl. b, of Act IX of 1871."

We think the question is of so much importance that it ought to be set at rest at once by an authoritative decision of a Full Bench, especially as in a variety of cases in which the point was not raised, appeals by Government against acquittals, presented after sixty days, have been admitted without hesitation.

The question arises in the following manner :—

The Limitation Act, IX of 1871, schedule II, art. 153, says, that the period of limitation for appeals to the High Court [437] under the Code of Criminal Procedure is sixty days, and that the date of the sentence or order appealed against is the time when the period of sixty days begins to run. By s. 6 of the same Act it is provided that, when by any law thereafter to be in force in British India, a period of limitation differing from that prescribed by the Limitation Act is specially prescribed for any appeals, nothing in Act IX of 1871 shall affect such law.

* Criminal Motion, No. 27 of 1877.

Thereafter, by Act X of 1872 (Criminal Procedure Code), s. 272, an appeal was given to the Local Government from a judgment of acquittal : and it was declared "the rules of limitation shall not apply to appeals presented under this section." By Act XI of 1874, s. 23, this clause is repealed, and for it is substituted the following clause :—"No appeal shall be presented under this section after six months from the date of the judgment complained of." So that as the law now stands, by s. 272 modified by s. 23 of Act XI of 1874, the Government may appeal from a judgment of acquittal, but no such appeal shall be presented after six months from the date of the judgment complained of.

On the one hand it is contended, that the ordinary sixty days' limitation applies to appeals by Government from judgments of acquittal, and that the six months are mentioned in s. 23 of Act XI of 1874, not as giving a right of appeal at any time within six months, but as providing that such an appeal must, under all circumstances, be presented within six months, after which time no excuse whatever can be received under the Limitation Act, 1871, s. 5, clause b, as sufficient cause for not having appealed within the sixty days.

On the other hand it is contended, that Act IX of 1871 does not apply to these appeals at all, and that there is no limitation of the right of appeal save s. 23 of Act XI of 1874, which says the appeal must be presented within six months.

The question referred is, whether an appeal by the Local Government under s. 272 from a judgment of acquittal is within time if presented within six months from the date of the acquittal, although presented more than sixty days from that date.

[438] The Advocate-General, Offg. (Mr. Paul) for the Crown.

The following was the **Opinion** of the Full Bench :—

Garth, C.J.—We are of opinion that an appeal from an order of acquittal is within time if presented within six months from the date of the order of acquittal. The sixty days' rule does not apply."

NOTES.

[STATUTORY PROVISION—

The Limitation Act 1908, enacts as follows :—

Description of suit.	Period of limitation.	Time from which period begins to run.
Art. 155—Under the same Code (of Criminal Procedure 1898) to a High Court except in the cases provided for by art. 150 and art. 157.	Sixty days	The date of the sentence or order appealed from.
Art. 157—Under the Code of Criminal Procedure, 1898, from an order of acquittal.	Six months	From the date of the order appealed from.]

* *Ed. Note.* In "*Reg. v. Dorabji Balabhai*" (11 Bom. Rep., p. 117) it was held, that s. 272 of Act X of 1872 must be read by itself.

[2 Cal. 438]

APPELLATE CIVIL.

The 22nd May, 1877.

PRESENT :

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE WHITE

Bheknarain Singh and another.....Defendants

versus

Januk Singh.....Plaintiff.*

Hindu law—Mitakshara—Sons' Interest in Ancestral Property—Mortgage by Father during minority of sons.

A Hindu, subject to the Mitakshara law, and forming with his sons a joint Hindu family, mortgaged certain ancestral immoveable property during the minority of his sons. In a suit by the mortgagees against the father and sons to recover the mortgage debt "by sale of the mortgaged property, and out of other properties, as well as from the person" of the father,—*held*, that it was incumbent upon the plaintiff to show for what purpose the loan was contracted, and that that purpose was one which justified the father in charging, or which the plaintiff had at least good grounds for believing did justify the father in charging, the son's interests in the ancestral immoveable property.

THE special appellants, who were two of the defendants in the Court below, sought relief against a decree passed by the Officiating Judge of Patna, under which their shares of the ancestral property were declared liable to be sold in satisfaction of a bond executed by their father, the first defendant, in favour of the respondent, who was the plaintiff in the Court below.

[439] It appeared that the father of the special appellants, on the 12th of January 1871, borrowed Rs. 1,100 from the respondent, at 1 rupee per cent. per mensem; and as a security for the loan, executed a bond to the respondent, by which he hypothecated, or mortgaged, to the respondent a 12-anna share in a certain mouza, with a stipulation that the money should be repaid in two years from the date of the bond.

It further appeared that the 12 annas share of the mouza was the ancestral property of the special appellants and their father; that the bond was executed whilst the special appellants were minors; and that they and their father formed a joint Hindu family governed by the Mitakshara law. On failure of the father to repay the money at the expiration of the appointed time, the respondent, on the 31st of August 1874, brought the present suit, in which he sought to recover the amount due on the bond "by sale of the hypothecated property, and out of the other properties, as well as from the person" of the father. The suit in the first instance was brought against the father alone, but, subsequently, on the 7th of October 1874, the plaintiff petitioned the Court to be allowed to add the special appellants as defendants, alleging that the loan to the father was applied to answer the joint necessities of the father as well as of his sons, and for the support and the education of the latter.

* Special Appeal, No. 836 of 1876, against a decree of E. Gray, Esq., Officiating Judge of Zilla Patna, dated the 17th of February 1876, reversing a decree of Baboo Ram Persad, Second Subordinate Judge of that district, dated the 15th of January 1875.

The special appellants were, accordingly, by leave of the Court, made defendants in the suit, the mother of the younger of them, who is still a minor, appearing on the record as his guardian. The Court of First Instance considered the loan and the bond to be proved, but gave a decree to the plaintiff against the father alone, and in respect only of 4 annas out of the 12 annas share hypothecated by the bond. As against the special appellants, that Court dismissed the suit, on the ground that there was a failure of proof that there was any legal necessity for the loan, and that consequently, the interest of the special appellants in the ancestral immoveable property was not properly and validly charged with the repayment of the loan.

On appeal by the respondent, the Officiating Judge, considering that he was acting in accordance with the decisions in *Gir-[440] dharee Lall v. Kantoo Lall* (14 B. L. R., 187; s.c., L. R., 1 I. A. 321; and 22 W. R., 56) and *Muddun Gopal Lall v. Mussamut Gourrambutty* (15 B. L. R., 264; s. c., 23 W. R., 365), remanded the cause for a finding on the following issue, viz:—"Whether the money borrowed by the father (defendant No. 1), was borrowed for an immoral purpose?" The Judge at the same time ruled that the burden of proof on the above issue rested on the defendants. He further added that the decision of the case turned on the finding upon that issue, and that if the money was borrowed for an immoral purpose, the appeal must be dismissed; but if not borrowed for such a purpose, the plaintiff was entitled to have the whole 12 annas of the mouza sold in satisfaction of his bond.

Under the order of remand, the Court of First Instance returned to the Officiating Judge a finding in favour of the defendants. But the Officiating Judge, when the appeal came before him for final decision, considered that the evidence adduced by the defendants was insufficient. He, accordingly, held, "that the issue was not proved in the affirmative," and acting on the view of the law which he had stated in his order of remand, reversed the decree of the Court of First Instance, and made a decree in favour of the plaintiff in respect of the whole of his claim.

From this judgment the two sons now appealed.

Baboos *Chunder Madhub Ghose* and *Abinash Chunder Banerjee* for the Appellants.

Baboo *Mohesh Chunder Chowdhry* for the Respondent.

The Judgment of the Court was delivered by

White, J. (who, after stating the facts as above, continued) :—It is to be observed that the present suit is not one in which a son is seeking to set aside a sale of ancestral property made by his father or to recover from a purchaser ancestral property which has been sold in execution of a decree against the father; but a suit in which a creditor, in whose favour a father has created a charge upon the ancestral immoveable estate, is endeavouring to [441] enforce that charge against the share or interest of the sons in that ancestral estate, where the latter were no parties to the charge, and were also minors at the time of its creation. Such being the nature of the present suit, the proposition of law laid down by the Officiating Judge amounts to this, that when a creditor brings such a suit, he is entitled to a decree against the sons upon simply proving the loan and the instrument of charge, and that his right to a decree can only be defeated, in the event of the sons showing that the money was advanced for an immoral purpose. In other words, any charge

which the father may create upon the ancestral immoveable property during the minority of his sons is a valid charge, and must be satisfied out of that property, unless the sons, on whom the Judge throws the burden of proof, can show that the charge was created to secure money borrowed by the father for immoral purposes. If this be good law, it follows that the interests in the ancestral immoveable property, which, under the Mitakshara law, are vested in sons by their birth, are entirely unprotected from the selfish or wasteful or capricious acts of the father except in the single instance of money borrowed by him upon the estate for immoral purposes.

The decisions on which the Officiating Judge relies in support of a proposition fraught with such serious consequences, are *Girdharee Lall v. Kantoo Lall* (14 B. L. R., 187; s. c., L. R. 1 I. A. 321; and 22 W. R., 56) and *Muddun Gopal Lall v. Mussamat Gourunbutty* (15 B. L. R., 264; s. c., 23 W. R., 365). But neither of these cases, when examined with reference to the facts involved in them, can, in my opinion, be considered as authorities for any such doctrine.

In *Girdharee Lall v. Kantoo Lall* (14 B. L. R., 187; s. c., L. R., 1 I. A. 321; and 22 W. R., 56) the suit was brought by sons for the purpose of setting aside a deed of sale of ancestral property executed by their father, and also of recovering from the purchaser the whole of the property which purported to pass by the deed. In giving the judgment of their Lordships, SIR BARNES PEACOCK, after referring to a certain rule laid down by Lord Justice KNIGHT BRUCE, in the case of *Hunooman Pursad v. Mussamat Baboocjee* (6 Moore's I. A., 393), proceeds thus:—"It is necessary, therefore, to see what was the nature of the debt for [442] the payment of which it was necessary to raise money by the sale of the property in question." The facts regarding the nature of the debt, which their Lordships considered to be established, were that, previous to the sale which was sought to be set aside, a bond had been executed by the father, upon which a decree had passed and execution issued against the father. "The bond," as their Lordships observe, "had been substantiated in a Court of justice," and the purpose for which the bond was given had not been impugned. The words used by their Lordships in observing upon this latter circumstance are as follow:—"There was nothing to show that it, viz., the bond, was given for an immoral purpose; and the holder recovered a decree upon it. There is no suggestion that either the bond or the decree was obtained *benamie* for the benefit of the father, or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested and nothing proved." Their Lordships further considered it established by the evidence that it was necessary for the father to raise money to get rid of the execution which had issued upon the decree obtained upon this unimpeached bond; that acting under that necessity the father executed the deed of sale in question; and that the purchase-money arising from the sale "had been paid into the bankers of the father, and been applied partly to pay off the decree, and partly to pay off a balance due from the father to the bankers, and partly to pay Government revenue." Upon this state of facts, the Judicial Committee decided that it was "not because there was a small portion which was not accounted for, that the son, probably at the instigation of the father, has a right to turn out the *bona fide* purchaser who gave value for the estate," adding, that "even if there was no necessity to raise the whole purchase-money the sale would not be wholly void."

Their Lordships' decision, as I understood it, proceeds on the ground that a *prima facie* case of necessity for the sale had been shown, against which no

rebutting evidence had been offered, and that as, moreover, a considerable portion of the purchase-money had been proved to be applied for purposes which would [448] make the sale binding on the sons, their suit to set aside the sale could not be maintained.

In *Muddan Gopal Lall v. Mussamut Gourunbutty* (15 B. L. R., 264 ; s. c. 28 W. R., 365), sons were again the plaintiffs, and brought a suit against their father and elder brother, and certain persons who claimed interests in the ancestral estate under bonds, or as purchasers in execution of decrees obtained on bonds, praying for a partition of the ancestral estate and for possession of their shares free from encumbrances by cancelment of the bonds. PHEAR, J., in delivering the Court's judgment, which was given in those appeals at the same time, states, as the facts found "that in Muddun Gopal's case the plaintiffs' father and elder brother had mortgaged 8 annas of the joint property to Muddun Gopal in consideration of a loan of money which was wanted for a family purpose; and that in the cases of Girdharee Lall and Pooran Lall, the plaintiffs' father and elder brother had mortgaged 8 annas of the joint property in order to prevent the sale of that property at the instance of Girdharee Lall and Pooran Lall, in execution of decrees which these persons had respectively obtained against the father and eldest son personally." And the Court then held that, under these circumstances, the plaintiffs, the minor sons, were not entitled to obtain their share of the joint property free from these mortgages.

In neither of the decisions which are relied on by the Officiating Judge was the suit brought by a bond-holder or mortgagee against the father and sons to enforce a charge upon the ancestral estate created by the father, and in both of the decisions it is clear that the transaction of the father, whether it consisted of a sale or a loan, was inquired into by the Court with a view to see if there was any legal necessity for the transaction, or if it had reference to family purposes, and that the result of that inquiry formed the main ingredient of the decisions arrived at.

The liability of a son for the debts of his deceased father under Hindu law appears to me to be a distinct question from the right of a father in his lifetime to charge the interest of his infant sons in the joint ancestral immoveable estate with the [449] payment of a debt. It is the latter question which is before the Court in the present suit; and to arrive at a correct decision, I think that the principles to be applied are those which are laid down in the leading case of *Hunooman Persad v. Mussamat Babooc* (6 Moore's I. A., 393). The authority of that case has been often recognized in the Privy Council, and notably in *Lalla Bunsseedhur v. Koonwar Bundesuree* (10 Moore's I. A., 454, at p. 461), and also in *Girdharee Lall v. Kantoo Lall* (14 B. L. R., 187 ; s.c., L. R., 1 I. A., 321, and 22 W. R., 56). In *Hunooman Persad's* case, the mortgage was made by a mother and widow, as guardian of her infant son and manager of his estate, but so far as relates to the interests in the ancestral estate which sons get by birth under the Mitakshara law, and the right of the father to alienate the same, there seems to be no essential difference between the position of the father when dealing with those interests during the minority of his sons, and the position of a mother when dealing as guardian and manager of her infant son's estate. Lord Justice KNIGHT BRUCE says in *Hunooman Persad's* case: "The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power; it can only be exercised rightly in a case of need or for the benefit of the estate"; and with respect to the question on whom the onus of proof lies, his Lordship, after stating that the onus will vary with the

circumstances, proceeds to say : " When the mortgagee himself with whom the transaction took place is setting up a charge in his favour made by one whose title to alienate he necessarily knows to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir,—namely, those facts which embody the representations made to him of the alleged need of the estate and the motives influencing his immediate loan."

Taking these to be the principles of law applicable to the decision of this suit, I am of opinion that the Officiating Judge was wrong in holding that it lay upon the special respondents to prove that the loan was contracted by the father for immoral purposes, and that on their failing to do so, the respondent was [448] entitled to a decree for a sale of the special appellant's interests in the ancestral property. Before he was entitled to such a decree, I think it was incumbent upon the respondent to show for what purpose the loan was contracted, and that that purpose was one which justified the father in charging, or which the respondent had at least good grounds for believing did justify the father in charging, the interests which the special appellants have in the ancestral immoveable property. As the respondent has failed to show this either in the Court of First Instance or in the lower Appellate Court, I think the order of remand, and the subsequent decree of the Officiating Judge, must be reversed, and that of the Court of First Instance restored. The appeal is allowed with costs.

Decree reversed.

NOTES.

[HINDU LAW—ONUS WHEN FATHER'S ALIENATIONS ARE IMPEACHED—

This case casting the *onus* on the creditor of proving justifying circumstances when the creditor seeks to enforce the father's alienation against the son was treated as no longer law after the Privy Council decisions in *Girdhari Lal's* case and *Suraj Bansi Koer's* case :—(1879) 5 C. L. R., 224 ; (1889) 14 Bom., 320.

The Allahabad High Court has, however, adopted the views in this case as to *onus* in two Full Bench decisions :—(1887) 9 All., 493 ; (1909) 31 All., 176. See *contra* (1908) 30 All., 156 ; (1908) 6 A. L. J., 133. See also (1889) 13 Mad., 51.

• In those cases a distinction has been drawn between the cases of creditor as plaintiff seeking to enforce alienation and of the son as plaintiff seeking to impeach alienation.

It has been finally held in the following cases that to bind the son there must be an antecedent debt or other justifying necessity :—Allahabad—(1909) 31 All., 176. Calcutta—(1907) 34 Cal., 735. Madras—(1905) 29 Mad., 200.

But a mortgage, though not binding as such, may yet be enforced as a debt :—(1909) 31 All., 176 ; (1907) 34 Cal., 735 ; (1892) 20 Cal., 328 ; (1897) 21 Mad., 28.]

[2 Cal. 445]

ORIGINAL CIVIL.

The 12th and 19th July, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MACPHERSON.

Kellie.....Defendant

versus

Fraser.....Plaintiff.

*Jurisdiction—Cause of action—Suit for land—Letters Patent, 1665,
cl. 12—Application to file award—Act VIII of 1859, s. 327—
Revocation of authority of Arbitrators.*

The plaintiff and defendant entered into partnership for the purpose of carrying on the cultivation and manufacture of tea, on a tea estate at Darjeeling, of which they were the owners in certain shares. The deed was executed and registered in Calcutta, but both the parties resided out of the jurisdiction. The deed contained provisions for a reference to arbitration in case of difference or dispute in any matters relating to the partnership. Differences having arisen, arbitrators were appointed in accordance with the clause in the deed. In the course of the arbitration proceedings one of the arbitrators received two telegrams purporting to be sent by the plaintiff and defendant to the arbitrators, the terms of which were "stay further proceedings, arrange matters here." The arbitrators subsequently made their award in Calcutta to the following effect: that the defendant's share in the partnership property should stand charged with the payment of a certain sum found to be due by him to the plaintiff, and that the defendant should execute a mortgage of his share to the plaintiff as security for such payment; that the partnership should be dissolved on certain terms, and that the tea garden at [446] Darjeeling should be sold in Calcutta. In an application under s. 327, Act VIII of 1859, to file the award, *held*, affirming the decision of the Court below, that the High Court at Calcutta had jurisdiction to file the award. Section 327 gives jurisdiction to file an award to any Court in which a suit in respect of the subject-matter of the award might be instituted. A suit in respect of the subject-matter of this award would not be a suit for land, but a suit in which, by reason of the execution of the deed of partnership in Calcutta, a part of the cause of action arose there; such a suit could, with leave, have been instituted in the High Court: that Court, therefore, had jurisdiction to file the award. *

Held also, that the telegrams sent to the arbitrators did not amount to a revocation of their authority.

APPEAL from a decision of KENNEDY, J., dated the 8th of June 1877, granting an application under s. 327,* Act VIII of 1859, to file an award.

* [Sec. 327 :—When any matter has been referred to arbitration without the intervention of any Court of Justice, and an award has been made, any person interested in the award may within six months from the date of the award make application to the Court having jurisdiction in the matter to which the award relates, that the award be filed in Court. The Court shall direct notice to be given to the parties

Filing in Court an award when the matter was referred to arbitration without intervention of Court.

to the arbitration other than the applicant, requiring such parties to show cause, within a time to be specified, why the award should not be filed. The application shall be written on the stamp paper required for petitions to the Court where a stamp is required for petitions by any law for the time being in force, and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

Enforcement of such award.

If no sufficient cause be shown against the award, the award shall be filed and may be enforced as an award made under the provisions of this chapter.]

The material facts were as follows :—

The plaintiff entered into partnership with the defendant for the purpose of working and carrying on the cultivation and manufacture of tea on the Lizziepore Tea Estate at Darjeeling, of which they were the owners in certain shares, on the terms and conditions contained in a deed of partnership, dated the 12th of April 1876, which was executed by the parties, and also registered, in Calcutta. By the deed the defendant was appointed manager of the tea garden, and it was agreed that both parties should reside on the estate. The deed contained a provision for a reference to arbitration in case of any doubt, difference, or dispute arising between the parties in connection with the partnership. Differences having arisen, steps were taken by the defendant for a reference to arbitration, and arbitrators were appointed and an award made; but the High Court refused to file it in consequence of some irregularity in the arbitration proceedings. The negotiations which resulted in the present award were opened by the plaintiff through his solicitors on the 29th December 1876, on which date they wrote to the defendant, proposing a reference to arbitration, and specifying the following questions as those on which the decision of arbitrators was desirable. "1st, whether you are bound forthwith to execute a mortgage to Mr. Fraser of your rights [447] and interest in the estate in terms of the deed of partnership? 2nd, whether you are bound to furnish accounts and estimates to Mr. McIntosh as agent? 3rd, whether you are liable to Mr. Fraser for any, and what, sum in respect of money misapplied, for damage caused by your conduct, or costs incurred thereby? 4th, whether the partnership ought not to be dissolved, and, if so, upon what terms?" The defendant, through his solicitor Mr. Leslie, thereupon notified to the plaintiff that he had appointed Mr. Shephard of Kurseong as arbitrator on his behalf, and the plaintiff then appointed Mr. Kellner as his arbitrator. Mr. Shephard, however, subsequently refused to act, and as the defendant omitted to appoint another arbitrator, Mr. Kellner, in accordance with the provisions of the arbitration clause in the deed of partnership in such a case, appointed Mr. Reily to act as arbitrator for the defendant. The arbitrators duly proceeded with the arbitration in Calcutta, and on the 4th of April, Mr. Kellner received two telegrams purporting to be sent by the plaintiff and defendant respectively to the arbitrators, the terms of which were "stay further proceedings, arrange matters here." The plaintiff subsequently attended before the arbitrators, and formally demanded their award, explaining that the telegram was sent by him on considerable pressure being brought to bear on him by the defendant and in ignorance of its possible effect.

The arbitrators published their award in Calcutta on the 7th of May 1877, as follows :—

"We find as a fact that there is due from Archibald Kellie to Duncan Donald Fraser the sum of Rs. 19,776-5-11, and award that the share of Archibald Kellie in the partnership property shall stand charged with the payment of that sum, and in accordance with the provisions of the partnership deed between the said parties, that the said Archibald Kellie shall forthwith execute a further mortgage of his share and interest in the partnership property, containing the usual covenants and powers, in favour of the said Mr. Fraser; and we further find that Kellie has committed a breach of the partnership deed in more than one instance, and still persists in a line of conduct fatally prejudicial to the interests of the partnership property, and we therefore [448] fore award a dissolution of such partnership from the 7th day of May

1877, upon the footing as regards accounts that each partner is entitled to his proportionate share of the sale proceeds of the said concern subject as to Kellie's third share to his debt to Fraser as aforesaid; that Kellie be removed from the managership of the said concern, and that a competent manager be appointed by Mr. McIntosh, the Calcutta agent of the Garden. We further award that the entire partnership estate, as a going concern, be sold on an early date by public auction by Messrs. Mackenzie, Lyall & Co., for the best price that it will fetch; that each partner shall be at liberty to bid for and to purchase the said concern; and further that the conditions of sale as regards amount of deposit and otherwise shall be such as the parties may agree upon; and if they cannot agree, then either of the parties shall be at liberty to refer the conditions of sale to the Court in which this award may be filed for settlement, and the conditions so settled shall be the conditions on which the sale shall take place. And we further award that if either of the partners shall become the purchaser, he shall be at liberty to set off against the purchase-money his share of the sale proceeds of the said concern, and as regards costs of the arbitration, we award that they shall be borne by Mr. Kellie."

Mr. J. D. Bell for the Plaintiff.

Mr. T. A. Apcar for the Defendant.

Kennedy, J.—In this case a question of considerable difficulty has been raised, and I should much prefer to have had a longer time to have considered the matter; but there seems to be strong reason why this particular matter should not be kept in suspense. On the 13th of April 1876, the parties entered into partnership, and on the 22nd of July, the gentleman who now opposes making this award a rule of Court, himself took proceedings to compel the appointment of arbitrators, and has conducted them with so much ability that now more than ten months after the initiation of these proceedings he is still in a [449] position to resist the confirmation of the award made under them. If, however, I had thought my judgment in this matter would be conclusive upon the questions between the parties, I should have tried to see if further light could not be thrown upon the questions. Possibly I should have been able to obtain the assistance of some other Judge, so that Mr. Kellie's objections might not have been finally determined by my single opinion. But on consideration of the authorities I am clearly of opinion that if I make an order which I have no jurisdiction to make, or if I confirm an award the subject-matter of which had been withdrawn from the arbitrators, I may be corrected by the Appellate Court.

The questions which arise before me appear upon the face of the two petitions presented in the case, one of which is supplementary to the other, and merely brings on the record the original partnership deed which was referred to in the first, and apparently not then filed with the record by some mistake.

An application was made to me yesterday when the case was called on to postpone the hearing in order to enable the respondent to file affidavits by way of showing cause. The affidavit used in that application, however, disclosed no possible ground for belief that the respondent would be in a position to show cause; it did not allege that he had any ground for opposing the application on the merits; and it did not even contain the ordinary averment that the application was not for the purposes of delay. When I look at the proceedings set forth in the petition I can very well understand that any solicitor of this Court would have been unwilling to make an affidavit to that effect.

What we have here to consider is this: there was first the execution in Calcutta by the parties of a deed which contained an arrangement for their carrying on in partnership certain tea plantations in Darjeeling: the parties also thereby provided for arbitration in case of future differences; and they did according to the terms of these provisions appoint arbitrators, who made an award. The present application is made under s. 327 of the Civil Procedure Code to have that award filed in Court, and the question is whether this can be done.

[450] The principal objection which was raised was, that this Court had no jurisdiction to entertain the application, and unquestionably the language of that section is as well calculated to create confusion as can well be imagined. It seems wholly to have omitted the consideration of the great difficulties which might arise in case of different matters which might properly be considered in different Courts. One knows enough of the history of this particular Act to be aware that no very careful legal revision of some of these sections was applied, and therefore that it would be hardly safe to apply the ordinary course of construction with very great strictness. Sir BARNES PEACOCK was, I believe, a member of the Council at the time; but I have always understood that he was in no respect responsible for the language of this Act, which I have always understood to be the production of a distinguished civilian. When then we find a change of language from that in s. 326,^a where the words "any Court" occur, to that in s. 327, where the words are "the Court," I think it would probably be unsafe to assume as certain, on the mere strength of the change of words, that the draftsman, by the use of different words, intended to define different powers and a different jurisdiction. I should be more disposed to think that these two sections, *in pari materia*, were intended to be enforced by the same tribunals, and that the change of language was merely *per incuriam* than to narrow the effect of s. 327 by reason of its difference in expression from s. 326. I am not certain that a different construction could be put on s. 327. It might possibly; but where there is a change of language, one would naturally except it to be caused by a change of intention and therefore would generally try to discover what this changed intention was.

I cannot believe, however, that the true meaning of the section was, that if in any particular case the whole cause of action arose within one jurisdiction, while the defendant resided in another, neither of the Courts should have jurisdiction:

* [Sec. 326:—When any person or persons shall by an instrument in writing agree that any differences between them or any of them shall be referred to the arbitration of any person or persons named in the agreement or to be appointed by any Court having jurisdiction in the matter to which it relates, application may be made by the parties thereto or any of them that the agreement be filed in such Court. On such application being made, the Court shall direct such notice to be given to any of the parties to the agreement, other than the applicants, as it may think necessary, requiring such parties to show cause, within a time to be specified, why the agreement should not be filed. The application shall be written on a stamp paper of one-fourth of the value prescribed for plaints in suits, and shall be numbered and registered as a suit between some or one of the parties interested or claiming to be interested as plaintiffs or plaintiff, and the others or other of them as defendants or defendant, if the application have been presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants. If no sufficient cause be shown against the agreement, the agreement shall be filed and an order of reference to arbitration shall be made thereon. The several provisions of this chapter so far as they are not inconsistent with the terms of any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court and to the award of arbitration and to the enforcement of such award.]

and yet that result would, of necessity, follow if one were by the light of s. 326 to make s. 327 exclude any case in which more than one Court would have jurisdiction. In fact, in this case, it would exclude the Darjeeling Court, which was pressed on me as the [431] proper forum, as I shall presently show, because here the High Court would, under the Charter, have jurisdiction in a suit. Many cases of very grave inconvenience might be suggested. In fact, it would make the section rarely applicable at all if I were to put on it that narrow construction. If, indeed, I were to meet that narrow construction by another still narrower, and hold that as the parties to the award are not properly described as plaintiff and defendant in a proceeding of this kind, no jurisdiction existed by reason of the residence of either party:—on this construction, no doubt, there would be power to file the award in the Court within the local limits of whose jurisdiction the whole cause of action had arisen; but then, unless the whole arose within the local limits of one Court, the section would be inapplicable.

I should be unwilling so far to nullify that provision by either of these constructions, and I cannot believe that it was the meaning of the framers of the Act. Therefore, I think, if this Court has jurisdiction in the matter referred to arbitration, then it is a Court which has jurisdiction to file the award. And the question then arises:—Has this Court jurisdiction in the subject-matter of the award?

I don't think that one can say that, where the Court has the power of dealing with the entire subject-matter of suit, it can be said to have no jurisdiction, merely because it might be necessary, if the matter were to come to Court by way of suit, to obtain the leave of the Court to sue. By the 12th clause of the Charter, the Court is empowered to receive, try, and determine suits of every description where the cause of action has arisen wholly or in part within its jurisdiction. It has jurisdiction over all those matters, although restrained from exercising that jurisdiction in cases where the whole cause of action did not arise here, by the necessity of obtaining the prior leave of the Court.

I take it that 'jurisdiction' means the power of receiving, trying, and determining suits; but that the necessity of obtaining the leave of the Court only limits the mode of exercising that power; and thus that, as, according to the true meaning of the 327th section, its effect is to confer the power upon every Court [432] in which a suit in respect of the subject-matter of the award may be instituted, we are brought to the question whether in this case a part of the cause of action has not arisen within the jurisdiction of this Court so as to let in the provisions of the Charter in such cases. I think that, unquestionably, a part of the cause of action has arisen here by the execution of the document by which the rights of the parties accrued. I know that, by modern English decisions, the words "cause of action" in recent English Statutes have recently received a meaning different from that which was formerly put on them by the former English decisions on earlier Acts and by the former decisions here. Of course, in any observations I make, I may be taken to have no doubt that the later decisions are right in so holding. But we, in this Court, must look at the Civil Procedure Code and the Charter, and remember that they were drawn at the time when the earlier cases were unimpeached, save so far as at the time of the Charter they were impeached by the opinion of Mr. Justice HOLLOWAY in *De Souza v. Coles* (3 Mad. H. C., 384)—an opinion in which he seems to have been led astray by his habit of seeking for guidance from any law rather than that which was likely to be in the minds of the framers of Indian Statutes. I think, bearing this in mind, it is impossible not to hold that "cause of action" in both those enactments has the more

extended meaning; and indeed, on the face of the Charter itself, it is clear that the earlier meaning must be given to the words in the 12th clause, and that we must hold that it is not the breach alone which constitutes the right to sue, but the entire bundle of facts which would, of necessity, be proved. If the breach alone is the cause of action, the words "*part thereof*" would in most cases be meaningless. This question has been recently discussed in *Mulchand Joharimal v. Suganchand Shivdas* (I.L.R., 1 Bom., 23), where the Court reviewed the recent English decisions and came to the same conclusion as that at which I have arrived.

I have thus come to the conclusion that, if we find a contract made here, and breach or other consequences occurring elsewhere, this Court has jurisdiction over the matter; but it is a [433] jurisdiction not to be exercised in ordinary suits without leave to sue. If there were nothing more in the case I should have no hesitation in deciding that this Court has jurisdiction; but as the partnership in this case was chiefly concerned with immoveable property in Darjeeling, I felt great difficulty in my way in consequence of the decision of the Appeal Court in the case of *The Delhi and London Bank v. Wordie* (I.L.R., 1 Cal., 249). I was counsel for one of the defendants in the Court below, but not on the appeal, and I had not sufficiently studied the difference in the grounds of the decision in the lower Court and on appeal. Upon careful examination I, however, think that, whatever may have been the opinion of Mr. Justice PHEAR, the Appeal Court has left untouched that which was supposed to be the result of earlier decisions. It has not in any way affected *Bagram v. Moses* (1 Hyde, 284) or *Ramdhone Shaw v. Nobinmoney Dossee* (Bourke, 218). These cases are left where they were before. In the case of *The Delhi and London Bank v. Wordie* (I. L. R., 1 Cal., 249), PHEAR, J., said:—"The plaintiff wants to have a sale of the property effected, and for that purpose to have the obstacles, which arise by the conduct of Morell and Lightfoot and otherwise than from the trustees, removed by the Court. So far as the substance of this suit is concerned, the plaintiff's case is the same as if the trustees were out of the way, and Morell and Lightfoot had bound themselves by covenant, on sufficient consideration, to sell the property and divide the proceeds according to the terms of the deed of 14th May 1875, among their creditors, of whom the plaintiff is one. The like transaction with the plaintiff as the sole creditor would manifestly be of the nature of a mortgage, and a suit by the plaintiff on the footing of it to obtain a realization of the charge by sale would be a suit for land within cl. 12 of the Letters Patent. It follows, I think, that the present suit is also a suit for land."

If that decision had been upheld by the Appeal Court in that form, I should have felt very great difficulty in distinguishing that case from the present. But the current of the opinion of the Court above seems all through the course of the argument to be adverse to the view taken by Mr. Justice PHEAR. [484] GARTH, C. J., during the argument referred to the case of *Abbott v. Abbott* (L.R., 6 P.C., 220), which is an important case, and which he had himself argued while at the bar. In that case there was an order in a Consular Court directing the receiver to sell land beyond the jurisdiction; that was held not beyond the power of the Court. Then he asked "have there been any cases here in which this Court has decreed specific performance of contracts relating to land," and he is referred to *Ramdhone Shaw v. Nobinmoney Dossee* (Bourke, 218). Again the Chief Justice says: "I have some doubt at present whether a 'suit for land' means more than a suit for possession of land, and whether it includes suits relating to or concerning land. Here, however, you ask for possession; I can understand a receiver being appointed to receive rents

where another person is in possession, but here you want a receiver put in possession." That does not appear to be the case here. Then further on we find the Chief Justice says: "It appears to me that, as to the 2-16ths, it is a suit for land, and even as to the rest I have great doubt whether it is not. What do you say to Lightfoot's share." And in the final, formal and considered judgment of the Court, it is said: "The express purpose of the suit is to compel the sale of the whole of the land conveyed by the trust deed, including Lightfoot's share. But then Lightfoot objects that his share is not subject to the trust at all, because Morell had no power or authority to deal with it; and, therefore, one of the main points which the plaintiffs seek to establish, and which they ask the Court to decide, is the title of the trustees to Lightfoot's share. Surely in that respect the suit is, strictly speaking, one 'for land.' But then the plaintiffs say that is not the sole or primary object of the suit, and that as regards Morell's share in the property, which is by far the largest portion of it, there is no question as to the trustees' title. But it was repeatedly, during the argument, put to the learned counsel for the plaintiffs, and distinctly admitted by them, that it would be impossible for the Court to deal effectually with the case unless Lightfoot's share were included as well as Morell's,"—that is to say, there being a [455] question in that case whether anything had passed to the trustees by the deed in respect of Lightfoot's share, the Court held that, as to that share, it was a suit for land. But I do not think there can be much doubt that if it had not been for that share, the judgment would have been in favour of the jurisdiction.

On the whole, then, I think that, with respect to the question of jurisdiction, I am bound to entertain the application.

The only other point of any importance was that upon the face of the petition there appeared to have been a revocation. I don't think there was, so far as I can understand; neither party conceived that the language they used was an absolute revocation of the authority. A revocation ought to be clear and distinct. We have it on the face of the respondent's own affidavit that, subsequent to the award having been made, he sent a letter of revocation. It came indeed too late to have effect, but it does seem to show that he did not believe the telegram to be a revocation, and the language is so vague and ambiguous that I would rather consider it to mean that the scene of the arbitration should be removed from Calcutta to Kurseong, and that it requested the arbitrators to arrange matters at Kurseong—not a statement that the litigants themselves would arrange their differences. It seems to me, having regard to what is on the face of the award with respect to Kellie and Fraser, that this is not a sufficient revocation; and I am by no means certain that since the Contract Act the unlimited right of revocation which existed at Common Law may not be taken away in such a case as this.

There can be no doubt that if I am wrong I can be corrected by the Appellate Court. There is a judgment of the Full Bench in *Sashtri Charan Chatterjee v. Tarak Chandra Chatterjee* (8 B. L. R., 315), where there was great difficulty raised as to the power of appealing from an order affirming an award. But clearly it would not touch the case where the Court which made the order acted without jurisdiction.

With respect to costs, I much doubt whether I have any power. I mean that the party who seeks to have the award made a rule [456] of Court does so for his own security. It seems to me that it is analogous to the registration of a deed. If I thought I had jurisdiction in these proceedings so to do, I

should be much inclined to give costs to the applicant; but I don't think that I have power to give costs against the opposing party. Each party will bear his own costs on scale No. 2.

From this decision the defendant appealed.

Mr. Jackson and Mr. T. A. Apcâr for the Appellant.

Mr. J. D. Bell and Mr. Evans for the Respondent.

Mr. Jackson for the Appellant.—Section 327 of Act VIII of 1859 stands alone; the other sections in the same chapter are not incorporated into it as they are expressly into s. 326—*Chowdhri Murtaza Hossein v. Bibi Bechunnissa* (L. R., 3 I. A., 209). The learned Judge in the Court below thinks that the words of this section—"the Court having jurisdiction"—cannot have a narrower construction given to them than the words "any Court having jurisdiction" in s. 326 would bear. But taking them by themselves, and leaving out of consideration as immaterial the question of the intention of the framers of the Act, it is submitted that the Court having jurisdiction "in the matter to which the award relates" must be taken to mean the Court having jurisdiction over the whole subject-matter of the award—see *Gangappa v. Kapinappa* (5 Mad. H. C. Rep., 128). That Court would in this case be the Darjeeling Court. The jurisdiction meant is not a personal jurisdiction, but a jurisdiction which can be enforced. The only ground of jurisdiction in Calcutta is that the deed was executed in Calcutta; but the result of holding that that was sufficient would be to say that jurisdiction could be given by consent of parties,—by their signing a deed in Calcutta,—to a Court which would otherwise have no jurisdiction. Consent cannot give jurisdiction. [GARTH, C. J.—Is not the subject-matter of the award the differences which have arisen between the parties?] Yes, partly, but in arbitrating on those differences the [457] arbitrators award a sale of the land at Darjeeling, and it is submitted that a proceeding taken to enforce such an award is practically a suit for land within the meaning of cl. 12 of the Letters Patent. [MACPHERSON, J.—I see that, by the terms of deed, both the parties were to reside on the tea garden.] Yes, that is so, and the residence of the defendant out of the jurisdiction of this Court would distinguish the present case from all those in which the Court has held it has jurisdiction, for in all such cases it will be found that the defendant resided within the jurisdiction. This case comes within the principle of the decision in *The London and Delhi Bank v. Wordie* (I. L. R., 1 Cal., 249). There is nothing in the judgment on appeal in that case to cut down the effect of the decision in the lower Court as to the suit being a suit for land. In that case there were circumstances in favour of the jurisdiction which are absent in the present case. The persons to whom the property was stated to have been conveyed were subject to the jurisdiction. Here they are not. In this case part of the award is to remove the manager of the tea estate and appoint another; just as in that case part of the relief sought was to remove the trustees and appoint others. [GARTH, C. J.—You say we could not do that?] Not in a case where both the parties and the land are out of the jurisdiction. The order could not be enforced. [GARTH, C. J.—Could we not make an order for sale of the land, although the purchaser might afterwards have to sue for possession in another Court. The sale could take place without meddling with the land.] That might have been done then in *The London and Delhi Bank v. Wordie* (I. L. R., 1 Cal., 249). [GARTH, C. J.—As to a 14-anna share of the property in that case I thought there was jurisdiction.] In that case the defendant Morell, the owner of the 14-anna share, was subject to the jurisdiction. [MACPHERSON, J.—In that case, owing to the title of the trustees

to Lightfoots's 2-anna share being disputed, a question of title to that portion of the property arose, and therefore the suit was held to be a suit for land.] In all the cases referred to in that case in favour of the Court having jurisdiction, the parties against whom orders were [458] made were subject to the jurisdiction, as in *Bagram v. Moses* (1 Hyde, 284), *Abbott v. Abbott* (6 L. R. P. C., 220). Suits for foreclosure are suits for land according to the decisions of this Court on the words of the Letters Patent, which are to be adhered to rather than the English decisions. *Paget v. Ede* (L. R., 18 Eq., 118) has been held not to apply here. If this Court has jurisdiction in cases where the only cause of jurisdiction is that a deed was executed in Calcutta, it will be nullifying cl. 12 of the Charter.

Again, the leave of the Court should have been obtained in this case before applying to file the award. The case seems to have been treated in the lower Court as if leave had been obtained; but there is no more reason why leave should be assumed to have been obtained in this case than in a case where a plaint has been admitted. It would be necessary in filing a plaint in such a suit as this to obtain leave of the Court to sue; and such leave could not be obtained after the plaint has been admitted. [MACPHERSON, J.—I think it has been so held.] Then as to revocation, the telegrams amounted to a revocation. If the plaintiff thought there was no revocation, there was no necessity for him to complain of the telegram as having been wrung from him under pressure. [MACPHERSON, J.—Was it not rather a mere postponement of the proceedings, which might have prevented the arbitrators from proceeding with the arbitration in Calcutta?] It is submitted there was a sufficient revocation.

Mr. T. A. Apcar on the same side.

Mr. Bell for the respondent.—The deed creating the contract of partnership was executed in Calcutta. A suit relating to that contract is not a suit for land. There are many matters relating to such a partnership which are done in Calcutta, as selling the tea, &c. It is a contract relating to matters partly in and partly out of the jurisdiction. If the plaintiff had wished to sue for a dissolution of partnership, he could, it is submitted, have sued in this Court, and a decree in such a suit would be one *in personam*, which this Court could make. See *Penn v. Baltimore* (1 Ves. Sen., 444; 2 White and Tudor, L. C., 4th Ed. 923) and other cases there cited. [GARTH, C. J.—Your difficulty is that the person against whom you want the decree is not resident in the jurisdiction. If he were, those cases would apply.] It is submitted they apply by reason of the contract having been entered into in the jurisdiction—*Gopkrishna Gossami v. Nilkomal Banerjee* (13 B. L. R., 461). Parties entering into a contract in Calcutta thereby render themselves subject to the jurisdiction, with the restriction that if the performance is not to take place in Calcutta, leave to sue must be obtained. [GARTH, C. J.—Is there any case in which the English Courts have exercised their jurisdiction as in *Penn v. Baltimore*, 1 Ves. Sen., 444; 2 White and Tudor, L. C., 4th Ed., 923 against parties out of the jurisdiction?] The fact of a man having entered into a contract in the jurisdiction is sufficient to give the Court such power over him wherever he may be. In such a case part of the cause of action arises in the jurisdiction, so as to entitle a plaintiff to sue there. Then the Court being so seized as it were with jurisdiction, it is immaterial whether or not leave is obtained, because the seizure of jurisdiction enables the Court to operate upon the person in the way which has often been done in England. The restriction as to obtaining leave to sue is one which is put on the plaintiff merely for convenience. Want of leave does not take away the jurisdiction of the Court to pass an order *in personam*. [GARTH, C. J.—If we passed such an order here

could it be enforced by the Court at Darjeeling ?] It is submitted that it could. [MACPHERSON, J.— If it were a decree it could be executed, no doubt, by the Darjeeling Court in the same way as a decree of that Court, but there would be considerable difficulty in enforcing an order, as for instance an injunction, prior to decree.] Under s. 9 of the Charter Act, 24 & 25 Vict., c. 104, the High Court has the same power as the Supreme Court had, and that was the power of the Court of Chancery. Having power to pass the order the Court would surely have power to enforce it. Such an order could probably be enforced under s. 200,* Act VIII of 1859. What the plaintiff seeks for is an order relating [460] to certain breaches of a contract made in Calcutta; he does not seek a declaration of any title to, or with respect to possession of, any land; he does not ask this Court to give possession; that can be obtained by the purchaser from the Darjeeling Court. As to s. 327, the matter to which the award relates is that which was proposed for arbitration—see the questions referred. It is submitted that those are matters over all of which the Court has jurisdiction, and therefore it has jurisdiction to file the award. The section lays down a special procedure, and that is another reason why leave to sue is not necessary, for the other side have notice of the application to file the award and can show cause against it; here it differs from the filing of a plaint, of which no notice is necessary, and it is therefore only convenient that leave should be obtained in certain cases.

The learned Counsel then contended on the merits of the case, that there had been no revocation, and that the telegrams merely showed an intention to change the venue of the arbitration.

Mr. *Evans* on the same side. The Court has jurisdiction in this case subject to leave. The subject-matter of the award is practically a dissolution of the partnership and the matters usually incidental thereto, including a sale of the partnership assets. A suit for dissolution of the partnership could, no doubt, be brought here with leave of the Court, and it would have power to wind it up, and for that purpose to deal with all the partnership assets. Could it be said that the mere fact of a piece of land, portion of the assets, being out of the jurisdiction, would prevent it having that power. That power is a necessary incident of the winding up and realization of assets. In England land as a partnership asset would be treated as personalty. It would make no difference whether the assets consisted of money or land—see *Lindley on Partnership*, 671. In a suit for dissolution of the partnership, this Court would have had power so to treat the land. [GARTH, C. J.— And that would have been a suit for an order to change the land into money, not a suit for land.] Just so. [MACPHERSON, J.— This is not the same as a suit for winding up a firm in Calcutta. These [461] parties have never carried on business here, and are not resident here.] It is submitted that the Court could wind up a partnership not only where there is personal jurisdiction, but where part of the cause of action has arisen in the jurisdiction. We might have sued on the award, or at any rate have sued for a declaration that the partnership was dissolved as ordered by the

*[Sec. 200 :—If the decree be for any specific moveable, or for the specific performance of any contract, or for the performance of any other particular act, it shall be enforced by the seizure, if practicable, of the specific moveable, and the delivery thereof to the party to whom it shall have been adjudged, or by imprisonment of the party against whom the decree is made, or by attaching his property and keeping the same under attachment until further order of the Court, or by both imprisonment and attachment, if necessary; or if alternative damages be awarded, by leaving such damages in the mode hereinafter provided for the execution of a decree for money.]

award. The cases of *Macrae v. Macniell* (unreported) and *Macdonald v. Scott* (unreported) are cases in which orders were made by this Court with respect to land in the mofussil. In the former case the defendant was not personally subject to the jurisdiction. [MACPHERSON, J.—He lived on board his steamer which was in the river, and he did business, and had a ticket office, in Calcutta.] He was described as residing out of the jurisdiction, and the jurisdiction was founded on the fact that part of the cause of action arose in Calcutta. Here part of the cause of action arose in Calcutta, and if the plaintiff had brought a suit, he would have obtained leave. He had to file an award for which there is a special procedure, and no provision for obtaining leave to file it. The decision cited in the Madras High Court was not argued nor considered. If a plaintiff would have been thought good in this matter if we had sued, then this Court has jurisdiction although no leave has been obtained. No doubt, the execution of the deed was a part of the cause of action; see *Mulchand Joharimal v. Suganchand Shrivdas* (I. L. R., 1 Bom., 23), where all the cases as to cause of action are cited.

Mr. Jackson in reply.—The words of s. 327 are not only “having jurisdiction,” but “having jurisdiction in the matter to which the award relates.” The matter to which the award relates is not the partnership deed, but the tea garden at Darjeeling. The inference from the judgment of the Court below is, that if the words of the section are construed literally, the Court would have no jurisdiction. If the execution of the deed gives jurisdiction this Court might have jurisdiction with respect to land situated anywhere, for instance in California. But in such a case who would give possession of the land sold? An [462] award, however, is not a suit. The decision of the Madras High Court should be followed in this case. According to that case this Court has no jurisdiction.

Cur. adv. vult.

The following **Judgments** were delivered—

Garth, C. J. (after stating the facts continued).—The appellant, Mr. Kellie, contends—

1st. That this Court had no jurisdiction to confirm the award, and

2ndly. That the authority of the arbitrators was revoked by both parties before the award was made.

In support of the first objection, it has been argued that the only Court competent to confirm the award under s. 327 was the Court in which a suit must have been brought to settle the differences between the parties, if those differences had not been referred to arbitration; and that as the subject-matter in dispute was a tea garden at Darjeeling, and as both the litigants were resident there, the suit would have been a suit for land, and must have been brought in the Darjeeling district, and therefore that the Darjeeling Court was the only one capable of confirming the award.

The answer to this contention on the part of Mr. Fraser was that the suit under such circumstances would not have been a “suit for land” within the meaning of cl. 12 of the Letters Patent, and that as a part of the cause of action arose in Calcutta, inasmuch as the deed of partnership was executed there, the High Court might, although Mr. Kellie was resident at Darjeeling, have given leave to Mr. Fraser to bring this suit in the High Court; and that any Court in which such a suit might have been brought would have been “the Court having jurisdiction” over the matter in dispute within the meaning of s. 327.

Upon this point, we have been referred to several authorities, some of which have been discussed by the learned Judge in the Court below; and particularly to the late case of *The Delhi [463] and London Bank v. Wordie* (I. L. R., 1 Cal., 249), where it was held that a suit brought for the purpose of compelling the sale of a trust property was a "suit for land." it will be observed, however, that in all, or almost all the cases upon which the appellant relies, the suit was brought for the purpose of acquiring the possession of, or of establishing a title to, or an interest in, the property which was the subject of dispute, more particularly in the case of *The Delhi and London Bank v. Wordie* (I. L. R., 1 Cal., 249), where the object of the petitioner was to establish the title of certain trustees to a share in a portion of the trust property claimed by a person of the name of Lightfoot, and the establishment of this title was an essential element of the entire claim.

Now, in this case, it clearly appears, both from the description of the matters in difference and from the award itself, that Mr. Fraser's real object was to remove Mr. Kellie from the management of the partnership property, and to enforce a dissolution of the partnership upon such terms as the arbitrators should think proper. He did not seek to obtain possession of, or to acquire a title to, the tea garden, because that was already the property of the partnership, and the effect of the award was only to dissolve the partnership, and to dispose of the partnership property upon what they considered the most just and reasonable terms. I consider, therefore, that any suit instituted by Mr. Fraser to carry out these objects would not have been a "suit for land," properly so called; and that as the High Court might have given Mr. Fraser leave to bring such a suit in the High Court, that Court had also jurisdiction, under s. 327, to confirm the award.

As regards the other point, viz., the alleged revocation of the submission to the arbitrators, I am of opinion that the evidence relied on by the appellant is not sufficient to justify us in finding that a revocation did in fact take place. It is true that, pending the proceedings, a telegram was sent from Darjeeling by both parties to Calcutta in these words, "Stay further proceedings; arrange matters here;" but having referred to the circumstances under which that telegram was sent, and to the [464] subsequent correspondence and conduct of the parties, we do not consider that this telegram operated, or was ever intended to operate, as an absolute revocation of the submission.

I think, therefore, that the appellant has failed upon both grounds, and that the appeal should be dismissed with costs on scale 2.

Macpherson, J.— I also think that this appeal must be dismissed.

A suit the object of which was to deal with the matters, the subject of this arbitration, might certainly, in my opinion, have, with the leave of the Court first obtained, been instituted on the original side of this Court. The partnership deed having been executed in Calcutta, it seems to me that, according to the current of decision here, it is impossible to say that no part of the cause of action arose within the local limits of the ordinary original civil jurisdiction.

Of course if the suit were a suit for land, within the meaning of s. 12 of the Letters Patent of 1865, there would be no jurisdiction, the whole land lying in Darjeeling. But it is not a suit for land within that section. There is no dispute as to the title to the land. The questions at issue relate to the partnership between Kellie and Fraser, the mode in which its business has been and ought to be conducted, and the adjustment of accounts and winding

up of the partnership. The mere fact that the object of the partnership was the carrying on of the tea concern does not make a suit for adjustment of accounts and dissolution a suit for land. If it did, then this result would follow that, although all the members of a partnership were permanently resident in Calcutta, and the chief business of the partnership, was, at the time of suing, and always had been, conducted in Calcutta, a suit for an account and dissolution would not lie here, if one asset of the partnership happened to be an indigo factory or a tea garden in the mofussil. Yet, in the case suggested, there can be no manner of doubt a suit could be entertained by this Court on its original side; and such suits have, in fact, been repeatedly entertained.

The peculiarity in the present case is that the defendant [463] Kellie is not personally subject to the jurisdiction at all, save by reason of part of the cause of action (to wit, the execution of the partnership deed) having arisen in Calcutta. Had he been personally subject, by reason of residing in Calcutta, probably the question which has been raised would never have been suggested.

Some discussion has taken place as to the effect of the judgment of the Court in the case of *The Delhi and London Bank v. Wordie* (I. L. R., 1 Cal., 249). But I cannot gather from the report that the decision of the Appellate Court in any way modified or altered the earlier decisions. For the only point actually decided by the Appellate Court is that as the owner of a two annas' share of the property denied that he had ever conveyed his share to the defendants, to whom it was alleged to have been conveyed as trustees, the question of title as to these two annas was directly in issue, and therefore the suit was a suit for land and could not be entertained.

On the whole, I have no doubt that a suit might, with the leave of the Court first obtained, have been instituted here. And if a suit would have lain there, it appears to me that the Court had jurisdiction under s. 327 to order this award to be filed. I agree with Mr. Justice KENNEDY in declining to attach to the words of that section "the Court having jurisdiction in the matter to which the award relates," the limited and a special meaning contended for, and in construing them as meaning *any* Court having jurisdiction to entertain a suit for the matter to which the award relates.

I further agree in the opinion that there was no revocation of the authority to the arbitrators.

Appeal dismissed. .

Attorneys for the Appellant: Messrs. Orr and Harris.

Attorneys for the Respondent: Messrs. Chauntrell, Knowles, and Roberts.

NOTES.

[I. 'SUIT FOR LAND' WITHIN THE LETTERS PATENT, 1865, CL. 12—

I. WITHIN JURISDICTION:—

The following cases were held to be within jurisdiction:—

- (a) Specific performance of a contract for sale:—(1892) 19 Cal., 358; 22 Bom., 701.
- (b) Specific performance of agreement to grant lease:—(1906) 33 Cal., 1065.
- (c) Suit for foreclosure:—(1898) 22 B., 701.
- (d) Award relating to partition of property partly outside jurisdiction:—(1900) 24 Mad., 31.

But where the suit is for partition of the immoveable property lying wholly outside the jurisdiction, it was held that there was no jurisdiction:—(1880) 4 Bom., 482.

I.L.R. 2 Cal. 466 IN THE MATTER OF JANOKEY NATH ROY [1877]

- (e) The rule is applicable to plaintiffs only ; where defendant was second mortgagee he could enforce rights under the mortgage-decree even if that mortgage included lands outside jurisdiction :—(1897) 24 Cal., 190.

II. NOT WITHIN JURISDICTION—

The following cases were held to lie outside jurisdiction :—

- (a) Lessee seeking to obtain possession by claiming the rents and profits from the lessor :—(1908) 36 Cal., 59.
(b) Suit for charging maintenance on specific land :—(1908) 33 Mad., 151.
(c) Suit for declaration of title to land outside jurisdiction :—(1901) 29 Cal., 315.

II. CAUSE OF ACTION—

- (a) Suit on award against defendant residing in England, no part of cause of action within jurisdiction even where there is allegation of defendant's agent in Calcutta promising to pay amount payable under award :—(1903) 31 Cal., 274.
(b) Endorsement on hundi at Calcutta, part of cause of action within jurisdiction :—(1895) 22 Cal., 451.]

[2 Cal. 466]

ORIGINAL CIVIL.

The 15th July, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MARKBY.

In the matter of the Petition of Janokey Nath Roy.

Appeal—Presidency Magistrates' Act (IV of 1877), s. 41—Prosecution—

Sanction of Judge—Jurisdiction of High Court.

No appeal lies from the order of a Judge directing a prosecution under s. 41 of the Presidency Magistrates' Act.*

IN the suit of one *Bhoobun Mohun Neogy v. Janokey Nath Roy* an application had been made to Mr. Sconce, one of the Judges of the Calcutta Small Cause Court, to direct the prosecution of the defendant (the present appellant) for perjury and forgery. Mr. Sconce refused to direct such prosecution ; and the plaintiff applied *ex parte* under s. 41 of Act IV of 1877 to Mr. Justice KENNEDY, sitting on the Original Side of the High Court, for an order that he might be at liberty to prosecute the defendant, which was granted. Against this order the defendant presented a petition of appeal, on the grounds that the learned Judge had no jurisdiction to make the order ; that, under the circumstances of the case, the order ought not to have been made ; and that the appellant ought to have been allowed an opportunity of being heard against the order being made.

Mr. Branson (with him Mr. Bonnerjee) moved to admit the appeal.

Mr. Branson.—It is true that neither under the Criminal Procedure Code, nor the general law, has the Court any right to interfere with the discretion of a Judge, but the order amounts to a judgment. The word 'judgment' in

* [Sec. 41 :—A complaint of an offence against public justice described in sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211, or 228 of the

Sanction to prosecution for certain offences against public justice.

Indian Penal Code, when such offence is committed before or against a Civil or Criminal Court, shall not be received by any Presidency Magistrate, except with the sanction of the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate.]

clause 15 of the Letters Patent of 1865 has been held to mean a decision, whether final or preliminary, or interlocutory. This order is one creating jurisdiction, and is to that extent final; and so far there is a right of appeal. The learned Counsel referred to [467] *The Justices of the Peace for Calcutta v. The Oriental Gas Company* (8 B. L. R., 433); *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (13 B. L. R., 91); *Mowla Buksh v. Kishen Pertab Sahi* (I. L. R., 1 Cal., 102); and to *Barkat-ul-lah Khan v. Rennie* (I. L. R., 1 All., 17).

The Judgment of the Court was delivered by

Garth, C. J.—We are clearly of opinion that no appeal lies in this case, and that we ought not to grant leave to admit the appeal. Leave granted by a Judge to institute proceedings is not a 'judgment' within the meaning of cl. 15 of the Charter. If authority were wanted, the case of *The Justices of the Peace of Calcutta v. The Oriental Gas Company* (8 B. L. R., 433) would be ample authority for our judgment. But apart from that, this leave given by the Court is the creation of a later Statute. It is a power which did not exist when the Charter was passed. It is a power of a peculiar kind. The object is to check rash proceedings in criminal matters being taken. It gives power to take proceedings, which could not have been taken without leave. As the Legislature has not thought fit to give an appeal from such an order, we think that this appeal should not be admitted.

Application refused

Attorneys for the appellant: Messrs. *Pittar and Wheeler*.

[468] APPELLATE CIVIL.

The 21st June, 1877.

PRESENT:

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Kally Prosonno Hazra.....Plaintiff
versus
Heera Lal Mundle.....Defendant.*

*Limitation—Act IX of 1871, ss. 20, 21, sch. II, arts. 167, 169—
Execution Proceedings.*

The word 'debt' in ss. 20 and 21 of Act IX of 1871 applies only to a liability for which suit may be brought, and does not include a liability for which judgment has been obtained: therefore, where the last application for execution of a decree had been made on the 14th of December 1872, and a notice under s. 216, Act VIII of 1859, issued on the 19th of January 1873, and on the 28th of April 1873, the judgment-debtor filed a petition notifying part-payment, which petition was signed by the judgment-creditor,—held, in an application for execution made on the 27th of April 1876, that further execution was barred by limitation.

THIS was a suit in which the plaintiff, appellant, had obtained a decree on the 9th of January 1868. The last application for execution had been filed on the 14th of December 1872, and a notice under s. 216 of Act VIII of 1859 had been issued to the representatives of the judgment-debtor on the 19th of

* Miscellaneous Special Appeal, No. 91 of 1877, from a decree of C. D. Field, Esq., Judge of Burdwan, dated 22nd December 1876, confirming a decree of Baboo Amrit Lal Pal, Munsif of that district.

January 1873. On the 28th of April 1873, the judgment-debtor filed an application with the consent of the decree-holder, who appended his name at the bottom of the petition, notifying payment of a part of the decretal amount and the execution case was struck off the file. On the 27th of April 1876, the judgment-creditor applied for fresh execution. The judgment-debtor pleaded limitation. The Lower Appellate Court held, that further execution was barred. The judgment-creditor preferred a special appeal to the High Court.

Baboo *Rashbehari Ghose* for the appellant.—The petition presented by the judgment-debtor, and signed by the judgment-creditor, was in fact the acknowledgement of a 'debt,' and is therefore governed by ss. 20a and 21 of the Limitation Act. The period of limitation must, therefore, be computed from the date of the presentation of that petition.

The respondent was unrepresented; the pleader for the appellant, however, pointed out to the Court that the proviso to art. 169 of the 2nd schedule of Act IX of 1871 would have been mere unmeaning surplusage if limitation on part-payment of money under a decree had been already provided for under s. 21 of that Act.

The following **Judgments** were delivered :—

Markby, J.—In this case, whilst execution proceedings were going on, the judgment-debtor filed a petition in Court notifying payment of a part of the sum due under the decree, and asking for a stay of execution for four months. The judgment-creditor signified his assent to this application by signing the petition, which was granted. The question we have to determine on special appeal is, whether a new period of limitation runs either from the date of this petition under the provisions of s. 20 or from the date of the part-payment under the provisions of s. 21, Act IX of 1871. Both these sections are applicable to 'debts and legacies' only, and I do not think that the sum due under a decree is a 'debt' within the meaning of these two sections. It seems to me that the proviso to s. 21, which is general, would be unmeaning as applied to sums due under a decree; and the proviso to art. 169, sch. II would also have been wholly useless if part-payment of money due under a decree had been already provided for under s. 21. Both these arguments, it is true, apply only to s. 21. But I cannot suppose that the word 'debt' is used in a different sense in two consecutive sections of the Act. I do not of course mean to say that the sum due under a decree may not sometimes be properly called a 'debt': it is constantly spoken of as a judgment-debt; but taking the whole Act together, I think the 'debt' spoken of in ss. 20 and 21 is a liability to pay money for which a suit could be brought, and not for which judgment has been obtained. The Miscellaneous Special Appeal will be dismissed with costs.

[470] Prinsep, J.—I am of the same opinion. I would only add that the fact that it has been thought necessary to make a special proviso in art. 169, sch. II of the Limitation Act, seems to show that the ordinary law was not sufficient in this respect as regards decrees or orders of a High Court in its Ordinary Original Civil Jurisdiction. There is no such special provision for other decrees or orders. We cannot apply s. 20 or 21

Appeal dismissed.

NOTES.

[STATUTORY CHANGE—

The Indian Limitation Act (1908) has added the following Explanations owing to the conflicting decisions of the several High Courts on this question.

Explanation III to Sec. 19—

For the purposes of this section an application for the execution of a decree or order is an application in respect of a right.

Explanation to Sec. 20 :—

'Debt' includes money payable under a decree or order of Court.

II. CONFLICT OF DECISIONS UNDER THE OLD CODE AS TO WHETHER 'DEBT' INCLUDED JUDGMENT DEBT—

That it did not, was held by the Calcutta High Court, in (1877) 2 Cal., 468; (1879) 4 Cal., 708; 3 C. L. R., 572; (1902) 6 C. W. N., 766; 25 Mad., 431; (1904) 27 Mad., 608; (1904) 28 Mad., 40. That it did, was held by the Bombay and Allahabad High Courts :—(1889) 14 Bom., 390; (1903) 26 All., 36; (1892) 5 All., 201; (1890) 3 All., 247; (1881) 3 All., 781; (1894) 16 All., 228; (1905) 27 All., 575.]

[2 Cal. 470]

FULL BENCH.

The 20th July, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE JACKSON,
MR. JUSTICE MACPHERSON, MR. JUSTICE MARKBY AND
MR. JUSTICE AINSLIE.

Mohesh Mahto and another.....Defendants

versus

Sheik Piru.....Plaintiff.

*Special Appeal—Jurisdiction—Small Cause Court—Claim under Rs. 500—
Question of title—Act XXIII of 1861, s. 27—Act XI of 1861, s. 6.*

No special appeal lies to the High Court in a suit cognizable by the Small Cause Court, although a question of title to immoveable property has been raised and tried in the Court below.

THIS was a suit for the recovery of Rs. 476, the price of certain sakhs trees. A question of title had been raised and determined in the Court below in favour of the respondent. Upon a special appeal from this decision, MARKBY and PRINSEP, JJ., referred the following point to a Full Bench : "Whether, having regard to the provisions of s. 27 † of Act XXIII of 1861, a special appeal lies to the High Court in a suit of the nature cognizable by a Court of Small Causes, when a question of title to immoveable property has been raised and tried in the Courts below."

* Special Appeal No. 1385 of 1875, against a decree of Col. Boddam, Deputy Commissioner of Zilla Hazaribagh, dated the 18th March 1876.

† [Sec. 27 :—No special appeal shall lie from any decision or order which shall be passed

No special appeal from decision of any Court subordinate to the Sudder Court in certain suits.

on regular appeal after the passing of this Act by any Court subordinate to the Sudder Court, in any suit of the nature cognizable in Courts of Small Causes under Act XLII of 1860 (for the establishment of Courts of Small Causes beyond the local limits of the jurisdiction of the Supreme Courts of Judicature established by Royal Charter), when the debt, damage, or

demand for which the original suit shall be instituted shall not exceed five hundred rupees; but every such order or decision shall be final.]

Baboo *Anandanauth Chatterjee*, for the respondent, took a preliminary objection to the hearing of the appeal, and con-[471]tended that no appeal would lie to this Court, inasmuch as the case was one cognizable by the Small Cause Court, being merely a suit for damages. The words of the Act are "that no special appeal shall lie from any decision or order in any suit of the nature cognizable in Courts of Small Causes . . . when the debt, damage or demand for which the original suit shall be instituted shall not exceed five hundred rupees; but every such order or decision shall be final." It is true that a question of title was raised and tried, but it was simply raised incidentally in order to the determination of damages, and as the suit itself was merely for damages, no appeal lies—*Grant v. Modhoosudun Singh* (10 W. R., 79) and *Lasmani Debia v. Mahomed Hafezulla* (3 B. L. R., Ap., 96).

Baboo *Roopnath Bonerjee* for the Appellants.—If the sole question raised and decided in this suit had been the plaintiff's claim to damages, it is clear that no appeal would lie to this Court. But the decree of the Court below was based upon a question of title, which, if it had properly arisen incidentally in a suit brought in the Small Cause Court, would not then have been finally concluded between the parties—*Bhoop Narain Sahoo v. Meer Mahomed Hossein* (4 W. R., 60); and as this question of title had to be determined before a decree could be given, the appeal is admissible—*Pachoo Raree v. Gooroo Churn Dass* (15 W. R., 556); see also *Dikshit v. Dikshit* (2 Bom. H. C. Rep., 4) and *Ramchandra Raghunath v. Abaji bin Rastya* (6 Bom. H. C. Rep., A. C., 12).

The Opinion of the Full Bench was delivered by

Garth, C. J.—We are of opinion that as this was a suit cognizable by the Court of Small Causes, no special appeal lies to this Court, although a question of title may have been incidentally raised in it. The appeal will, therefore, be dismissed.

Appeal dismissed.

NOTES.

[JURISDICTION—COURT OF SMALL CAUSES—

I. *Jurisdiction of Court of Small Causes not ousted by reason of question of title having to be decided incidentally in such suit.*

In (1881) 3 Mad., 192, F. R., the suit was for damages for loss than Rs. 500, for carrying away crops from a certain land. Held, jurisdiction of Small Cause Court is not ousted by reason of the defence setting up title to the land.

Per Muttusami Ayyar, J.—

The question what is a suit of the nature cognizable by a Court of Small Causes within the meaning of sec. 586 of the Civil Procedure Code, has reference to the mode of adjudication and not to the *forum* and the fact that the suit is instituted in the District Munsif's Court and not in a Court of summary jurisdiction makes no difference :—*Ibid.*

See also (1890) 15 Bom., 400.

In (1904) 31 Cal., 1001, it was held that the Presidency Small Cause Court has jurisdiction to try questions of title even though they form the important questions to be tried in the suit. Question of title must not be the sole and only question in the suit.

II. *Consequently no second appeal also lies :—*(1897) 24 Cal., 557.]

[472] ORIGINAL CIVIL,

The 19th July, 1877.

PRESENT :

MR. JUSTICE KENNEDY.

Koegler

versus

Prosonno Coomar Chatterjee.

Civil Procedure Code (Act VIII of 1859), s. 73—Adding parties—Amending plaint.

Under s. 73, Act VIII of 1859, a person is not liable to be added as a party to the suit, although he may be "likely to be affected by the result," unless he is also entitled to or claims some interest in the subject-matter of the suit.

APPLICATION on notice to amend a plaint by adding a party defendant to the suit.

The suit was instituted by the plaintiff, carrying on business in Calcutta under the name of Graf and Banziger against the defendant, carrying on business in Calcutta in the name of Ramchunder Chatterjee, to recover damages in respect of breaches of certain contracts made between the plaintiff and defendant for the delivery of wheat. In the petition in support of this application the plaintiff stated that, at the time of the institution of the suit, he was informed and believed that the defendant above named was the sole partner of the firm of Ramchunder Chatterjee; that since the institution of the suit and service of summons on the defendant, the plaintiff had discovered that he was not the sole partner in the firm, but that he and one Ramchunder Chatterjee carried on the business in co-partnership. The present application was, therefore, made to have the plaint amended by adding the name of Ramchunder in the plaint as a party-defendant to the suit.

The application was opposed both by the defendant and by Ramchunder Chatterjee who alleged, in separate affidavits filed by them, that they did not carry on business in co-partnership, but that the business was carried on by Ramchunder alone, the defendant Prosonno Coomar being his agent and manager; and that the contracts had been entered into by the defendant in that capacity.

[473] Mr. Bonerjee, in support of the application, contended that the person the plaintiff alleged to be a necessary party might be added as a party under s. 73 of Act VIII of 1859.

Mr. Stokoe, for the defendant, contended that s. 73 did not apply to such a case as this, and that to grant the application would be practically to allow the plaintiff to wholly change the nature of his suit—to bring a new suit in fact.

Mr. R. Allen, for Ramchunder Chatterjee, contended that, according to the practice of the Court, he could not at this stage be added as a party. A motion like this is not a hearing within the meaning of s. 73. [KENNEDY, J.—I think it is clear that it is.] Then it is not a case to which s. 73 applies. The plaintiff finds he has made a mistake and sued the wrong person, and now wishes to add the person he ought to have sued as a party: that would be to allow him to bring a totally different suit. It is submitted that would be perverting the meaning of the section.

Mr. *Bonnerjee* in reply.—The application should be granted, subject of course to payment of the costs by the plaintiff, if Ramchunder is wrongly made a party; it is not for the defendants to choose whether they will be parties or not: the Court has discretion under s. 73 to make this person a party. The application is not made at a late stage of the case, or under circumstances which will prejudice the defendant in any way.

Kennedy, J.—I have not been referred to any authority which shows me that the old practice with respect to the addition of parties to a suit has been retained. The Civil Procedure Code seems to have been introduced by the rules of this Court as laying down the entire practice. Section 73 of that Code is the only section which provides for adding parties, and by that section parties can only be added where they "may be entitled to, or claim some share or interest in the subject-matter of the suit, and may be likely to be affected by the result." Probably the framers of the Act had in their minds suits for land. I do not think, therefore, that a person who is not entitled to, and [474] who does not claim, any interest in the subject-matter of a suit can be made a party to it. By the old practice any number of persons who were necessary parties were considered as being parties having an interest in the matter of the suit, except in matters of contract. Under the Contract Act the distinction between joint and several contracts in respect of pleading has been abolished, and one party of any number, unless there be an express contract to the contrary, may be sued alone. In this case if the plaintiff can make out a partnership between the defendant and the person he wishes to have made a party, he will be able to recover against the person he has sued. If the person he has sued is only an agent, then the plaintiff having elected to sue the agent has no right to be allowed to join another person as principal; that would be a different suit. I must therefore refuse this application. I cannot see any reason why the original defendant should have appeared in this application, therefore he will get no costs. The other party who has opposed it must have his costs.

Application refused.

Attorneys for the Plaintiff: Messrs. *Pillar and Wheeler*.

Attorneys for the Defendant: Messrs. *Tortman and Watkins*.

Attorney for Ramchunder Chatterjee: Mr. *Farr*.

[2 Cal. 474]
APPELLATE CIVIL.

The 5th July, 1877.

PRESENT:

MR. JUSTICE PRINSEP.

Doorga Prosad Mytee and others.....Defendants

versus

Joynarain Hazrah.....Plaintiff.

Co-sharers—Ijaradar—Enhancement of rent—Beng. Act VIII of 1869, s. 18.

An ijaradar is entitled to enhance the rent of raiyats holding under him where there is no condition or stipulation in his lease precluding him from so doing.

[475] One of several joint proprietors may, without making his joint proprietors parties, bring a suit for enhancement of rent against ryots holding under him, from whom he has been in the habit of realizing separate rents.

The Full Bench Ruling in *Doorga Churn Surma v. Jampa Dossee* (12 B. L. R., 289; s. c. 21 W. R., 46) distinguished.

THE plaintiff, a farmer for a term of years, and one of several co-sharers entitled to the rent of certain property, brought a suit for the enhancement of his share of the rent. The plaintiff alleged that the proportionate part of the rent due to him had hitherto been paid exclusively to him by the defendants irrespective of the shares due to the other co-sharers, who were not made parties to the suit. The Lower Appellate Court gave the plaintiff a decree. The defendants preferred a special appeal to the High Court.

Bahoo *Umakali Mukerjee* for the appellants.—An ijaradar of a fractional portion of an undivided estate cannot sue for enhanced rents, although in receipt of a definite portion of the rent, unless he makes his co-sharers parties to the suit—*Doorga Churn Surma v. Jampa Dossee* (12 B. L. R., 289; s. c., 21 W. R., 46). An ijaradar cannot sue for a kabuliati for his fractional share; and, therefore, cannot sue for enhancement—*Surrut Soondery Dabza v. Watson* (11 W. R., 25). If such separate suits were possible, it would result in the splitting up of the tenure without the consent of the tenant, but see judgment of MITTER, J., in *Indar Chandra Dugar v. Brindabun Bihara* (8 B. L. R., 251; s. c., 15 W. R., F. B., 21). The co-sharers, at any rate, should have been made defendants—*Dookhee Ram Sircar v. Gcwhur Mundul* (10 W. R., 307) and *Raj Chunder Mojomdar v. Rajaram Gope* (22 W. R., 385). The ijara patta did not authorise the plaintiff to bring an action for enhanced rent.

Bahoo *Doorgaram Bose* for the respondent.—A co-sharer in receipt of his separate share of rent can sue for enhancement without making co-sharers parties to the suit—*Rakhal Chunder* [476] *Roy Choudhry v. Mahtab Khan* (25 W. R., 221) and *Gunga Narain Das v. Saroda Mohun Roy* (3 B. L. R., A. C., 230; s. c., 12 W. R., 30). The ijara patta contains no express stipulation precluding enhancement: the ijaradar may, therefore, sue for enhancement—*Rushton v. Girdharee Tewaree* (Marsh., 331).

* Special Appeal, No. 2601 of 1876, from a decision of Baboo Jadunath Roy, Subordinate Judge of Midnapore, reversing a decision of Baboo Annoda Prosad Chatterjee, Munsif of Chouki Danton.

Prinsep, J.—The plaintiff, as ijaradar of a third share, sues for rent at an enhanced rate. After the determination of the rate to which he is entitled, the rent has been decreed by the Lower Appellate Court. In special appeal two objections are taken to this decision: *first*, that inasmuch as the plaintiff was only an ijaradar, he had no right to enhance the rent; and *secondly*, as he held only a share in the rent, he could not enhance without making all his co-sharers parties to the suit. Another objection is taken that the defendants hold under a mokurree patta. But the finding of the Lower Appellate Court that there is a total absence of satisfactory evidence with regard to the alleged mokurree tenure completely disposes of this point. The law as laid down by Lower Appellate Court that, unless there is an express stipulation against the enhancement of rent by an ijaradar, he can exercise that power, is in accordance with the law as laid down in the case of *Rushton v. Girdharee Tewaree* (Marsh, 391); and the correctness of that ruling cannot be disputed. On the other point, whether being an ijaradar he has the right to enhance without making the co-sharers parties, it seems to me that, as he had admittedly received a specific sum for rent originally, no doubt calculated on a specific share, but for a long time received independently of the other co-sharers, it was in no way necessary that he should make those co-sharers parties to this suit. The decision of a Full Bench of this Court in *Doorga Churn Surma v. Jampa Dossee* (12 B. L. R. 289; s. c. 21 W. R., 46), does not appear to be in point; the facts as they appear in the judgment of Mr. Justice JACKSON not being the facts that I have already stated. In that case it would seem that there was no separate collection of rents from the ryots on the plaintiff's share; but that the rents were collected jointly on behalf of all the landlords. The law seems to have been clearly laid down in the case of *Gunga Narain Das v. Sarodo Mohun Roy* (3 B. L. R., A. C., 230; s. c., 12 W. R., 30), that if the plaintiff, landlord, either proves that the tenants have paid their rents to him separately, or proves an express agreement on their part to pay his rent separately, the suit will lie by that landlord having only a share in the absence of his other shareholders. And if he can bring a suit for arrears of rent on his specific share, there seems to be no reason why he should not be able to enhance that particular rent. The decision in *Dhookee Ram Sircar v. Gowhur Mundul* (10 M. R., 307), as I read it, goes only so far as to state that, in order to arrive at a proper conclusion as to the amount of rent due to one having only a share in the property, the calculation must be based on an enhancement of the entire share; that the rent of the entire share should be enhanced as regards the payment of the full rent by the ryot does not appear to be necessary. In my opinion, therefore, there is no reason why the plaintiff who has himself, and whose lessor has also realized rent separately from the ryot on his one-third share, should not be able to sue for rent at an enhanced rate, even although he may not have joined his co-sharers as parties to the suit. I find also that this opinion is in accordance with that expressed by Mr. Justice GLOVER in the case of *Rakkhal Chunder Roy Chowdhry v. Mahtab Khan* (25 W. R., 221). The special appeal will, therefore, be dismissed with costs.

Appeal dismissed.

NOTES.

[As regards the question whether notice to enhance given by one of several joint tenants is sufficient, see (1878) 3 Bom., 23, where it was answered in the negative, and this case was distinguished as proceeding on the special facts of the case. See also (1900) 24 Bom., at 545.]

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ANY HIGH COURT.

CALCUTTA—VOL. III—1878.

APPELLATE CIVIL

The 5th September, 1877.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Adurmoni Deyi.....Defendant

versus

Chowdhry Sib Narain Kur.....Plaintiff.

Hindu law—Mitakshara—Son's interest in ancestral estate—

Burden of proof.

In a suit by a son to set aside an alienation of property made by his father during the son's minority, it was shown that the property in suit originally belonged to the plaintiff's grandfather, who came to a partition of his property with his brother : and that, on the death of the plaintiff's grandfather, his two sons, the father and uncle of the plaintiff, divided the estate between them, the property in suit falling to the share of the plaintiff's father. It was sought to set aside the alienation on the ground that there was no legal necessity for effecting it. The suit was brought seven or eight years after the plaintiff attained his majority.

Held, that, notwithstanding the partition by the plaintiff's father, the property was ancestral property in which the plaintiff at his birth acquired an interest. *

Held, also, reversing the decision of the Courts below, that the question to be tried in the suit was, according to the decision of the Privy Council in *Girdharee Lall v. Kantoo Lall* (14 B. L. R., 187), not whether there was any legal necessity for the alienation, but whether the debt of the father, in satisfaction of which the alienation was made, was incurred for an immoral purpose, and that, under the circumstances, the onus was on the plaintiff to show that it was.

* Special Appeal, No. 832 of 1876, against a judgment of W. Macpherson, Esq., Officiating Judge of Cuttack, upholding a decision of Baboo Chunder Prosonno Dutt, Munsif of Balasore.

Quære.—Is a son bound to discharge debts of the father which are illegal, though not immoral?

THIS was a suit for the recovery of mouza Similia and half of mouza Gentia, on the allegation that the plaintiff's father, during the minority of the plaintiff, improperly sold the said properties without the consent of the plaintiff, the family being governed by the Mitakshara law. There was a further allegation that no necessity or occasion had existed for the sale. The sale of the second mouza took place on the 16th of May 1862, to the defendant, for a consideration of Rs. 1,750, and the defendant thereupon entered into possession. The property in dispute originally formed part of the estate of one Chowdhry Huri Narain Kur Mahapater, the grandfather of the present plaintiff, who, during his lifetime, divided his ancestral and self-acquired property between himself and his brother, under a registered deed of partition dated the 5th Assar 1237 (27th September 1830). On the death of the grandfather, his two sons, the father and uncle of the present plaintiff, by a deed of partition dated the 7th Cheyt 1242 (18th of March 1836), divided the estate of their father between them, the father of the plaintiff receiving the property in dispute as part of his share. The present suit was instituted on the 4th of May 1874. The lower Appellate Court held that the share of the property obtained by the father of the plaintiff was ancestral property. The Court also held that the burden lay on the defendant to show that the sale to him by the father of the plaintiff was founded on legal necessity, and gave the plaintiff a decree. The defendant preferred a special appeal to the High Court.

Baboo *Komolakant Sen* for the Appellant.—The incidents attached to ancestral property under the Mitakshara law were destroyed by the partition made by the grandfather of the respondent. The property, the subject of the suit, belonged absolutely to the father of the plaintiff. Under the Mithila law, ancestral property which descends to a father is not exempted from liability for his debts because a son is born—see *Girdharee* [3] *Lall v. Kantoo Lall* (14 B. L. R., 187). The burden of proof that the sale made by the father of the plaintiff was not legally necessary should have been on the plaintiff.

Mr. *Twidale* for the Respondent.—The property of the father of the respondent was ancestral property—*Mudden Gopal Thakoor v. Ram Buksh Pandey* (6 W. R., 71). The onus was properly cast on the defendant. Alienations by a member of a joint Hindu family cannot be made except for the benefit of the family—*Sadabart Prasad Sahu v. Foolbush Koer* (3 B. L. R., F. B., 31).^{*} It lies, therefore, on the alienee to show the circumstances under which the alienation was made.

The following **Judgment** was delivered by

Markby, J. (PRINSEP, J., *concurring*).—The plaintiff in this case sued to recover possession of a mouza which he alleged to be his ancestral property. He stated that the property had been sold to the defendant by his father in May 1862, that is twelve years, all but a very few days before this suit was brought; but that, as there was no necessity for the sale, it was void, and not binding on him, the plaintiff.

The plaintiff claimed to belong to a family governed by the Mitakshara law. There was some dispute about this, but this point has been finally settled in favour of the plaintiff.

It has also been argued that this property is not to be considered as ancestral, because, though it belonged to the grandfather of the plaintiff, the father of the plaintiff made a partition of the family property with his own

brother, and the mouza in suit, when it fell to the share of the plaintiff's father, belonged to him absolutely as his separate property, and his son did not on his birth acquire any interest therein. Upon this point we think the decision of the Courts below that the son acquired an interest in this property at his birth is correct. There is no authority for the contrary.

The remaining question for consideration in the suit now before us is, whether the sale was, under the circumstances, [4] binding upon the plaintiff. Both the lower Courts have held that it is not, but it is argued in special appeal that, in deciding this question, the Courts below have not adopted the correct principles of Hindu law. The Munsif says :—"The Mitakshara law rules that a son, as soon as he is born, has equal right with his father in his ancestral property; consequently, a father cannot, without the consent of his son, and in the absence of any legal necessity, sell his ancestral property. This being so, the burden of proving that the sale sought to be set aside was made under a legal necessity, as adverted to, is wholly on the defendant." Subsequently he says :—"As, therefore, the defendant has failed to prove the existence of a legal necessity which alone could render her purchase valid, plaintiff is not bound by the sale under consideration." And the District Judge says :—"It is for the defendant to show that the sale was effected for at least reasonable, if not pressing, necessity. He [She?] has failed, however, to produce any proof which can be regarded as in the slightest degree satisfactory. There is no proof of the existence of any debts or pressure of any kind such as would justify the sale; on the other hand, there is certainly far better evidence to show that there was no real necessity, but that the sale took place simply to provide means for the gratification of loose and extravagant tastes."

Whatever may have been once thought in this Court, I do not think that, after the decision of the Privy Council in *Girdharee Lall v. Kantoo Lall* (14 B. L. R., 187), it can be said that this is the right way of dealing with such a case.

There was certainly at one time a disposition in this Court to treat the father as having no power whatever to bind his son by his disposition of the ancestral property of the family except in cases where the son was a minor, and there was a legal necessity to dispose of the property; putting, therefore, the father, as regards his minor son's interests in the property, in the same position as a guardian. The effect of this view of the position of the father under the Mitakshara law, coupled with the decision [5] of the Full Bench in the case of *Saidabart Prasad Sahu v. Foolbask Koer* (3 B. L. R., F. B., 31), that no member of a Mitakshara family can dispose even of his own share, was practically to enable the son to set aside *in toto* all alienations of the family property made during his minority, unless the alienee could show that the alienation was one which was really necessary for the preservation of the interests of the family.

But the Privy Council in the case *Girdharee Lall v. Kantoo Lall* (14 B. L. R. 187) have taken an entirely different view of the position of the son under the Mitakshara law. Proceeding upon a decision of the Sudder Dewany Adawlut, they have practically put the son in the same position with respect to debts contracted by his father, as if he had succeeded to the ancestral estate as heir upon the death of his father. They say :—"It would be a pious duty to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son, as the son of his father, acquires an interest by birth, is liable to the father's debts." And they infer from this that an alienation made to satisfy such debt of the father is binding on the son.

Applying these principles to the present case; it appears to me that the true question for consideration is, not whether there was any legal necessity for the sale of this property, but whether the sale was to satisfy a debt which, if contracted by the father and left unpaid by him, the son would, under the Hindu law, be under an obligation to discharge. If it was to satisfy such a debt that the property was sold, then, I think, according to the Privy Council decision, the sale is valid. And I think that decision also clearly shows that it is only in respect of debts contracted for an immoral purpose that the son can say that, under the Hindu law, he is not liable. That seems to be the view taken in the passage printed at page 197 of the report.

I do not mean it to be inferred from what I have said above that a son is bound to discharge debts that are illegal although not immoral: that is an altogether different question, and not now under consideration.

[6] I think, therefore, that the question which the Court below should have proposed for consideration was, whether the debt which this property was sold to satisfy was incurred for an immoral purpose.

Upon the question of onus I have had more doubt. One would be inclined to think that the party alleging immorality was bound to prove it. Probably, however, the question of onus is one which must be determined according to the circumstances of each particular case. But I have no doubt whatever that, under the circumstances of this case, the onus ought to be placed upon the plaintiff. The transaction took place a very long time ago, and the plaintiff attained his majority seven or eight years before he took any steps to set this purchase aside. I think it would be a grievous injustice to allow him now to do this, unless he can show affirmatively that the transaction is one which the law renders void.

Appeal allowed.

NOTES.

[1. ANCESTRAL PROPERTY—SHARE ON PARTITION :—

1. In *Lal Bahadur v. Kanhaiya Lal*, (1907) 29 All., 244, at 254, it was held by the Privy Council that such share is ancestral property :—"The share then taken by Durga Prasad was undoubtedly ancestral property, as between him and his sons, who from the moment of their birth acquired an interest in it." It was held in that case that such property could not be disposed of by will.

2. This principle holds good whether the son was born before or after the partition :—

(a) One of the sons was born after the partition in (1907) 29 All., 244.

(b) Mr. Mayne in his *Hindu Law* (7th ed.), p. 346, says :—

"Where ancestral property has been divided between several joint owners, there can be no doubt that if any of them have issue living at the time of the partition, the share which falls to him will continue to be ancestral property in his hands, as regards his issue, for their rights had already attached upon it, and the partition only cuts off the claims of the dividing members. The father and his issue still remain joint [(1868) 5 B. H. C., 129; (1894) 9 Bom., 438]. But it is not so clearly settled whether the same rule would apply where the partition had been made before the birth of issue."

He adds in the footnote, with reference to this case of 3 Cal., 1, that, "The report does not state whether the son was born before or after the partition, but I think the latter seems to have been the case." This point, however, seems to be placed beyond doubt by this case, as the partition in it took place in 1836 (3 Cal., 2), the suit was brought in 1874 (3 Cal., 2), which is stated (in 3 Cal., 6) to have been seven or eight years after the plaintiff attained his majority.

3. Even if encumbrances should have been discharged the ancestral character is not taken off :—(1870) 5 M. H. C., 150.

II. ONUS ON SON IMPEACHING FATHER'S ALIENATION —

The Privy Council stated as follows in *Suraj Buns Koer v. Sheo Proshad* (1879) 5 Cal., 148, at 171 :—

"When ancestral property has passed out of the family either under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the latter's debt, his sons by reason of their duty to pay their father's debts cannot recover that property, unless they show that the debts were of a kind for which they would not have been liable, and that the purchasers had notice that they were so contracted."

But the debt must have been antecedent :—(1907) 34 Cal., 735 ; (1905) 29 Mad., 200 ; (1909) 31 All., 176.]

[3 Cal. 6]

The 12th March, 1877.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE MITTER.

Watson & Co.....Defendants

versus

Dhonendra Chunder Mookerjee.....Plaintiff.*

Res judicata—Limitation—Beng. Act VIII of 1869, s. 29—Tenancy in abeyance—Obligation to payment.

A, the zamindar, granted a patni lease of certain talooks to B, who assigned it to C and D. On B's death, C and D applied to the Collector for registration of the patni talook in their names as assignees of B. A objected to the registration on the ground that the lease enured only for the life of B. A's objection being overruled, he instituted a regular suit to eject C and D, the present defendants, which was decided against A finally by the Privy Council in 1874. During the pendency of this litigation, the zamindar sued to recover the rent for the year 1868, not upon the basis of the patni lease, but for use and occupation, treating the tenants as mere trespassers. This suit was dismissed on the ground that the plaintiff ought to have sued on the lease. In 1875, the plaintiff brought the present suit for the rent of 1868 on the patni lease. The defendants pleaded *res judicata* and limitation. The plaintiff contended that the suit was within time on the ground that the right to [7] recover the rent was in suspense during the pendency of the litigation regarding the lease. *Held*, that the suit, though not *res judicata*, was barred under s. 29 of Beng. Act VIII of 1869.

Rani Swarnamayi v. Shashi Mukhi Barmani (2 B. L. R., P. C., 10 ; s. C., 12 Moore's L. A., 244) distinguished.

SUIT to recover arrears of rent due in respect of certain estates in the zilla of Midnapore held by the defendants as patnidars.

Two different patni leases, respecting the property of which rent was now claimed, were obtained originally by John Watson and Robert Watson. The defendants were their successors as transferees of their rights and interests in the above leases. The two Watsons dying in 1865, the defendants preferred an application before the Collector for the special registration of the patnidars as transferees of the original lessees. The plaintiff objected to the registration, but the objection was overruled. The plaintiff, thereupon, instituted two separate suits in 1868, against the defendants, on the ground that the leases enured for the joint lives of the grantees, and that rights thereunder were

* Regular Appeal, No. 270 of 1875, against a decree of Baboo Jadu Nath Mullick Subordinate Judge of Zilla Midnapore, dated the 4th of September 1875.

inalienable. These suits were dismissed finally by the Privy Council on the 21st of February 1874. During the pendency of this litigation, the zamindars sued to recover from the patnidars rent for the year 1275 F.S. (1868), for use and occupation of the property, in order to avoid any admission that the leases were still in existence. The defendants pleaded in that suit that the plaintiff ought to have sued on the basis of the patni pattas, and not for use and occupation. The plaintiff's suit was dismissed upon this objection of the defendants on the 29th of June 1872. The validity of the leases being finally established, the plaintiff now sued upon them to recover the rent for the year 1868.

The defendants pleaded, *inter alia*—(1) accord and satisfaction; (2) that the suit was a *res judicata*; and (3) that the claim was barred under s. 29 of Beng. Act VIII of 1869.

The Subordinate Judge of Midnapore framed, among others, the following issues:—

1. Whether the claim was liable to dismissal under s. 2 of Act VIII of 1859?

[8] 2. Whether limitation barred the claim for rent for the year 1868?

The Subordinate Judge held, with reference to these two issues, that the plaintiff's claim was not "heard and determined" in the previous suit within the meaning of s. 2 of Act VIII of 1859; and that, according to the principles laid down by the Privy Council in *Rani Swarnamayi v. Shashi Mukhi Barmant* (2 B. L. R., P. C., 10; s. C., 12 Moore's I. A., 244), and the decisions of the High Court in *Eshan Chunder Roy v. Khajah Assanoollah* (16 W. R., 79) and *Dindayal Paramanik v. Radha Kishori Debi* (8 B. L. R., 536), the plaintiff's right to recover the rent for 1868 was not barred under s. 29 of Beng. Act VIII of 1869.

The defendants appealed to the High Court.

Mr. Evans (Babu Bhowany Churn Dutt with him) for the Appellants.

Mr. Woodroffe (Babu Mohini Mohun Roy with him) for the Respondent.

Mr. Evans.—The plaintiff's suit is barred under s. 29 of Beng. Act VIII of 1869. The rent fell due in 1871, and the present proceeding was not instituted until the 19th of February 1875. The cases referred to by the lower Court do not apply; on the contrary, *Huronath Roy Chowdry v. Golucknath Chowdry* (19 W. R., 18) and *Buroda Kant Roy v. Chunder Coomar Roy* (23 W. R., 280) are exactly in point. In *Rani Swarnamayi's* case (2 B. L. R., P. C., 10; s. C., 12 Moore's I. A., 244), as pointed out by JACKSON, J., the landlord could not have brought the suit for the old rents until the tenant was replaced in the possession of the talook. In the present case, as in *Buroda Kant Roy v. Chunder Coomar Roy* (23 W. R., 280), the tenants were in possession of the land; there was nothing to prevent the plaintiff from suing in the alternative as well on the basis of the special contract alleged by the defendants as for use and occupation. The plaintiff's suit is also barred under s. 2 of [9] Act VIII of 1859. He had sued previously for use and occupation, but the cause of action on which he now sues had then arisen, and the mere fact of the plaintiff suing upon a different title would not save it from being barred: *Denobundhoo Chowdry v. Kristomonee Dossee* (I. L. R. 2 Cal., 152).

Mr. Woodroffe for the respondent.—The principle of equity upon which the case of *Eshan Chunder Roy v. Khajah Assanoollah* (16 W. R., 79) was decided is exactly applicable to the present case. It was held in that case, that certain steps which were necessary under Reg. XI of 1822 to put an end to the tenure

had not been taken, and that the zamindar's suit for ejectment having fallen through on that account, the suit to recover the rents for the period during which the action for ejectment was pending would not be barred by the special limitation provided by the Statute. What is submitted in the present case is this, that as long as the relationship of landlord and tenant is *pendente lite* the right to sue remains in abeyance, and only comes into force when the right is re-established. COUCH, C. J., in *Dindyal Paramanik v. Radha Kishori Debi* (8 B. L. R., 536), distinctly laid down the character of the obligation on the part of the tenant to pay rent, and the time when it came into operation after remaining in suspense for the period during which the relationship between the parties formed the subject of litigation. It is submitted, therefore, that the right of the plaintiff to recover the rent of 1868 is not barred under s. 29 of Beng. Act VIII of 1869. [The learned Counsel was stopped in his argument on the question of *res judicata*, the Court intimating that they were clearly of opinion that the plaintiff's suit was not barred under s. 2 of Act VIII of 1859, as the cause of action upon which he now sued, was not "heard and determined" in the previous suit.]

Mr. Evans in reply.—There is no doubt that Beng. Act VIII of 1869 contains two sections respecting the time when rent became due. But from the arguments before COUCH, C. J., it would appear that it was assumed as undisputed that rent falls due at the end of the year. The law provides that the tenancy [10] would be determined only by a particular process, and that a period of grace should be allowed to the tenant during which he may elect to continue his tenancy as before. The result of his exercising this option would carry with it the arrears of rent. That is all the effect of the Chief Justice's decision. It does not go further. Unders. 32, there can be no doubt that the rents fall due at the end of each year. In *Rani Swarnamayi's* case (2 B. L. R., P. C., 10; S.C., 12 Moore's L. A., 244) there was a moment of time when the tenancy was in abeyance, during which the tenant had not exercised his right of option whether he would have himself be treated as trespasser or tenant. In this case, there was no such abeyance at any time. The contention that the tenancy, together with the obligation to pay rent, was in abeyance whilst the litigation was going on, is absurd; for the tenants never denied the relationship or contested the liability; the cause of action was existing, but the plaintiff, instead of suing upon it, elected to treat the defendants as trespassers. It is submitted, therefore, that if it is not a *res judicata*, the right to sue for the rent of 1868 is barred by the limitation provided by Beng. Act VIII of 1869.

Cur. adv. vult.

The Judgment of the Court was delivered by

Markby, J.—This was a suit brought by the plaintiff on behalf of the zamindars to recover arrears of rent due in respect of certain estates in the Zilla of Midnapore, held by the defendants as patnidars. The rents claimed were those which fell due between Bysack 1275 and Aughran 1281. The defence set up was, *first*, that as to the rent which fell due in 1275, the suit was barred by s. 2 of Act VIII of 1859; *secondly*, that as to all the rent which fell due prior to the 30th of Cheyt 1277, the claim was barred by limitation; *thirdly*, that the defendants had paid to one Captain Murray Rs. 2,500 out of the rent due by the order of the plaintiff. The defendants contended that if these deductions were made, only Rs. 2,780-3 remained due for rent, which amount they had deposited in the Collectorate.

[11] It appears that the zamindars of this property and their patnidars have been for a long time in litigation with each other. In the year 1271 some opposition was made by the zamindars to the patnidars getting their names registered by the Collector. This opposition was unsuccessful, and the zamindars thereupon brought two suits to recover possession of the estates, alleging that the patni leases had determined. These suits were dismissed in the year 1275. The zamindars appealed to the High Court, and their appeal was dismissed in the year 1276. The zamindars further appealed to the Privy Council, and in the year 1280 their appeal being again dismissed, this litigation terminated. Pending this litigation the zamindars had brought a suit to recover from the patnidars the amount which would have been due in respect of the patni rent for the year 1275, but the suit was dismissed, because the zamindars sought to recover that amount, not as rent, but for the use and occupation by the patnidars of the property; the object of bringing the suit in this form being to avoid any admission that the patni leases were in existence.

It is scarcely necessary to do more than to state these facts to show that the first ground of defence cannot be maintained. The defendants, or those whom they now represent, got the suit for the rent of 1275 dismissed upon the ground that it had not been brought upon the patni leases. The present cause of action, which is based upon the patni leases, was in no sense "heard and determined" in that suit. The first ground of defence, therefore, fails.

It will be convenient next to take the third ground of defence. The Subordinate Judge has found that the defendants have not proved the payment, and I see no reason to interfere with his decision upon this point. Supposing it to be proved that the two receipts produced by the defendants were duly given as alleged by the executor of Captain Murray, still it is not shown that those payments were made on account of the rent of these estates. There is upon the record a document which shows that the defendants were authorized to make certain payments to Captain Murray, and to deduct those payments from the rents due by them to the zamindars; but it is sworn by the plaintiff [12] that one of the defendants distinctly stated to him that no such payment had been made, and had these payments been made as the defendants now allege, there can scarcely be any doubt that one or both of them would have been pleaded in part satisfaction of the claim for rent which fell due between Bhadro and Choitro of the year 1274, and which the plaintiff appears to have recovered in full by a decree of Court. The defendants asked to be allowed to give further evidence upon this point, but in this case both parties seem disposed to stand upon their strict rights, and I see no reason to grant them this indulgence.

It remains to consider the question of limitation. Section 29 of Beng. Act VIII of 1869 provides that suits for the recovery of arrears of rent shall be instituted within three years from the last day of the year in which the arrears claimed shall have become due; and I think I may get rid of some of the confusion which has crept into the discussion of this part of the case by saying at once that there is nothing, unless it be some provision in the Statute itself, which will justify us in extending this period of limitation. What we have to see is when did these arrears of rent become due, and have three years elapsed since that time? *Prima facie* the rents became due upon the dates when they were payable under the patni leases. But the plaintiff contends that, in this case, the rents did not fall due upon those dates, because the right to demand the patni rents was what he calls "in suspense during the pendency of the litigation as to the existence of the patni leases, and that the cause of action as to the rents which accrued during this litigation did

not arise until the zamindar's suit to recover possession had been dismissed by the highest Court of appeal." This is how the case is put in the plaint, and this is how it has been put before us in argument upon the appeal.

The real question seems to me to be whether the defendants continued to be the patni lessees of the zamindars after the existence of their patni leases had been denied, and the suits to recover possession had been commenced; or, to put it more generally, does a landlord, by merely denying the tenancy and bringing a suit to recover possession, in which he is ultimately [13] unsuccessful, put an end to the tenancy so long as the litigation is going on; and is the tenant at the end of the litigation restored to his tenancy from which he has been for the time ousted, or does he simply retain a possession which has never been disturbed. It seems to me scarcely possible to doubt which of these two views is correct. I cannot see how the mere denial of the landlord, or a denial coupled with an unsuccessful attempt to eject the tenants can in any way affect the tenant's position.

The plaintiff has, however, relied on some decisions which he says support his contention.

The first case is that of *Rani Swarnamayi v. Shashi Mukhi Parmani* (2 B. L. R., P. C., 10; S.C., 12 Moore's I. A., 244). There the patnidars being in arrears the zamindar had sold the patni for arrears of rent. The patnidars were ousted, and the purchaser put into possession. Subsequently, this sale was set aside on the ground of irregularity, and the patnidars were restored to possession. A suit was then brought by the zamindar against the patnidars for arrears of rent in respect of the period that the patnidars were out of possession; the patnidars pleaded limitation, but the Privy Council held that, upon the setting aside of the sale, and the restoration of the parties to possession, they took back the estate subject to the obligation to pay the rent, and that the particular arrears of rent there sued for must be taken to have accrued due in that year in which the restoration took place; and the Privy Council are further careful to overrule an opinion which had been expressed by two learned Judges of this Court that the sale by the zamindar had, by reason of the irregularity, become altogether inoperative. The other case is that of *Dindoyal Paramanik v. Radha Kishori Debi* (8 B. L. R., 536); that case proceeds entirely upon the authority of the Privy Council decision above stated, and lays down no principle. There the zamindar had, under the lease, a right to put an end to the tenancy if the rent fell into arrear. The zamindar had exercised this right, and brought his suit to recover possession. He ultimately obtained a final decree for possession, but the tenant then took the advantage which the law of this country gives him of staying the ejectment by payment of the rent within fifteen days. A Division Bench of this Court held that the obligation to pay the arrears of rent there sued for arose when the tenant took advantage of this provision of the law in his favour.

The only other case relied on by the plaintiff is that of *Eshan Chunder Roy v. Khajah Assanoollah* (16 W. R., 79). The facts are not given in the report, and all we know is that the learned Judges who decided it thought that the principle laid down by the Privy Council very clearly applied to that case also.

So far, therefore, as authority is concerned, what we have principally to deal with is the decision in the Privy Council. But I think that that case is clearly distinguishable from the present. In that case, by a proceeding which, though irregular, was not inoperative, the zamindar had put an end to the tenancy and ejected the tenant. The tenant taking advantage of the irregularity

got this proceeding set aside, and recovered possession. The Privy Council held that the tenant recovered the tenancy burdened with the obligation to pay the arrears of rent. In the present case there was no proceeding, however irregular, by which the *zaufindar* could put an end to the tenancy. In no sense of the word was the tenant ousted, nor when the litigation terminated was he restored to possession. The landlord had, no doubt, put himself into a position in which he considered it disadvantageous to himself to accept or recover rent from his tenant; but the tenant's position remained, as far as I can see, wholly undisturbed. It seems to me, therefore, that there is no ground upon which we can depart from the ordinary rule that the rents fell due in each successive year according to the dates specified in the *patni pattas*.

The plaintiff has, however, attempted to escape the effect of the law of limitation by alleging that an entirely new and different cause of action arose by reason of a settlement of accounts which he alleges took place between himself and the defendants in Cheyt 1281 (March 1874). He says that the zamindar's accounts were then submitted of the rents due from the [15] 1st of Bysack 1275 to Aghran 1281, and it was agreed that if certain deductions were made on account of payments to Captain Murray, the balance would be settled and paid. The plaintiff says that he agreed to the proposed deductions, but that the defendants subsequently refused to pay the amount agreed upon. The plaintiff has not been very clear as to what use he would make of this arrangement. In the Court below he seems rather to have relied upon it as an acknowledgment which would bar the operation of the Statute of Limitation, though I think he did also put it forward, though less confidently, as what under the English law is called an "account stated." I do not understand that the plaintiff any longer insists upon this arrangement as affecting the operation of the law of limitation upon the claim for arrears of rent. He did not produce at the trial any acknowledgment which would have that effect. Nor does the evidence seem to me to prove an account stated which would form an independent cause of action. He says that the account showed Rs. 24,143-10 as the whole amount due, and that from this Rs. 2,500 was deducted on account of Captain Murray, and four or five hundred rupees besides, but he cannot say exactly how much. But the very essence of an account stated is that an exact account was agreed upon between the parties. But there is a further difficulty in the way of the plaintiff in this part of the case. He says in his evidence, "I did not agree to allow unconditionally the deduction of Rs. 2,500; this is also stated in the plaint." The plaint is certainly susceptible of this interpretation. It may mean that the arrangement was that if the rents were paid minus the deduction without further dispute, then, and then only, the deduction would be allowed. But this is not such a final statement of accounts as would give the plaintiff a new cause of action.

I think, therefore, that so much of the claim as is for arrears of rent which fell due prior to the 30th Cheyt 1277 is barred by the law of limitation. As to the question of interest, both parties are dissatisfied with the decision of the Subordinate Judge upon this point. He has allowed interest from the time the validity of the *patni* leases was finally established, and he [16] thinks that, up to that time, it was, no doubt, the fault of the zamindars that the rents were not paid. This is not altogether so. If the defendants felt any hesitation about paying as for use and occupation, they might have deposited the rents in the Collectorate. Section 21 of Bengal Act VIII of 1869 shows that, ordinarily, a landlord will get interest unless there are special grounds for making an exception. We do not think that such special grounds exist here. The account will be made up upon this principle, and deducting the amount deposited with

the Collector, which the plaintiff is entitled to receive, the plaintiff will get a decree for the balance, and costs of both Courts in proportion. Costs to be added to the amount decreed, and the whole to carry interest at 6 per cent. from the date of decree.

Two objections only have been pressed before us in this case. One is, that interest should not be allowed on the sum of Rs. 2,780-3-8 tendered in December 1874. According to the usual rule, the plaintiff was only bound to accept the amount he was then entitled to receive. He was not bound to accept a less sum; and, therefore, the tender of it ought not to stop interest running upon it.

On the other question,—namely, whether interest should be given from the date of the decree, it is only objected that that question was not open to us on the appeal. It is sufficiently raised by the objections taken on both sides to the amount of interest allowed by the Court below. Both the objections, therefore, fail. The decree will be made up upon the account filed by the plaintiff.

The plaintiff will be entitled to the costs of this hearing.

Decree varied.

NOTES.

[I. TENDER OF PART OF WHAT IS DUE—

- (a) Interest continues to run :—(1877) 3 Cal., 6 at 16; (1878) 3 Cal., 468.
- (b) A distinction was drawn in (1891) 16 Bom., 141, between cases where tender is made of part when more is admittedly due, and tender which is believed to be of the whole when it is, as a matter of fact, a part of what is due; and an opinion was expressed that in the latter case interest would cease. See the remarks of Messrs. Pollock and Mulla on this case in their Indian Contract Act, 2nd Edn., p. 211, who think that this decision is erroneous.
- (c) The English rule is stringent and partial tender is invalid even where the debtor has a set-off unless there be an agreement to the contrary :—*Searles v. Sedgrove*, (1856) 5 F. & B., 539.
- (d) Where the plaintiff agrees with a third person to take a part in discharge of the whole, payment of that part would be sufficient, when "by suing the son he commits a fraud on the father whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability" :—*Welby v. Drake* (1825) 1 Car. & P., 787.
- (e) The Civil Procedure Code (1908) enacts as follows in respect of deposit in Court :—
Sch. I, order XXIV, rule 3 :—"No interest shall be allowed to the plaintiff on any sum deposited by the defendants from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof."

II. BENGAL ACT VIII OF 1869, s. 29—

The bar imposed by Beng. Act VIII of 1869, s. 29, would prevent recovery of rent from the expiry of an ijara when on the expiry taking place, the plaintiff sued for khas possession and omitted to sue for rent under certain choudhari tenures set up by the defendants which was decided in their favour by the Courts :—(1878) 3 Cal., 817.]

[17] ORIGINAL CIVIL.

The 27th August, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MACPHERSON.

Kinmond

versus

Jackson and another.

*Limitation Act IX of 1871, sched. II, art. 11, 118—Exclusive Privilege—
Account of Profits—Damages—Act XV of 1859, s. 22.*

In a suit for an account of profits obtained by the infringement of an exclusive privilege, the period of limitation, the taking of an account being only a mode of ascertaining the amount of damages, is the same as the period of limitation for an action for damages on the same ground, *viz.*, the period prescribed by art. 11, sched. II, Act IX of 1871.

THE facts and arguments sufficiently appear in the judgment of the Court.

Mr. J. D. Bell and Mr. Branson for the Plaintiff.

The Advocate-General, Officiating (Mr. Paul), Mr. Jackson and Mr. Agnew for the Defendants.

Garth, C. J. (MACPHERSON, J., *concurring*).—This was a suit for an injunction to restrain the defendants from infringing an invention of the plaintiff for the rolling of tea leaf, the specification of which was filed, under the provisions of Act XV of 1859, on the 6th November 1865; and the plaintiff also prayed for an account of the profits made by the defendants, and for damages.

The question of infringement has virtually been decided by our judgment in the several rules obtained by the plaintiff on the one hand, and the defendant, W. Jackson, on the other, which was given on the 19th of August last. In the first of those rules we decided that Jackson's invention, the specification of which was filed on the 25th of April 1873, was substantially an imitation of Kinmond's; and it is admitted that between that date and the commencement of this suit, the defendants have been making, using, and selling a number of machines in accordance with that specification. The parties have very properly consented that all the affidavits and mate-[18] rials which were used before the Court on the argument of the rules, should be taken as evidence in this suit. The infringement, therefore, being established, it is clear that the plaintiff is entitled to the injunction for which he prays.

As regards the rest of his claim, the defendant objected at the trial that the plaintiff was not entitled both to damages and to an account; and that he must elect between the two remedies. This is quite true, and the plaintiff has, accordingly, elected to have an account of the profits; but then comes the only real question in the case, for how many years before suit the account is to be taken.

The defendant contends that article 11 in the second schedule to the Limitation Act is the one applicable to the suit. That article enacts that in a suit for damages for infringing a copyright or any other exclusive privilege, the period of limitation shall be one year from the date of the infringement.

On the other hand, the plaintiff contends that as he has waived his claim for damages, and asks to have an account instead, the suit is one which would have been brought in a Court of Equity in England for an injunction and an account; and, therefore, that article 118 of schedule ii applies to this case, as being a suit for which no period of limitation is provided elsewhere in the schedule.

I was of opinion at first that the plaintiff's contention was right; but upon consideration, and more particularly having regard to the repealed section of the Indian Copyright Act XX of 1847, and to the Patent Act of 1859, I have come to a different conclusion.

By the 16th section of the Indian Copyright Act it was provided that "all actions, suits, bills, indictments, informations, and other criminal proceedings for any offence committed against the Act, shall be brought, sued, and commenced within twelve calendar months next after such offence committed." The Indian Limitation Act IX of 1871, s. 2, repeals s. 16 of Act XX of 1847 to the extent of the words "actions, suits, and bills." It thus repeals the limitation prescribed by that section in the case of civil proceedings, actions, suits, and bills for infringement of copyright; and then by article 11, schedule ii, [19] enacts that, in suits for damages for infringing copyright or any other exclusive privilege, the period of limitation is to be one year, beginning to run on the date of the infringement. There can be little doubt that the intention of the framer of article 11 was to supply the provision repealed in s. 16 of Act XX of 1847 relating to civil suits; and I think we ought to read the words of Act IX as not confined to what is technically known at common law as an action for damages but as meaning generally every civil suit seeking a remedy for infringement, &c.

We have then also to look at s. 22 of the Patent Act XV of 1859, which enacts that "an action may be maintained by an inventor against any person who, during the continuance of any exclusive privilege granted by this Act, shall, without the license of the said inventor, make, use, sell or put in practice the said invention, &c., provided that no such action shall be maintained in any Court other than the principal Court of original jurisdiction in civil cases, &c." This is the section under which an inventor has his remedy by civil suit for any infringement of his exclusive privilege. The term used, "an action," is quite general, and includes every form of suit, whether an action for damages (in the technical sense), or a suit for an account of profits.

In my opinion article 11 of schedule ii embraces any suit or action brought under s. 22 of Act XV of 1859, and there was no intention of drawing any distinction between a suit framed as an action for damages, and one framed as a suit for an account. The taking of an account of profits is only a mode of compensating an inventor for the infringement of his privilege other than by an assessment of damages, and it seems unreasonable, that if the period of limitation is one year in the one case, it should be six years in the other. We think, therefore, that the plaintiff is entitled to an account of the profits for one year only from the date of the filing of the plaint; and he will have his costs of suit on scale 2.

Attorneys for the Plaintiff: Messrs. Sanderson & Co.

Attorneys for the Defendants: Messrs. Orr and Harris.

NOTES.

[STATUTORY PROVISION—

The Legislature has made the matter clear by the use of the words for "compensation." The Indian Limitation Act, 1908, Art. 40 (=The Indian Limitation Act, 1877, Art. 40) runs thus :—

Description of suit.	Period of limitation.	Time from which period begins to run.
Art. 40 :—For compensation for infringing copyright or any other exclusive privilege. |	Three years	The date of the infringement.]

[20] FULL BENCH.

The 20th July, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE L. S. JACKSON,
MR. JUSTICE MACPHERSON, MR. JUSTICE MARKBY,
AND MR. JUSTICE AINSLIE.

Raj Koomar Singh and others. . Defendants
versus
Sahebzada Roy.....Plaintiff.*

*Jurisdiction of Civil Court—Encroachment on Public Thoroughfare— Special
Damage - Abatement of Nuisance—Criminal Procedure Code
(Act X of 1872), s. 518 et seq—Right to a Jury—Practice
—Conflict of Opinion between individual Judges—
Reference to Full Bench.*

Where special damage is caused to any person by an obstruction placed upon a public thoroughfare, he is entitled to bring an action in the Civil Court for the purpose of having the nuisance abated, notwithstanding the provisions of s. 518 † and the following sections of

* Special Appeal, No. 1036 of 1876, against a decree of Moulvi Syed Mahomed Nurul Hosain, Subordinate Judge of Zilla Shahabad, dated the 29th of January 1876, reversing a decree of Moulvi Dader Buksh, Subder Munsif of Arrah, dated the 11th of April 1874.

† [Sec. 518 :—A Magistrate of the district, or a Magistrate of a division of a district or any Magistrate specially empowered, may, by a written order, direct any person to abstain from a certain act, or to take certain order with certain property in his possession, or under his management, whenever such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, or danger to human life, health, or safety, or a riot or an affray.

Explanation I.—This section is intended to provide for cases where a speedy remedy is desirable and where the delay, which would be occasioned by a resort to the procedure contained in section five hundred and twenty-one and the next following sections would, in the opinion of the Magistrate, occasion a greater evil than that suffered by the person upon whom the order was made, or would defeat the intention of this chapter.

Explanation II.—An order may, in cases of emergency or in cases where the circumstances do not admit of the serving of notice, be passed *ex parte*, and may in all cases be made upon such information as satisfies the Magistrate.

Explanation III.—An order may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

Explanation IV.—Any Magistrate may recall or alter any order made under this section by himself or by his predecessor in the same office.]

the Criminal Procedure Code for summary proceedings before a Magistrate, and notwithstanding that he may be entitled to damages.

A question arising from a conflict of opinion between individual Judges is not, properly speaking, the subject of reference to a Full Bench.

THE following was the referring order in this case:—

Markby, J.—In this case the lower Appellate Court has ordered the defendants to remove an obstruction which they have placed upon a public road near to the plaintiff's house. It is, in my opinion, sufficiently found that the plaintiff has suffered damage by the obstruction, and this not merely as one of the public, but as having his house in the vicinity of the obstruction, so that it causes him a particular inconvenience of a substantial character. But there is a decision in the case of *Kistonath Bhagbutty v. Jumboonath Chuckerbutty* (21 W. R., 145), decided by AINSLIE, J., that no order for the removal of an obstruction from a public road can be made by the Civil Court even in such a case as this. On the other hand, there is a decision in the same volume, *Poorobashi Pal v. Bhoobun Chunder Dey* (21 W. R., 408), decided by BIRCH, J., [21] that a decree directing the removal of an obstruction is not erroneous in law.

I have been formally requested by the pleaders to refer this question to the Full Bench, and I do not think that in this state of the authorities I can refuse to do so.

The question referred is, whether, when the Civil Court finds that an obstruction to a public road causes a particular inconvenience of a substantial kind to the plaintiff, it can direct the defendant, who has placed the obstruction there, to remove it?

If the answer to this question is in the affirmative, in my opinion, the special appeal should be dismissed; if in the negative, the appeal should be allowed, and the suit dismissed with the costs in all the Courts.

Moonshi Mahomed Yusuf for the appellants.—In the case of *Kistonath Bhagbutty v. Jumboonath Chuckerbutty* (21 W. R., 145) it was decided that the proper course of procedure for the removal of obstructions to public thoroughfares, is that prescribed in the Code of Criminal Procedure, s. 518 *et seqq.*, viz., by an application to the Magistrate; and that the fact that a party sustains special damage does not warrant his claiming from the Civil Court that remedy which the law says must be afforded by the Magistrate after taking proceedings in a particular form; that case conflicts, no doubt, with *Poorobashi Pal v. Bhoobun Chunder Dey* (21 W. R., 408), where it was held that a suit for damages might be brought against a defendant who encroached upon a public thoroughfare, where such encroachment caused the plaintiff damage and inconvenience beyond, and in excess of, what his neighbours suffered. If the plaintiff wished to abate the alleged nuisance, he ought to have proceeded under the Criminal Procedure Code. The only suit which he was entitled to bring in the Civil Courts was one for damages and not for abatement of nuisance. By bringing such a suit he has deprived the defendant of his right to have the question, as to whether there was a nuisance or not, tried by a jury.—**Baroda Prasad Mostafi v. Gora Chand Mostafi** (3 B. L. R., A. C., 295). It is not every crime in respect of which a civil action can be instituted; in some cases [22] only, both remedies are open. It is for the plaintiff to show that he has a remedy in both the Civil and Criminal Courts. [JACKSON, J.—You have admitted that he has a remedy in a civil action by damages, why shouldn't he have a remedy by having the nuisance removed?] The injury in this case is

not sufficient to warrant an order for removal. In Story's Equity Jurisprudence, s. 925, it is laid down that "it is not every case which will furnish a right of action against a party for a nuisance, which will justify the interposition of Courts of Equity to redress the injury or to remove the annoyance: but there must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction . . . a mere diminution of the value of property by the nuisance without irreparable mischief will not furnish any foundation for equitable relief." The cases of *Abdool Hye v. Ram Churn Singh* (11 W. R., 445) and *Ramtarak Karati v. Dinanath Mandal* (7 B. L. R., 184) were also referred to.

Mr. *M. L. Sandel* for the respondent was not called upon.

The following **Judgments** were delivered by the Full Bench:—

Garth, C.J.—As this question has arisen from a conflict of opinion between individual Judges,* it ought, properly speaking, not to have been the subject of reference to a Full Bench. But as the reference has been made, and the question is one of general importance, we have thought it desirable to decide it.

We are of opinion that as the obstruction in this case has caused special injury to the plaintiff, the Civil Court was perfectly justified in directing it to be removed.

[23] The Criminal Code, no doubt, contains provisions for the removal of obstructions in public thoroughfares by summary proceedings before a Magistrate; but there is nothing in those provisions which shows that the Legislature intended to deprive a private individual of the redress which the law affords him under such circumstances by means of a civil suit.

Markby, J.—I have nothing to add to the judgment which has just been delivered. I only wish to say that, on further consideration, I concur in thinking that I ought not to have referred this case to the Full Bench.

Garth, C.J.—The appeal will be dismissed with costs.

NOTES.

[OBSTRUCTION TO HIGHWAY.]

I. SPECIAL DAMAGE NECESSARY—

The English rule of special damage being necessary to maintain action for obstruction to a highway is followed:—

Bom.:—(1877) 2 Bom., 457.

Cal.:—(1877) 3 Cal., 20; (1884) 11 Cal., 8; (1885) 12 Cal., 137; (1895) 22 Cal., 551.

All.:—(1876) 1 All., 249; (1878) 1 All., 557.

Mad.:—(1886) 9 Mad., 463.

II. MAGISTERIAL PROCEEDINGS NO BAR TO CIVIL SUIT—

(a) So held in this case of (1877) 3 Cal. 20.

(b) In the converse case of plaintiff suing for a declaration of title to land as owner against those who claim the same as a public highway, the magisterial proceedings are likewise no bar:—(1888) 15 Cal., 460 F. B.

* *Reporter's Note.*—The rule as to reference to a Full Bench, passed in July, 1867, provides for reference to a Full Bench only where one Division Court differs from another Division Court on a point of law: and a Division Court is, by s. 13 of 24 and 25 Vict., c. 104, the Act establishing the High Courts, to consist of two or more Judges. Here the cases in which there was a conflict of opinion were decisions by one Judge sitting alone.

- (c) An owner of land may bring a suit under sec. 42 of the Specific Relief Act, 1877, for a declaration of title when a claim of public highway is being asserted over it :— (1888) 15 Cal., 460.

III. NATURE OF SPECIAL DAMAGE—

Where access to fields and pastures is obstructed, sufficient; but not the death of cows consequent on the obstruction :—(1895) 22 Cal., 551.

"Such special damage must differ not merely in degree but in kind from that sustained by the rest of the public" :—Messrs. Ratan Lall and Dhiraj Lal on Torts (3rd. ed.), p. 321, citing certain Punjab cases.]

[3 Cal. 23]

APPELLATE CIVIL.

The 28th June, 1877.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Bheeka Lall.....Plaintiff

versus

Bhuggoo Lall.....Defendant.

Res Judicata—*Act VIII of 1859, s. 2*—*Suit for specific sum of money.*

In a suit for a specific sum of money, it was held in accordance with the Full Bench decision in *Dinobundhoo Choudhry v. Kristomonee Dossee* (1. L. R., 2 Cal., 152) that the plaintiff was bound to put forward every right under which he claims.

THIS was a suit for the recovery of Rs. 611-8, being the moiety of Rs. 1,223, the amount of a decree dated the 20th May 1864, and realized by the present defendant alone on the 4th September 1871.

The plaintiff and defendant were uterine brothers. On the death of their father they inherited, in equal shares, together with other property, a certain shop. In the year 1278 F. S. (1870-71) a partition was effected between the parties, when, among other things, it was agreed that each should be entitled to a moiety of all moneys that might subsequently be received to be recovered on [24] decrees obtained on the said joint shop account. On the 4th of September 1871, the defendant recovered a sum of Rs. 1,223, on a decree passed on the 20th May 1864. In the year 1872, the plaintiff brought a suit against the defendant, ignoring the partition, for an account of the joint business, which was treated in the plaint as still subsisting, and for the recovery of, among other items, the said sum of Rs. 1,223. That suit was dismissed, and on the 12th of September 1874, the plaintiff instituted the present suit for the recovery of Rs. 611-8, being the moiety of the said sum of Rs. 1,223, included in the sums already sued for in the previous suit. The plaintiff based his claim on the terms of the partition previously effected with the defendant. The lower Appellate Court held that the suit was barred under s. 2† of Act VIII of 1859. The plaintiff preferred a special appeal to the High Court.

* Special Appeal No. 2438 of 1875, against a decree of J. M. Lewis, Esq., Judge of Bhagulpore, dated 14th August 1875, reversing a decree of Baboo Burma Dutt, Sudder Munsif of Monghyr, dated the 15th of March 1875.

† [Sec. 2 :—The Civil Courts shall not take cognizance of any suit brought on a cause of

Unless suits previously heard and determined. action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.]

Baboo *Mohiny Mohun Roy* and *Moonshee Mahomed Yoo'suf* for the Appellant.

Mr. C. Gregory and *Baboo Rash Behary Ghose* for the Respondent.

The following **Judgments** were delivered :—

Markby, J.—At first I was inclined to think that the decision of the Court below was not correct ; but, after hearing the argument, I think that decision was right. The plaintiff having been in partnership with the defendant brought this suit upon the ground that there was partition in the year 1870, under which it was arranged that each should be entitled to a moiety of any decree which should be recovered, and he alleges that the moiety of a certain decree was recovered on the 4th September 1871, and that, therefore, under that partition he was entitled to a moiety of the sum so recovered.

The defendant answers that the plaintiff had already brought a suit in the year 1872 after this decree was recovered, in which he claimed, together with a number of other items, this very sum for which the present suit is brought. The plaintiff replies to that, that the former suit was not based upon any right which he had under the partition, but upon a general right to an account, alleging that the business continued subse-[23]quently to the partition ; and he maintains that that suit was dismissed solely upon the ground that the Court found that, by the partition, the business was put an end to. That is true. But it is also clear that the plaintiff might, if he had chosen in that suit, have gone on to say that even if he was not entitled to a share in this decree as an item of the general account which he claimed, he still was entitled to it upon the terms of the partition itself, whether the business continued after the partition or not, and he did not choose to do so. Therefore, this is a suit in which the plaintiff having two rights under which he could recover this specific sum of money puts forward only one and claims upon that. And the question is whether he could then put forward a claim for the same identical sum of money under any other right subsequent to that suit. I think that question is conclusively decided by the Full Bench in *Dinobhundhoo Chowdhry v. Krustomonee Dossee* (I. L. R., 2 Cal., 152). It is quite true that that decision relates to a claim to land. But every argument by which it can be maintained that if a man sues for land he is bound to put forward every title of which he was possessed at the time when the suit was brought, applies with equal force to a suit for money. I think it is impossible not to hold after that decision that if a man sues for a specific sum of money, he must put forward every right under which he claims at that time that sum of money. Therefore, the decision of the Court below was right, and this appeal will be dismissed with costs.

Prinsep, J.—I am of the same opinion. It is quite clear that, in a former suit, the plaintiff made the money now claimed a portion of his claim against the defendant ; and that, quite independently of the ground on which that suit was decided, he might and should have insisted on requiring a decree to be given to him at least for his share of the money collected under the decree which forms the subject of this suit. But, instead of contesting the decision of the Court which refused to give him such a decree by appealing against that order, he submitted to it, and he cannot now bring another suit to recover money which he could have obtained in that suit.

Appeal dismissed.

NOTES.

[RES JUDICATA —

See our notes to the analogous case of 2 Cal., 152.

This case was dissented from in 4 Mad., 308, where the first suit was on an oral lease and the subsequent one was on the ground of title.

In *Alkal v. Kunhali*, 5 Indian Jurist, 408, it was observed that "the entire *ratio decidendi* in the Privy Council case relied on by the majority of the Full Bench (in 2 Cal. 152) was that a party must include in a suit every ground of claim arising out of the same cause of action which was altogether different from the foundation on which the majority of the Full Bench based their judgment."

See (1880) 6 Cal., 559.

See also the very instructive judgment of Sir V. BHASHYAM AYYANGAR in (1903) 26 Mad., 760.]

[26] APPELLATE CIVIL.

The 21st June, 1877.

PRESENT:

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Boydonath Bag.....Defendant

versus

Grish Chunder Roy and another.....Plaintiffs.

Co-sharers — Suit for enhancement of rent— Non-joinder of parties—

Suit barred by limitation as to added parties—Act IX of 1871,

s. 22—Beng. Act VIII of 1869, s. 29.

In a suit for the recovery of rent at an enhanced rate, brought by two of four brothers, joint and undivided owners of the tenure, the other two brothers, on an objection taken by the defendant that they ought to have been parties to the suit, presented a petition signifying their assent to the institution of the suit, and were thereupon treated as parties to the suit. This application was, however, made after the period of limitation proscribed for such a suit had expired. Held by MARKBY, J., that although the rights of such added parties were absolutely barred, yet the Court could proceed to adjudicate upon and declare the rights of the remaining plaintiffs who had originally filed the suit, and that, as the claim for rent was indivisible, the decree in their favour should be for the whole amount.

By PRINSEP, J.—The objection as to the defect of parties after the case had passed through two Courts is not one affecting the merits of the case so as to be a ground of special appeal.

THIS was a suit for the recovery of rent for the year 1279 B. S. (1872-73), calculated at an enhanced rate in accordance with a notice previously served. The suit was instituted by two of four brothers, the joint and undivided owners of the tenure. At the hearing of the case objection was taken by the defendant to the non-joinder of the other brothers of the plaintiff in the suit, whereupon the two brothers, not originally made parties, put in a petition signifying their assent to the suit. The petitioners were thereupon not formally made parties, but the suit proceeded on the supposition that they were to be considered plaintiffs in the suit. The petition, however, was presented more than three months after the end of the Bengal year [27] for which the enhanced rent specified in the suit was claimed. Before the lower Appellate Court it was contended by the defendant, appellant, that the original defect of parties could not be cured by the petition put

* Special Appeal No. 2058 of 1875, against a decree of L. R. Tottenham, Esq., Officiating Judge of Zilla Midnapore, dated 17th June 1875, reversing a decree of Mouli Enamul Haq, Munsif of Chouk Ghatal, dated 8th December 1874.

in by brothers of the original plaintiff; and that the prior omission of the four brothers to sign the notice of enhancement was also a fatal defect. In overruling these objections the Judge said: "I do not think the defect of parties is material to this case. For the remaining two co-sharers with the plaintiff filed a petition assenting to the suit, and the lower Court ought to have added them as plaintiffs. The defendant does not seem in any way to be prejudiced by the omission of their names from the plaint. I think, therefore, that the suit could proceed by virtue of the assent given by the co-sharers. And, similarly, I think that the absence of the signatures of the two co-sharers does not invalidate the notice of enhancement." The defendant preferred a special appeal to the High Court.

Baboo Mohesh Chunder Chowdhry for the Appellant.

Mr. C. Gregory and *Baboo Nobo Kissen Mookerjee* for the Respondent.

Baboo Mohesh Chunder Chowdhry.—The defect of parties was material, and could not be cured by the petition of the other co-sharers assenting to the suit. The defect (if cured at all) was not cured until the time prescribed in s. 29, Beng. Act VIII of 1869, for the institution of the suit had expired. The right of the assenting co-sharers at any rate is absolutely barred—see s. 22, Act IX of 1871; and this being so, the Court cannot disassociate the interest in the tenure of the four brothers who form a joint and undivided Hindu family, and therefore no decree can be made in respect of the rights of the brothers who were the original plaintiffs in the suit.

Baboo Nobo Kissen Mookerjee for the Respondents.

The following **Judgments** were delivered:—

Markby, J.—As regards the question of the tenure being protected from enhancement, I do not think that there is any ground for interfering. As regards the other point, the facts seem to be that several persons, members of a joint family, were the owners [28] of this tenure. Some of these persons brought a suit for rent at an enhanced rate. It was objected in the course of the suit that it was wrongly framed, because all the members of the family interested in the tenure were not joined; thereupon the other members of the family came in and expressed their assent to the suit. I take it that what was then done amounts to this,—that although no formal order was then drawn up, still the suit was from that time a suit by all the members of the family. That is how the lower Appellate Court treats it, and that is how we treat it. Now, this being a suit for which a very short period of limitation is provided, it turned out that those parties who were subsequently added as plaintiff were so added after this period of limitation had expired; and under the provisions of s. 22, Act IX of 1871, if after institution of a suit a new plaintiff is added, the suit, as regards him, must be deemed to have been commenced when he was made a party. Therefore, there is no resisting the argument that, as regards the persons who were subsequently added, the suit was commenced after the period of limitation had expired. But then it is said, that for that reason the suit should be dismissed altogether. That really amounts to this, that because two of the parties who joined were barred, therefore the whole are also barred. The law does not say that; and it is not at all a reasonable construction of the statute to hold that. No doubt, it is difficult to see in what cases of a joint claim s. 22 could have any application at all. But I can see no more difficulty in drawing up the decree in this case than there would be in the case in which some of the holders of the tenure who had refused to join in the suit, might be made defendants. In that case the decree could not be in favour of any person

except the plaintiff, nor can there be a decree here in favour of the plaintiffs who are barred; but, nevertheless, the other plaintiffs are entitled to a decree for the rent at the rate fixed by the Court. The claim for rent not being divisible, the decree must be for the whole rent.

It seems to me, therefore, that the decree of the lower Appellate Court is right, and this special appeal ought to be dismissed with costs.

[29] **Prinsep, J.**—As far as I understand the case, the landlords of the defendants are four brothers. Two of them sued the defendants for arrears of rent. An objection was then raised that all the brothers ought to have sued jointly. Thereupon the other two brothers signified to the Court that they had consented to this action having been brought by two plaintiffs. And I understand from that that the two plaintiffs intended to represent the entire estate, and brought the suit as managers of a Hindu family for themselves and their brothers; and that it was only when they became alarmed on an objection raised by the defendants that the other two thought it necessary to come in and signify their consent. The objection as to defect of parties, after the case had passed through two Courts, would not in my opinion be one affecting the merits of the case so as to be a point to be taken in special appeal under s. 372.

As regards the other objection on the point of limitation, I cannot see how a claim of two of the brothers for rent at an enhanced rate could be separated from the claim of the two others. The Limitation Act does not appear to have contemplated such a case as that; and it would be impossible to specify the particular shares of joint owners in such a case. The proper course, in such a case, would have been for the first Court to have thrown out the case for defect of parties. The first Court did not do so, but proceeded to decide it. That being so, I think, in special appeal, we cannot do otherwise than dismiss the appeal.

Appeal dismissed.

NOTES.

[LIMITATION IN RESPECT OF JOINT RIGHTS—

This case was dissented from in (1881) 6 Cal., 815; 7 Bom., 217. But see (1892) 3 M. L. J., 176. There certain persons were jointly entitled to a sum of money upon a mortgage and some of them sued for their shares making the rest defendants, as they were unwilling to join as co-plaintiffs, and the Court of its own motion made the latter co-plaintiffs, when their claim was barred; it was held that the original plaintiffs were entitled to recover.

See also (1906) 33 Cal., 613, as regards the distinction between Court's own motion and parties' action.]

[30] FULL BENCH.

" The 19th and 20th July, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE JACKSON,
MR. JUSTICE MACPHERSON, MR. JUSTICE MARKBY,
AND MR. JUSTICE AINSLIE.

Jogesh Chunder Dutt.....Defendant

versus

Kali Churn Dutt.....Plaintiff.*

[-1 G. L. R. 5]

*Money paid under process of good decree, Suit to recover—Decree superseded
--Review—Act XXIII of 1861, s. 11.*

In a suit by the present defendant against the present plaintiff for enhancement of rent, the Courts of First Instance and the High Court made decrees for enhanced rent. The Privy Council, in the year 1873, reversed those decrees, and held that the rent could not be enhanced. Before the date of the Privy Council judgment, the present defendant obtained several other judgments for enhanced rent against the present plaintiff. No application was made by him for review of those judgments, but in 1875 he brought this suit to recover the difference between the amount of enhanced rent recovered and the fixed rent which he was bound to pay. *Held* by MACPHERSON, MARKBY, and AINSLIE, JJ., following *Shama Purshad Roy Chowdry v. Hurro Purshad Roy Chowdry* (10 Moore's L. A., 203; S.C., 3 W. R., P. C., 11), that the decrees for enhanced rent were superseded, and that such a suit as the present one would lie. *Held* by GARTH, C.J., and JACKSON, J., distinguishing *Shama Purshad's* case (10 Moore's L. A., 203; S.C., 3 W. R., P. C., 11) that these decrees were not superseded; that the principle of *Marriot v. Hampton* (2 Sm. L. C., 375, 6th ed.; 405, 7th ed.) applied, and that the plaintiff was not entitled to recover.

THE referring order of GARTH, C.J., and McDONELL, J., in this case was as follows:—

" This was a suit to recover certain sums by way of enhanced rent, which the plaintiff has been compelled to pay the present defendant under certain decrees hereinafter mentioned.

• " The facts are these—

" The plaintiff claimed to hold certain property under the defendant at a permanent fixed rent of Rs. 461. The defendants brought a suit against him to enhance that rent, and one of the grounds of defence was, that the rent was not legally capable [31] of enhancement. The Court of First Instance gave the plaintiff a decree for an enhanced rent of Rs. 2,417, and the High Court on appeal affirmed that decree. On appeal to the Privy Council, their Lordships, on the 25th day of March 1873, reversed the judgments of both Courts, and held that the old rent could not legally be enhanced.

" Meanwhile, between the date of the first decree for the enhanced rent and the judgment of the Privy Council reversing that decree, the present defendant brought several suits for the enhanced rent against the plaintiff, and obtained judgment for various sums amounting to Rs. 8,561, which sums were duly paid by the present plaintiff. No application was made by the present plaintiff for a review of those judgments, but on the 25th of November 1875,

* Regular Appeal, No. 212 of 1876, against a decree of Baboo Krishna Mohan Mukerji, Roy Bahadur, Officiating Subordinate Judge of the 24-Perganas, dated the 17th April 1876.

suit was brought by the then plaintiff to recover from the defendant the sum of Rs. 8,561, being the difference between the amount of enhanced rent recovered under those judgments and the amount of the fixed rent, which the plaintiff was bound to pay. The Courts below have given the plaintiff a decree for this difference.

"From this decree the defendant has appealed, and he contends that, according to the well-known rule of law laid down in *Marriot v. Hampton* (2 Sm. L. C. 375, 6th ed.; 405, 7th ed.), money paid under the judgment of a competent Court cannot be recovered back so long as that judgment remains unreversed.

"The plaintiff, on the other hand, contends that the case of *Shama Purshad Roy Chowdry v. Hurro Purshad Roy Chowdry* (10 Moore's I. A. 203; s.c., 3 W. R., P. C., 11) is an authority in his favour, and that the judgment for enhanced rent, obtained after the first suit for enhancement was decreed, must be considered as superseded by the judgment of the Privy Council reversing that decree. The case of *Raja Nilmoney Singh Deo Bahadur v. Sharoda Pershad Mookerjee* (18 W. R., 434), decided by Justices KEMP and PONTIFEX on 31st December 1872, seems to favour this view; whereas the case of *Mooraree Mohajun v. Mahomed Akmal* (22 W. R., 161) decided by Justices KEMP [32] and BIRCH, seems opposed to it. See also decision of PHEAR and MORRIS, JJ., in *Mewa Lall Thakoor v. Bhuphun Jha* (22 W. R., 213).

"The point being an important one, and the decisions upon it being apparently conflicting, we think it right to refer this question to a Full Bench: 'Whether the plaintiff is entitled to recover in this suit the difference between the fixed rent and the enhanced rent which he has paid to the defendant under the above circumstances.'"

Mr. J. D. Bell (with him Baboo Grija Shunker Muzcomdar) for the Appellant.—It is submitted that this case must be governed by the well-established rule laid down in *Marriot v. Hampton* (2 Sm. L. C., 375, 6th ed.; 405, 7th ed.), and if that rule is to be adopted in this country, money paid under process of a good decree cannot be recovered. The case of *Shama Purshad Roy Chowdry v. Hurro Purshad Roy Chowdry* (10 Moore's I. A., 203; s.c., 3 W. R., P. C., 11) is against me. But in that case Lord Justice TURNER points out that, in ordinary cases, money paid under process of law cannot be recovered. His Lordship says (10 Moore's I. A., 211 :—"There is no doubt that, according to the law of this country—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force." So that their Lordships were clearly of opinion that the law on this point is the same in this country as in England. This is a proper case for review under the provisions of Act XXIII of 1861. The eleventh section of that Act provides that questions regarding the amount of mesne profits, and interest and sums paid in satisfaction of decrees and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of decree, "shall be determined by order of the Court executing the decree, and not by separate suit; and the order passed by the Court shall be open to appeal." When, therefore, the Court is once seized of a suit, it is not disseized so long as any question arises as to [33] the subject-matter of the suit, even though there has been a decree and execution under it. In the case of *Mooraree Mohajun v. Mahomed Akmal* (22 W. R., 161) claims for rent were decreed by a Deputy Collector on the basis of a decree for a kabuliati: the latter decree was subsequently set aside on appeal; and it was held that the remedy open to

the judgment-debtor under the former decree was to petition the Deputy Collector for a review of his decision. The learned counsel also referred to *Mewa Lal Thakoor v. Bhuphun Jha* (22 W. R., 213) and Act VIII of 1859, s. 3.*

Mr. R. E. Twidale (with him Baboos Chunder Madhub Ghose and Gopal Lal Mitter) for the Respondent.—The case of *Shama Purshad Roy Chowdry v. Hurro Purshad Roy Chowdry* (10 Moore's I. A., 203; s.c., 3 W. R., P. C., 11) concludes this question. Their Lordships, after admitting that the principle of *Marriot v. Hampton* (2 Sm. L. C., 375, 6th ed.) applies in this country, go on to say (10 Moore's I. A., 211 :—"But this rule of law rests, as their Lordships apprehend, upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded." [GARTH, C. J.—What does 'superseded' mean? Suppose that there have been two suits, the first for possession, in which a decree has been made for possession; the second for wasilat; and that the first suit has been appealed, and the decree reversed.] Then, I submit, that the decree for wasilat is superseded, and that money paid under it may be recovered. In the case of *Nilmoney Singh Deo Bahadur v. Sharoda Pershad Mookerjee* (18 W. R., 434), it was decided that a suit for a refund of money realized under a rent-decree founded upon a contract, will lie in [34] the Civil Court when that contract (and virtually the decree based upon it) is subsequently superseded and modified by a decree of the Civil Court. The provisions of s. 11 of Act XXIII of 1861† apply to the Civil Courts, and there is no express provision of law of a similar nature with regard to the Collectors' Courts—*Kristo Chunder Goopto v. Ramsoonder Sein* (17 W. R., 14) and *Hur Dyal Mundul v. Tirthamund Thakoor* (13 W. R., 34).

Mr. Bell in reply.—The proper course for subsequent litigants to take is to apply for stay of execution pending the appeal in the original suit—*Bulkiram Nathuram v. The Guzerat Mercantile Association, Limited* (4 Bom. H. C. Rep., A. C., 81). This suit is not a suit to set aside decrees, but is merely an action for money had and received, the decrees subsisting. He also referred to *Chowdry Wahed Ali v. Mussanmut Jumae* (11 B. L. R., 149; s. c., 18 W. R., 185).

*[Sec. 3 :—The judgments of the Civil Courts shall not be subject to revision, otherwise than by those Courts under the rules contained in this Act applicable to reviews of judgment and by the constituted Courts of Appellate Jurisdiction.]

Revision of judgment of the Civil Courts.

†[Sec. 11 :—All questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the order passed by the Court shall be open to appeal. Provided that if upon a perusal of the petition of appeal and of the order against which the appeal is made, the Court shall see no reason to alter the order, it may reject the appeal, and it shall not be necessary in such case to issue a notice to the respondent before the order of rejection is passed.]

The following **Judgments** were delivered by the Full Bench :—

Ainslie, J.—It is obvious that the defendant has, received from the plaintiff, under successive decrees made during the long period that elapsed between the decree for enhancement and the reversal of that decree by the order of Her Majesty in Council, sums of money for enhanced rent, to which the final order in the enhancement suit shows that he is not entitled. The plaintiff as tenant persistently refused to acknowledge his liability, and compelled his landlord to recover the rent by suit, in order, as I understand it, to have a formal record that he only paid it under compulsion. The Courts were bound to follow the existing judgment by which the liability of the plaintiff to pay enhanced rent had been declared. They had no option in the matter at the time. Under such circumstances, I cannot conceive that it was their intention to declare finally that the defendant was entitled to the enhancement for the periods covered by the several suits, irrespective of the result of the appeal to Her Majesty in Council, which was delayed for some fourteen years. The order of Her Majesty in Council was such that if it had been known at the time of making the decrees, [35] they must, of necessity, have gone the contrary way, so far as the enhanced portion of the rent claimed was concerned ; and therefore it seems to me that it did at once supersede the decrees based upon the reversed order of the High Court.

There appears to me to be a wide distinction between the re-opening of decrees based upon, and necessarily controlled by, a previous decree subsequently reversed on appeal ; and the re-opening of decrees which the Court making them might have varied had it not thought fit to follow a decree afterwards set aside. Looking at the case of *Shama Purshad Roy Chowdry v. Hurro Purshad Roy Chowdry* (10 Moore's L. A., 203 ; s. c., 3 W. R., P. C., 11) I am of opinion that there is authority for saying that the former class of decrees are *ipso facto* superseded so soon as the controlling decree is nullified, and that what may have been done under them is not final, but may be undone ; the mode of proceeding for this purpose is not a question of serious importance. I agree with the judgment of Mr. Justice MACPHERSON.

Macpherson, J. (MARKBY, J., concurring).—In my opinion the principle on which the Privy Council acted in the case of *Shama Purshad Roy Chowdry v. Hurro Purshad Roy Chowdry* (10 Moore's L. A., 203 ; s. c., 3 W. R., P. C., 11) is applicable, and the plaintiff is entitled to recover the difference between the rent for which he was really liable and the enhanced rent which he paid pending his appeal against the decree by which the rent was enhanced. That decree (although in a suit instituted in 1859 before Act X came into force) was made by the Principal Sudder Ameen on the 29th of June 1863. Appeals to the Judge of the district and to this Court were decided on the 18th of June 1864, and the 6th of February 1865, respectively. An appeal to the Privy Council was filed here on the 20th of July 1865, and was finally disposed of by the decree of the Privy Council of the 5th of May 1873, which reversed the decisions of the Courts in this country, and found that the rent was not liable to enhancement.

I assume that the plaintiff is in equity and good conscience entitled to have the whole of the rent which he paid at the enhanced rate refunded to him. All these decrees for the [36] enhanced rent were based solely upon the decree for enhancement which the Privy Council reversed in May 1873, and the only question to be decided now is, whether the plaintiff (if he has any remedy at all) is technically wrong in the remedy which he seeks.

The contention is that as these subsequent decrees for rent at the enhanced rate are still unreversed, a suit will not lie to recover the money paid under them. It is suggested that though our Courts had decided that the rent could be enhanced, the defendant ought not to have submitted to these latter decrees, but should have contested each case, and appealed, if necessary, to the Privy Council in each; and it is also said that he should apply or should, on the Privy Council making its order in May 1873, have applied, for a review of judgment in each of the sixteen cases, and having got the judgments reviewed and reversed, should obtain restitution in each suit.

In thirteen out of the sixteen suits the decree was for a sum under Rs. 1,000 (and in seven of them it was for less than Rs. 500), and I should hesitate before declaring that, in the circumstances in which the plaintiff was placed, he was bound to appeal in all these suits and incur the enormous expense necessarily involved in such a course—an expense far exceeding the amount in dispute. As to applying for a review in each case, it is exceedingly doubtful, to say the least of it, how far a review could be obtained, or could at any time have been obtained, in the cases under Act X of 1859, even supposing it obtainable in the four cases under Bengal Act VIII of 1869. But if it be granted that a review might have been obtained in each of the sixteen suits, that mode of proceeding would have been, on the whole, much more cumbrous and inconvenient than the single suit which the plaintiff has instituted embracing his whole claim; of course, these questions of convenience and the like could not be taken into consideration at all if there were any fixed rule prohibiting this suit from being brought. It seems to me, however, that not only is there no such fixed rule, but that the Privy Council has expressly decided in *Shama Purshad Roy's case* (10 Moore's I. A., 203; s. c., 3 W. R., P. C., 11) [37] that a suit such as this may properly be entertained by this Court. In their judgment, it is said:—"There is no doubt that, according to the law of England, and their Lordships see no reason for holding that it is otherwise in India, money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force. But this rule of law rests, as their Lordships apprehend, upon the ground that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded." Applying that rule to the case before us, I think that the original decree (which is the sole basis of all the decrees made pending the appeal) having been reversed by the Privy Council, all the subsequent decrees were superseded by the Privy Council's order. It was plainly intended by the Privy Council's order, which decided that the rent of this tenure could not be enhanced, that the plaintiff should not pay rent at any rate higher than that for which the tenure was declared to be liable; and it is practically a contravention of the order to permit the decrees obtained by the zamindar pending the appeal to interfere with that intention. The subsequent decrees were mere subordinate and dependent decrees, and they cannot, under the circumstances of this case, be held to have remained in force so far as the enhanced rate of rent was concerned, when the decree on which they were dependent has been reversed. I am aware that in *Shama Purshad Roy's case* (10 Moore's I. A., 203; s. c., 3 W. R., P. C. 11) the order made by the Privy Council turned in some degree on the peculiar terms of their original order. But giving full weight to that fact, it seems

seems to me clear that their Lordships admit the principle that the main decree being reversed, which was the basis of the subsequent decrees, [38] these latter, being subordinate and dependent decrees, were superseded. It cannot be disputed, that although the later and subordinate decrees remained unreversed, the Privy Council held that a separate suit lay to recover what had been wrongfully paid under those decrees, and this was evidently the view taken of the effect of *Shama Purshad Roy's* case (10 Moore's I. A. 203; s. c., 3 W. R., P. C., 11) by KEMP and PONTIFEX, JJ., in the case of *Nilmoney Singh v. Deo Bahadur v. Sharoda Purshad Mookerjee* (18 W. R., 434).

The question of limitation is not raised in the order of reference. But I incline to agree with the Subordinate Judge (and substantially for the reasons given by him) in thinking that the suit is not barred.

The circumstances of this case are peculiar, and it is impossible in dealing with it to lay down any rule of very general application. The plaintiff has practically no remedy unless this suit will lie.

Garth, C. J. (JACKSON, J., *concurring*).—I am of opinion that the decree made by the Privy Council in the case of *Ram Churn Dutt v. Romesh Chunder Dutt* did not supersede or modify the several decrees which had been previously obtained for enhanced rent by the present defendants, and consequently that the plaintiffs in this case are not entitled to recover.

The plaintiffs base their claims entirely upon the authority of the case of *Shama Purshad Roy Chowdry v. Harro Purshad Roy Chowdry* (10 Moore's I. A., 203; s. c., 3 W. R., P. C., 11) contending that the principle upon which that case proceeded applies to the present, and that the decrees for enhanced rent obtained by the present defendant since the year 1864 have been partially superseded or modified by the decree of the Privy Council in the above case of *Ram Chunder Dutt v. Romesh Chunder Dutt*. We are bound, of course, to accept the decision in *Shama Purshad Roy Chowdry v. Harro Purshad Roy Chowdry* (10 Moore's I. A., 203; s. c., 3 W. R., P. C., 11) as binding upon this Court, so far as it goes; but if the principle of it is to be extended, as the plaintiffs contend it ought to be, it would lead, in my opinion, to very inconvenient consequences, and to a direct departure from a [39] rule of law which has been established for years, and has always been acted upon in England and in this country.

Now, in order to see how far the authority of the case of *Shama Purshad Roy Chowdry v. Harro Purshad Roy Chowdry* (10 Moore's I. A., 203; s. c., 3 W. R., P. C., 11) is applicable to the present, it is necessary to ascertain, in the first place, what the grounds of that decision really were. The case was a very peculiar one. In the year 1821, Doorga Purshad, claiming to be heir to his uncle, brought a suit against Shama Purshad, a debtor to his uncle's estate, for Rs. 23,024, the principal and interest due upon a bond.

Pending this suit, Tara Purshad sued Doorga Purshad for one half of the uncle's property; and in 1829 a compromise was effected of that suit, under which Tara Purshad became entitled to a 6-anna share of the debt due from Shama Purshad.

Subsequently to this Doorga Purshad obtained a decree against Shama Purshad for the principal and interest due upon the bond. From this decree Shama Purshad appealed to the Sudder Court, and pending that appeal in 1831, there was a compromise of that suit also, under which Shama Purshad was to pay Rs. 27,127 at the end of three years, without interest; in default of which payment Doorga Purshad was to be at liberty to realize the amount.

This compromise was made without Tara Purshad's knowledge, and Shama Purshad did not pay the stipulated amount at the end of the three years.

In this state of things Tara Purshad, in March 1835, brought another suit against Doorga Purshad, claiming a 6-anna share of the bond-debt and interest due up to the commencement of Doorga Purshad's first suit in 1821; and in his plaint he reserved to himself the right of bringing another suit for his share of the interest upon the bond-debt from 1821 to the 27th May 1829, on which day Doorga Purshad obtained his decree against Shama Purshad.

This suit was carried through the Courts of this country up to the Sudder Dewany Adawlut, where eventually a decree was made against Doorga Purshad for the entire amount of principal and interest sued for.

[40] From this decree Doorga Purshad appealed to the Privy Council, who decided in 1849 that the decree of the Sudder Court ought to be reversed, and that Doorga Purshad was not liable to Tara Purshad for the whole amount of his 6-anna share and interest of the debt. Their Lordships held that Doorga Purshad ought to be considered as a trustee for Tara Purshad, and was only responsible for so much of the debts as he actually received, or without his wilful default might have recovered, and an order was made accordingly by their Lordships that the decree of the Sudder Dewany Adawlut should be reversed; that Doorga Purshad should be declared liable to Tara Purshad for a 6-anna share of what he had received or might thereafter receive, or what he might have received but for his wilful default, for and in respect of the sum of Rs. 24,217-12-17, and the interest thereon, and the case was referred back to the Sudder Dewany Adawlut to ascertain and carry out and enforce the rights and liabilities of the parties as above declared.

From the 11th of March 1835, when the above suit was commenced, to the 5th July 1849, when the judgment of the Privy Council was pronounced, upwards of fourteen years had elapsed: and during that interval, in the year 1842, an action was brought in this country by Tara Purshad against Doorga Purshad to recover Rs. 4,392-12-9, being the amount of interest on the 6-anna share of the bond-debt, for which in his previous proceedings he had reserved his right to sue: and in this action he obtained a decree for the Rs. 4,593-12-9, with interest at 12 per cent., amounting to Rs. 11,127-15-3, which he accordingly paid thus -Rs. 8,200-7-3 on the 28th of April 1848, and Rs. 2,927-8 on the 4th August 1857.

Several attempts were made by Doorga Purshad to have this decree for interest dealt with and adjusted by the Sudder Dewany Adawlut as part of the entire subject-matter of the first suit upon which the Privy Council had passed their judgment; but failing these attempts, he brought a suit against Tara Purshad to recover back the Rs. 11,127-15-3, which he had been unjustly compelled to pay. This was decided against him by the Courts of this country and was taken on appeal to the Privy Council, where the judgment was given, which has been [41] the subject of so much discussion, and which is insisted upon here by the plaintiff as a conclusive precedent in his favour.

Their Lordships in that case distinctly affirmed the well-known principle of law, that in this country as in England money recovered under a decree or judgment cannot be recovered back in a fresh suit so long as the decree or judgment under which it was reversed remains in force. They go on to say, that this rule of law rests upon the ground that the decree or judgment must be considered as subsisting until it has been reversed or superseded by some ulterior

proceedings. But where it has been so reversed or superseded, the money paid under it may be recovered back.

Their Lordships then go on to say, that the decrees in this country under which the sum of Rs. 11,127-15-3 was recovered were in fact superseded by the order of Her Majesty in Council in 1849. That order they considered extended not only to the claim of the plaintiff in the particular suit in which it was made, but to the adjustment of the rights and interest of the parties in the entire subject-matter of that suit. The order had declared Doorga Purshad to be a trustee for Tara Purshad of the whole 6-anna share of the bond and interest, and it had directed the Sudder Dewany Adawlut to adjust and enforce the rights and liabilities of the parties in accordance with the directions of the Privy Council. If this order had been obeyed by the Sudder Dewany Adawlut, as their Lordships say it ought to have been, the interest in question, Rs. 11,127-15-3, would have been refunded to Doorga Purshad by the order of the Sudder Dewany Adawlut under, and by force of, their Lordships' previous decree, because that decree had superseded and annulled what their Lordships call the "dependent and subordinate decree" which had been obtained for the interest. But as the Sudder Dewany Adawlut failed to take any steps to carry out the directions of the Privy Council, their Lordships considered that the Rs. 11,127 were recoverable by a fresh suit, and they, accordingly, reversed the decree of the Sudder Court and adjudged to the plaintiff that amount with interest at 12 per cent.

[42] Now two things appear to me clear from this judgment, *first*, that the Privy Council had no intention of questioning the authority of the rule laid down in *Marriot v. Hampton* (2 Sm. L. C., 375, 6th ed.; 405, 7th ed.); on the contrary, they distinctly affirm it, because they say, that as long as the decree or judgment under which money has been obtained remains in force, no money paid under it can be recovered back; and, *secondly*, that their Lordships' judgment is based entirely upon this principle, viz., that the effect of the order of Her Majesty in Council made in 1849 was not only to reverse the judgment in the case which was then *sub judice*, but also to supersede and annul *ipso facto* the decrees which had been made in another suit.

I have searched in vain to find any other instance in which the decree of an Appellate Court in one suit has been held to have the legal effect of annulling or altering *ipso facto* a decree made by a subordinate Court in another suit; but of course we are bound here to treat the decision of the Privy Council as binding upon us as far as it goes, and to deduce as carefully as we can from the language of the judgment what was the ground upon which their Lordships considered that the order made in the first suit in 1849 had the effect of superseding the decree for Rs. 11,127 interest.

It appears to me that the only explanation of the apparent difficulty is this,—that, in the decree of 1849, their Lordships assumed to deal, and were in fact dealing, not only with the actual claim made in the suit, but with the status and rights of the parties with reference to the whole subject-matter of it. They declared that Doorga Purshad was a trustee of Tara Purshad upon certain terms and conditions, and they directed the Court here to adjust the rights and liabilities of the parties in accordance with that declaration; and as the interest of the bond (Rs. 11,127) formed part of the fund in respect of which the trust had been declared, their Lordships considered, that although a decree had been obtained in the Courts here for the interest, that decree was as much dealt with and superseded by their judgment as the decree which had been made with reference to the remainder of the bond-debt. Upon this

[43] ground, and upon this ground only, it appears to me their Lordships' judgment proceeded; and I do not understand that they intended to overrule the principle laid down in *Marriot v. Hampton* (2 Sm. L. C., 375, 6th ed.; 405, 7th ed.), or to prescribe a different rule of equity in this country from that which obtains in England.

It does not appear to me that their decision can be considered as governing the present case, unless we can find that the decree made by their Lordships on the 25th of March 1873, reversing the first judgment for the enhanced rent, had the legal effect *per se* of superseding or modifying the subsequent decrees for enhanced rent obtained between the year 1864 and the 25th of November 1875.

Now, on looking at the language of their Lordships in that decree, I cannot discover that they dealt, or intended to deal, with anything else than the actual subject-matter of the suit upon which they were engaged. Their judgment involves no change in the mutual relation of the parties. Their Lordships give no directions to the Courts of this country as to adjusting the parties' rights or liabilities. They simply decide the question, whether or no the plaintiff was or was not entitled to enhance the plaintiff's rent, so that unless we are to hold that in every case the decree of an Appellate Court has the effect of superseding or modifying every other decree inconsistent with it which may have been made between the same parties in any other suit brought in a subordinate Court upon the same subject-matter. I do not see how we can consistently say that the decree of the Privy Council of the 25th March 1873 has superseded or modified the subsequent decrees for enhanced rent obtained by the present defendant.

It will be observed that in the case of *Doorga Purshad* against *Tara Purshad* the decree, which was superseded by the judgment of the Privy Council, was for interest which that judgment had declared not to be payable, and which their Lordships had in fact directed the Sudder Dewany Adawlut to restore to *Doorga Purshad*: so that the effect of Her Majesty's order, according to the view which their Lordships took of it, was to supersede the decree for interest altogether.

[44] But here the case is very different. Their Lordships here have given no direction which could have the effect of superseding or altering any other decrees; and it is not contended that these subsequent decrees are absolutely superseded. It is said that they are only modified; or, in other words, that the Privy Council judgment has had the effect *per se* of altering a judgment for one sum into a judgment for another sum.

But if that is so, and if this principle is to be consistently carried out, the amount of costs ought to be altered also. The doctrine is certainly a novel one, and if we are to apply it in all cases, as of course we must (if we are to act consistently) it will be attended with some strange consequences. The rule, if it is to be applied in the case of one of the parties, must be applied also in the case of the other; thus if in a suit like the present a claim can be made by the tenant to recover sums which he has overpaid to the landlord, the landlord ought to have a corresponding remedy if the state of things were reversed. Suppose, that in the original suit the Courts here had decided that the landlord was not entitled to the enhanced rent, but the Privy Council overruled that judgment, and decided that he was so entitled; and suppose also, that pending the appeal to the Privy Council, the landlord had brought several suits for the enhanced rent, but in each had only recovered the original

rent; if the above principle is to be carried out, the landlord would be entitled, in a fresh suit, to recover the enhanced rent which he had failed to recover in his subsequent suits here, and to which the Privy Council had declared him entitled.

So again, if the rule is to apply to cases of landlord and tenant, it must apply to all other cases where the relative rights of parties are determined in one suit, and claims founded on those rights are enforced in subsequent suits. The case of *Shama Purshad Roy Chowdhry v. Harro Purshad Roy Chowdhry* (10 Moore's I. A., 203; S. C., 3 W. R., P. C., 11) was not a case between landlord and tenant.

Thus, for instance, A sues B to recover the value of coal which he claims as having been taken out of his coal mine. The question depends upon whether B has a right to take the coal [45] from a particular area; and A obtains a decree for damages upon the ground that B has no such right. B appeals to the High Court; meanwhile B continuing to take the coal, A brings another suit against him for damages, and recovers. The High Court reverses the original decree; B may then sue for the damages, which he has paid in the second action, as money had and received to his use.

But if this is to be law, the converse proposition ought to hold good also, - that is to say, suppose the decree in the first suit to be in favour of B, on the ground that B had a right to get the coal, and A appealed, and pending the appeal A brought another suit against B and failed upon the same ground. The Court of appeal reverses the final decree. Surely A ought to be entitled to recover by a fresh suit the value of the coal which was due to him in the second action. It would be a palpable injustice to allow one party to avail himself of the judgment of the Appellate Court, and not the other.

In the cases above mentioned, the question as to the sum to be recovered would be tolerably simple. But suppose a case of this kind: A sues B for damages for building a house upon two pieces of land which he claims, Black-acre and White-acre, the question is, whether B has any right to do this. The Court decides that he has not, and awards damages to A. B appeals. Meanwhile, the building still going on, A brings a fresh suit for damages, which he has a right to do for the continuing trespass, and recovers further damages. The Court of appeal reverses the first judgment in part, upon the ground that B had a right to build on Black-acre, but not on White-acre, and reduces the damages accordingly. Can B sue to recover part of the damages incurred in the second action? and if so, what part, and how is the amount to be ascertained? In other words, to what extent, if at all, has the judgment of the Appellate Court superseded or altered the decree of the subordinate Court? Then again, it must be borne in mind that if a decree of one Appellate Court is to have the effect of reversing or altering decrees in other suits, the same effect must be given to a decree of any other Appellate Court under similar circumstances. The decree of the Privy Council as an Appellate Court cannot [46] have a different effect from that of the High Court or the District Court, or the Court of the Subordinate Judge in its appellate capacity.

Thus, suppose that in a suit by a landlord against a tenant for enhanced rent, the Munsif gives the plaintiff a decree. The case is appealed to the Subordinate Judge, who reverses the Munsif's judgment. Meanwhile a second decree has been obtained before the Munsif for the enhanced rent, and the tenant has paid the amount. The tenant, under these circumstances, would be enabled by force of the judgment of the Subordinate Judge, to recover from the landlord the amount which he has overpaid under the second decree. But the

landlord then takes the Subordinate Judge's judgment upon special appeal to the High Court ; and the High Court reverses that judgment, and affirms the Munsif's. The consequence would be that the landlord would be entitled to recover in a third suit the sum which he had previously recovered from the tenant in the second suit.

If this state of the law is to prevail in this country, it is difficult to see where litigation is to stop ; or when people's rights are even to be considered finally determined. If in cases like the present it is right that the English rule should be departed from at all, it appears to me that a review of judgment would be not only the most complete, but the most appropriate and unobjectionable remedy ; but this point we are not asked to decide in the present reference.

The only question before us is, whether the present suit will lie ; and I am strongly of opinion that it will not. I consider that it does not come within the principle of the case of *Shama Purshad Roy Chowdhry v. Hurro Purshad Roy Chowdhry* (10 Moore's I. A., 203 ; s c., 3 W. R., P. C., 11) decided by the Privy Council ; and I cannot help deeply regretting the conclusion at which the majority of my learned brethren have arrived.

It is a conclusion directly opposed to what I consider a valuable and well established rule of law ; and I believe that it will be attended with most inconvenient and mischievous consequences.

[47] The case will be sent back to the Division Bench for final disposal and speaking only for myself, I trust that the very serious question involved in the case may be taken upon appeal to the Privy Council.

NOTES.

[I. SUPERSESSION OF DECREE—

(a) (1879) 5 Cal., 589, was a case in which the decree for enhanced rent had been passed conditional on the confirmation by the Appellate Court of a decree in a previous suit ; on reversal of which the decree was held to be superseded.

(b) In (1898) 20 All., 237, it was held that the principle would apply only to a reversal or supersession by a competent Court ; an order of the Board of Revenue in respect of rent was not given this effect.

(c) Whether review proceedings are the appropriate remedy :—(1888) 13 Bom., 330.

II. EFFECT OF SUPERSESION—

(a) *Res-judicata*—

Where separate decrees are given in cross-suits. The unappealed decree will not operate as *res judicata* in respect of the appealed decree :—(1905) 29 Mad., 333, F. B. : 16 M.L.J. 63.

(b) *Mesne Profits on Restitution*—

(i) Mesne profits may be granted for the period during which possession was had under the decree :—(1894) 21 Cal., 989.

(ii) Such right to mesne profits is not a decree, however, and consequently cannot be attached :—(1901) 24 Mad., 341.

III. ENFORCING RESTITUTION—

(a) The right to restitution might be enforced by suit or by summary process in execution, under Sec. 583, C. P. C. 1882 :—(1908) 35 Cal., 265 ; (1889) 13 Mad., 437 ; see *per contra* (1907) 29 All., 348.

(b) Sec. 583, C.P.C. 1882 was held not to apply to Review or Privy Council Appeal :—(1906) 28 All., 665 ; (1898) 20 All., 139.

(c) The C. P. C. 1908, has changed the law.

The C. P. C. 1908, sec. 144,¹ enacts as follows :—

(i) Where and in so far as a decree is varied or reversed, the Court of First Instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed ; and for this purpose the Court may make any orders including orders for the refund of costs, and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(ii) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).]

[3 Cal. 47]

PRIVY COUNCIL.

The 18th and 19th April and 14th May, 1877.

PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH,
AND SIR R. P. COLLIER.

The Delhi and London Bank, Limited.....Judgment-creditors.

versus

Orchard.....Judgment-debtor.

[On appeal from the Chief Court of the Punjab.]

Limitation (Act XIV of 1859). ss. 20, 21—Execution of decree—

Interpretation of Statutes—Res judicata—Act VIII of 1859, s. 2.

A decree was obtained in the Court of the Deputy Commissioner of Delhi on the 5th October 1866, prior to the date when Act XIV of 1859 was extended to the Punjab, viz., the 1st of January 1867. On the 22nd of October 1869, an application admittedly *bona fide*, was made for execution, but the application was refused on the ground that it was barred by lapse of time, and no appeal was brought against that order. A subsequent application for execution was made on the 4th of May 1871, which was also refused on a similar ground. On appeal, the Commissioner and Chief Court confirmed this order. *Held*, reversing the decision of the Court below, that execution of the decree was not barred by s. 21*, Act XIV of 1859.

In interpreting statutes, the words 'must' and 'shall' may, in some cases, be substituted for the word 'may,' but only for the purpose of giving effect to the intention of the Legislature. In the absence of proof of such intention, the word 'may' should be taken as used in its natural, i.e., in a permissive, and not in an obligatory, sense.

In construing s. 21, Act XIV of 1859, the words "nothing in the preceding section shall apply to a judgment in force at the time of the passing of the Act," mean that nothing in the preceding section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act, and the words "but process of execution may be issued, &c.," mean that notwithstanding anything in the preceding section, execution might issue either within the time limited by the law in force when the Act was passed, or within three years next after the passing of the Act, whichever should first expire.

Preceding section not to apply to judgments, etc., in force at the passing of this Act.

* [Sec. 21 :—Nothing in the preceding section shall apply to any judgment, decree, or order in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire.]

[48] An order passed by a Court rejecting a *bond fide* application by a judgment-creditor for the execution of his decree on the ground that the period allowed by law for execution had expired, held not to be an adjudication within the rule of *res judicata*, or within s. 2, Act VIII of 1859.

[This portion of the headnote is incorrect. See per MELVILL, J., in *Manjunath v. Venkatesh* (1881), 6 Bom., 654, at p. 60 :—

"It appears to us that the above order was not in the nature of an adjudication at all, and that the description of it in the headnote to the report in the Indian Appeals, and still more the description in the headnote to the Calcutta report, is *incorrect and gives an erroneous idea of the meaning of the Judicial Committee's observation.*"

See further extracts from this and other cases given in the footnote at 3 Cal., p. 58 *infra*.]

THE appellants in this case obtained a decree against the respondent in the Court of the Deputy Commissioner of Delhi on the 5th October 1866, and on the 22nd October 1869 applied to the Deputy Commissioner to have the decree transferred to the Civil Court at Meerut for execution. This application was refused by the Deputy Commissioner on the 10th December 1869, on the ground that, as the decree was of date prior to the 1st January 1867, when Act XIV of 1859 was extended to the Punjab, the period within which it could have been executed was, under the law of the Punjab, one year only, unless leave to extend the time had been obtained from the Commissioner, and such leave had not been obtained. No appeal was brought against this order.

A subsequent application for execution, made on the 4th May 1871, was likewise rejected by the Deputy Commissioner, whose order was confirmed by the Commissioner of Delhi on the 18th August 1871, and afterwards, on appeal, by the Chief Court of the Punjab. But on a review of their judgment, on the 17th March 1873, the Chief Court held that the effect of the application of the 22nd October 1869, was to keep the decree alive, and that the subsequent application having been made within three years from the date of the first, was in time under the provisions of s. 20, Act XIV of 1859. Subsequently, however, on the 31st July 1874, on a second review of their judgment, a majority of the Judges of the Chief Court (Messrs. BOULNOIS and MELVILLE, Mr. THORNTON dissenting) reversed the order of the 17th March 1873, and restored the order of the Commissioner of Delhi, dated the 18th August 1871, which declared the application to be barred.

The cases which were before the Court were conflicting, viz., on the one hand, *Bai Udekuar v. Mulji Naran* (3 Bom. H. C. Rep., A. C., 177) and *Makunda Valad Balacharya v. Sitaram* (5 Bom. H. C. Rep., A. C., 102), decided by the Bombay High Court, [49] in which it was held that ss. 20 and 21 must be read independently of each other; and that in the case of a judgment, decree, or order in force at the time of the passing of Act XIV of 1859, the creditor must, within the time limited by the Act, do all that is necessary to procure process of execution to be issued, and that if he failed to do so the decree could not be executed; and on the other hand, *Kanyaleechurn Ghosal v. Bonamalee Mullick* (B. L. R., Sup. Vol., 709), decided by a Full Bench of the Calcutta High Court, and certain cases in that Court in which that decision had been followed (see *Gregory v. Juggat Chunder Banerjee*, 5 W. R., Mis., 17;

Time for enforcing execution of judgment, &c., of a Civil Court not established by Royal Charter.

* [Sec. 20.—No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution.]

Doorgachurn Roy v. Dinomoyee Debia, 6 W. R., Mis., 14; *Huronath Bose v. Muddun Mohun Chuckurbutty*, 6 W. R., Mis., 40; *Nawarja Chowdhry v. Ram Kanaye Doss*, 7 W. R., 330), in which it was held that ss. 20 and 21 must be read together and that process of execution of a decree obtained before the passing of Act XIV of 1859 may be issued within the time mentioned in s. 21, without any prior proceeding having been taken, but when it is sought to execute such decree after three years from the time of the passing of the Act, process of execution shall not be issued unless some proceeding within the meaning of s. 20 shall have been taken to enforce the decree within three years next preceding the application for execution; and the case of *Karuppanan v. Muthannan Servey* (5 Mad. H. C. Rep., 105), in which the view of the Calcutta Court was followed. The case of *Rhidoy Krishnu Ghose v. Kailas Chandra Bose* (4 B. L. R., F. B., 82), decided by a Full Bench of the Calcutta High Court, was also relied upon as supporting this interpretation of the Act.

Mr. BOULNOIS and Mr. MELVILL, in accordance with the view taken by the Bombay High Court, allowed the review, holding that process of execution was barred.

Mr. THORNTON, the dissentient Judge, followed the construction put on ss. 20 and 21 by the Calcutta High Court.

The Chief Court of the Punjab having refused to certify the case as a fit one for appeal, the appellants petitioned Her Majesty in Council for special leave to appeal, which was granted under an order dated the 28th July 1875.

[30] Mr. Leith, Q.C., and Mr. Graham for the Appellants.—According to the true construction of Act XIV of 1859, the Appellants were not barred from having execution against the defendant on this decree, which was in full force at the time when execution was applied for. The interpretation put on the Act by the Chief Court of the Punjab is erroneous. Having regard to the general intent of the Act, and the sections immediately preceding s. 21, it was clearly not meant to take away the remedy on judgments in force when the Act passed or came into operation, or to place these judgments in a worse position than those obtained after the Act began to operate. The words in s. 21—"nothing in the previous section shall apply to judgments in force at the time of the passing of this Act,"—must be interpreted to mean that nothing in s. 20 should apply prejudicially to existing judgments. That was the only reasonable construction which could be put on the language of the Act, and was the one adopted by the Calcutta High Court in the case of *Kangaleechurn Ghosal v. Bonomalee Mullick* (B. L. R., Sup. Vol., 709). When three years from the time when Act XIV of 1859 passed had expired, the benefit conferred by s. 21 was lost to the holders of old decrees, who had then only the provisions of s. 20 to look to. By Act XIV of 1870, which repeals a variety of enactments which had become obsolete or useless, the Legislature repealed s. 21 of Act XIV of 1859. It clearly would not have done so had it not considered that all old decrees had by that time either become inoperative or had been brought within the operation of s. 20. The Bombay decisions which would read 'may' in the second sentence of s. 21 as 'must', were opposed to the view followed in the decisions of the Calcutta and Madras High Courts, and were opposed to the most approved rules for the interpretation of statutes; as to which, see Maxwell on the Interpretation of Statutes, p. 209, and Baron Parke's observation in *Becke v. Smith* (2 M. & W., at p. 195); see also *Roddam v. Morley* (26 L. J., N. S., Ch., 438). As to the proceedings sufficient to keep a decree alive, see *Maharajah Dheraj Mahtab Chand Bahadoor v. [31] Bulram Singh* (13 Moore's I. A., 479)

and *Kristo Kinkur Roy v. Rajah Burrodacaunt Roy* (14 Moore's I. A., 465 ; s. C., 10 B. L. R., 101).

Mr. *Doyne* for the Respondent.—The final order of the Punjab Court was right in law, and should be confirmed. The appellants' application for execution on the 22nd October 1869, was rejected by the Deputy Commissioner as out of time. The appellants took no steps to dispute that ruling. No appeal was brought against the order of the Deputy Commissioner, which, consequently, became final. There being thus a previous adjudication to the effect that execution was barred, the application to execute could not be renewed. The matter was *res judicata*.

Apart from this objection, the second application was clearly inadmissible. The decree sought to be executed was governed either by the Punjab Code, which fixed one year as the period within which execution should be applied for, or it was governed by the provisions of Act XIV of 1859, which had been extended to the Punjab on the 1st January 1867, and under which a period of three years from the date of such execution was fixed as the limit for execution. As held by the High Court of Bombay, the plain words of s. 21 of the Act declare that the extension of time which may be had under s. 20 in the case of judgments obtained after the passing of the Act, do not apply to judgments obtained before the passing of the Act; the words "passing of the Act" being in this case understood as equivalent to the extension of the Act to the Punjab. The appellants, whose judgment dates from October 1866, in applying for execution in May 1871, can have no benefit from the proceedings taken in October 1869, because s. 21 gives no effect to such proceedings as keeping alive the decree. Since, under s. 21 of Act XIV of 1859, three years was an absolute limit to the appellants' right to execute, it made no difference that at the time of the second application for execution that section had been repealed by Act XIV of 1870. The period of three years had run against the appellants in January 1870; they had suffered a bar [52] of their right to execute, and it was expressly provided by the repealing Act that it should not affect the validity of anything already suffered.

Mr. *Leith* in reply.—There was no abandonment of the proceedings to enforce execution under the application of October 1869. An arrangement was come to with the defendant under which further payments were received from him. That was a sufficient reason for not appealing against the order of the Deputy Commissioner. [Sir J. COLVILLE.—If these payments did not keep your decree alive, your sufficient reason is gone.] There is no ground for saying that our proceedings were not *bonâ fide*. As to the contention that our application is in a matter already adjudicated, there is no decision to bring the case within the rule as to *res judicata*. If s. 21 Act XIV of 1859, restricted the period for executing decrees obtained before the Act was extended to the Punjab to three years from the date of such execution, that limit had at the time of our second application to execute been swept away by Act XIV of 1870. [Sir M. SMITH.—Not if you had already suffered a bar of your remedy.] We shall have the advantage of what we have done, and are safe under s. 20, Act XIV of 1859.

Cur. adv. vult.

The Judgment of their Lordships was delivered by

Sir B. Peacock.—This is an appeal from a judgment and order of the Chief Court of the Punjab, dated the 31st July 1874, reversing on review a former judgment and order of the same Court of the 17th March 1873,

and thereby disallowing the execution of a decree obtained by the appellants against the respondent for the recovery of a sum of Rs. 14,408-14 for debt and costs.

The judgment was recovered on the 5th of October 1866, in the Court of the Deputy Commissioner of Delhi. Subsequently to the decree, the defendant made various payments on account up to the month of October 1869. On the 22nd of that month the plaintiffs presented a petition to the Deputy Commissioner, claiming a balance of Rs. 19,227-3 for [53] principal and interest, and praying that, after ascertaining the amount to be recovered, a certificate might be sent to the Civil Court at Meerut, transferring the decree, in order that it might be executed in that Court.

It is unnecessary to refer particularly to all the proceedings which took place on that petition; it is sufficient to say that, on the 10th of December 1869, the Deputy Commissioner made the following order:—"The decree is of a prior date to the introduction of Act XIV of 1859. It should be executed according to the civil law of the Punjab: and as, according to the said law, the period of one year was fixed for its execution, and in case that period expires, the rule is that the decree should be executed by obtaining the sanction of the Commissioner; and as on the report sent for obtaining sanction the Commissioner did not pass any order either giving sanction or any other order, and as it is not within the power of this Court to execute such a decree, it is ordered that the petition be sent to the record-room."

There can be no doubt that the application made on the 22nd October 1869, was *bonâ fide*, and, indeed, the learned Counsel for the respondent has very properly admitted that it was so.

No appeal was preferred from the order of the 10th December 1869, but the defendant, notwithstanding the order, made further payments on account.

On the 4th May 1871, the plaintiffs, alleging that the payments made were not sufficient to cover the interest, and claiming a balance of Rs. 23,772-13-7, made a fresh application to the Deputy Commissioner for a certificate and transfer of the decree to the Court of Meerut for execution, and prayed that a summons might be issued under the provisions of Act VIII of 1859. Upon that petition the Deputy Commissioner, on the 6th May 1871, made the following order:—"As the application for execution has already been rejected and sent to the record-room, and now the period for execution has expired totally, it is ordered that the application be rejected and sent to the record-room."

With reference to the statement that the period for execution had totally expired, it may be as well to point out [54] that Act XIV of 1859 was extended to the Punjab on the 1st January 1867, and consequently that the period of three years from the time when the Act came into operation in the Punjab had expired before the application of the 4th May 1871, was made. On the 30th June 1871, the Deputy Commissioner refused to review his judgment, and on the 10th July of that year the plaintiffs appealed to the Commissioner, who, on the 18th August 1871, dismissed the appeal, holding, amongst other things, that the three years' grace under the limitation law expired on the 1st January 1870, and that a mere petition for execution which was dismissed was not sufficient to keep a decree in force.

The case was appealed to the Chief Court of the Punjab, which at first rejected the appeal. Subsequently, a Full Bench of that Court, on the

17th of March 1873, upon review, decreed the appeal with costs, and reversing the orders of the lower Courts, ordered and decreed the appellants' application for execution with costs and the costs of the appellants in the Appellate Court. They said:—"The application for execution in 1869 to the Assistant Commissioner at Delhi was, in the opinion of this Court, a *bona fide* proceeding to enforce the decree of 1866. It was a proceeding to enforce the decree, and not merely to keep the decree in force. Before the expiration of three years from the date of that proceeding the present application was filed."

Subsequently, on the 31st July 1874, upon a review of the judgment so given on review, the Chief Court reversed their decree of the 17th March 1873, upon the ground that the decree having been obtained before the introduction of Act XIV of 1859 into the Punjab, the case must be governed by the provisions of s. 21, and not by s. 20. The case was decided by Mr. Justice BOULNOIS and Mr. Justice MELVILL upon the authority of the cases of *Bai Udekuwar v. Mulji Naran* (3 Bom. H. C. Rep., A. C., 177) and *Makunda Valad Balacharya v. Sitaram* (5 Bom H. C. Rep., A. C., 102). Mr. Justice THORNTON held a contrary opinion, and recorded his reasons for dissent. It was not contended that the decision of the [55] Chief Court of the 17th March 1873, was incorrect for any other reason than that afforded by the words of the 21st section of the Act.

The case depends upon the proper construction to be put on ss. 20 and 21 of Act XIV of 1859. The following are the words of those two sections:—

"20. No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, as to keep the same in force, within three years next proceeding the application for such execution."

"21. Nothing in the preceding section shall apply to any judgment, decree, or order in force at the time of the passing of this Act, but process of execution may be issued, either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire."

It was pointed out in the case of *Ram Sahai Sing v. Sheo Sahai Sing* (B. L. R., Sup. Vol., 492: s.c., 6 W. R., Mis., 98) that, according to the literal wording of s. 20, no process of execution could ever issue to enforce a judgment, even within a week from the date of it, unless some proceeding had been taken to enforce or keep it in force within three years next before the application for execution; and it was held that such a construction was obviously insensible, and that the meaning of the section was that no process of execution should be issued to enforce a judgment or order of a Court not established by Royal Charter after the expiration of three years from the date of it, unless some proceeding to enforce it, or to keep it in force, should have been taken within three years next before the application for such execution. That was held to be the proper construction of s. 20, both in that case and in the subsequent Full Bench case of *Kangalee Churn Ghosal v. Bonomalee Mullick* (B. L. R., Sup. Vol., 709). In the latter case it was held that, under the 21st section, execution might issue after the expiration of three years from the time of the passing [56] of the Act to enforce a judgment which was in force at the time when the Act was passed, provided some proceeding to enforce the judgment within the meaning of s. 20 had been taken within three years next preceding the application for execution. That decision was followed by the High Court of Madras in the case of *Karuppanan v. Muthannan Servey* (5 Mad. H. C. Rep., 105).

The High Court of Bombay put a different construction upon s. 21. The cases are those of *Bai Udekwar v. Mulji Naran* (3 Bom. H. C. Rep., A. C., 177) and *Makunda Valad Balacharya v. Sitaram* (5 Bom. H. C. Rep., A. C., 102), referred to in the judgment now under appeal. They held that the words "nothing in the preceding section shall apply to judgments in force at the time of the passing of this Act" could not be rejected without violating a fundamental rule for the construction of statutes; and that the words "may be issued" should be read as "must be issued"; and the Chief Court treated the words "judgment in force at the time of the passing of this Act" as applicable to a judgment in force at the time of the extension of the Act to the Punjab, though not in force at the time of the passing of Act XIV of 1859.

It cannot be disputed that the construction put upon the Act by the High Court at Calcutta, if permissible, was equitable, and prevented what must be admitted to be an inconvenience and injustice. Indeed, if the construction put upon the Act by the High Court at Bombay, and by the Chief Court in the Punjab, is correct, a judgment-creditor could not, after the three years, have enforced a judgment which was in force in the Regulation Provinces when Act XIV of 1859 was passed, for a judgment which was in force in the Punjab at the time when the Act was extended to that province, however diligent he might have been in endeavouring to enforce his judgment, and however unable, with the use of the utmost diligence, to get at the property of his debtor. Such a construction would cause great inconvenience and injustice, and give the Act an operation which would retrospectively deprive the creditor of a [57] right which he had under the law as it existed in the Regulation Provinces at the time of the passing of the Act, and in the Punjab at the time of the introduction of it. Their Lordships are of opinion that such a construction would be contrary to the intention of the Legislature.

There is no doubt that in some cases the word 'must,' or the word 'shall,' may be substituted for the word 'may'; but that can be done only for the purpose of giving effect to the intention of the Legislature; but in the absence of proof of such intention, the word 'may' must be taken to be used in its natural, therefore in a permissive, and not in an obligatory, sense.

On the construction of this inartificially drawn statute their Lordships are of opinion that the words "nothing in the preceding section shall apply to a judgment in force at the time of the passing of the Act" mean that nothing in the preceding section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act: and that the words "but process of execution may be issued" mean that, notwithstanding anything mentioned in the preceding section, execution might issue either within the time limited by law, or within three years next after the passing of the Act, whichever should first expire.

It appears, then, to their Lordships that the words "nothing in the preceding section" (as used in s. 21) mean that the prohibition laid down in s. 20 should not apply to judgments in force at the time of the passing of the Act.

Without expressing their concurrence in all the reasoning of the Full Bench in the Calcutta case above cited (*Kangaleechurn Ghosal v. Bonomalee Mullick*, B. L. R., Sup. Vol., 700), their Lordships are of opinion that that decision was correct, and that the application made to the Court of the Deputy Commissioner of Delhi, on the 22nd of October 1869, being *bona fide*, though unsuccessful, was a proceeding to enforce the judgment within the meaning of s. 20; and that that proceeding having been taken within three years next preceding the

application made on the 4th May 1871, to which the judgment [58] now under appeal relates, such last-mentioned application was not barred by the 21st section of Act XIV of 1859, and ought to have been granted.

It was contended that the rule *res judicata* applied, and that the application made on the 4th of May 1871 was barred by the order of the Deputy Commissioner of the 10th day of December 1869, from which no appeal was preferred. But their Lordships are of opinion that the order of the 10th day of December 1869 was not an adjudication within the rule of *res judicata*, or within s. 2 of Act VIII of 1859.*

* [Upon this sentence, see the explanation of WESTROPP, C.J., and MELVILL, J., in *Manjunath v. Venkatesh* (1881) 6 Bom., 54 at p. 60 :—

"It appears to us that the above order was not in the nature of an adjudication at all, and that the description of it in the head-note to the report in the Indian Appeals, and still more the description in the head-note to the Calcutta Report is incorrect and gives an erroneous idea of the meaning of the Judicial Committee's observations. The Deputy Commissioner did not, in fact, decide that the application was time-barred, nor did he decide anything. He simply said that, as he could not execute the decree without the Commissioner's sanction, and as the Commissioner had not given the sanction which had been applied for, nor made any other order, it was not within his power to execute the decree and therefore the application must go to the record-room. The Judicial Committee might well say that this was not an adjudication within the rule of *res judicata* or within section 2 of Act VIII of 1859. We do not think that the question, whether a decision that an application is time-barred is *res judicata* in any way concluded by the observation of the Privy Council in *The Delhi and London Bank, Ltd. v. Orchard*, but we think that it is concluded by necessary inference from the judgment of the same tribunal in *Mungul Pershad v. Girija Kant* (8 I. A., 123)."

In *Dhokal v. Phakkar* (1893) 15 All., 84 F. B., at p. 99, Sir JOHN EDGE observed as follows :—

"It will be noticed that Sir M. WESTROPP, C.J., and MELVILL, J., in giving that explanation of the decision of their Lordships of the Privy Council sought for the explanation in the reasons given by the Deputy Commissioner for ordering the petition to 'be sent to the record-room' and did not lay any stress upon the words used having been 'be sent to the record-room' instead of the words 'be dismissed.' I think the explanation given by Sir M. WESTROPP, C.J., and MELVILL, J., of the views which may have influenced their Lordships of the Privy Council is probably correct, and if it be, it follows that in considering the effect of an order passed by a Court in a proceeding for the execution of a decree we must be guided by the reason stated for making the order and not by the mere phraseology employed in the formal direction which concludes the order."

In *Khosla Chandra Roy v. Ukil Adh* (1909), 14 C. W. N. 114, MOOKERJEE and VINCENT, JJ., observed as follows :—

"As was pointed out by Mr. Justice MELVILL with the concurrence of WESTROPP, C.J., in the case of (1881) 6 Bom., 51, the order in the case before the Judicial Committee which is set out in the judgment of Sir BARNES PEACOCK was very peculiar in its terms. It did not decide that the application was barred by limitation. It was simply to the effect that as the sanction of the Commissioner which was required under a local law had not been received the application for execution must be sent to the record-room. This could not be treated as an adjudication that the application was time-barred. This explains why the Judicial Committee held that the order relied upon as a bar was not an adjudication. We may add that from the report of the case in the Indian Appeals (4 I. A., at 13) it is fairly clear that Sir BARNES PEACOCK intended to limit the decision to the question whether the doctrine of *res judicata* applied to cases in execution; this is obvious from the observation made by him in course of the argument of the counsel for the respondent. The wider question, whether upon general principles of law, an order made in the course of execution proceedings ought to be allowed to be re-opened at any subsequent stage of the proceedings, does not appear to have been raised before the Judicial Committee. This explains the guarded statement that the order relied upon as a bar was not an adjudication within the rule of *res judicata* or within section 2 of Act VIII of 1859. If this view were not taken of the true effect of the decision of the Judicial Committee in *The Delhi and London Bank, Ltd. v. Orchard*, 3 Cal., 51, we should be driven to the conclusion that it is inconsistent with at least three subsequent decisions of the Judicial Committee, namely, *Mungul Pershad Dutt v. Girija Kant Lahiri* (1881) 8 Cal., 51, *Ram Kirpal v. Rup Kuari* (1883) 6 All., 269, and *Bani Ram v. Nanku Mal* (1884) 7 All., 109; and it is worthy of note that the judgment in the first and second of these cases was delivered by Sir BARNES PEACOCK who was also a party to the judgment in the third case. These cases

For the above reasons their Lordships will humbly advise Her Majesty that the judgment and order of the Chief Court of the Punjab of the 31st of July 1874 be reversed, and that the judgment and order of the 17th of March 1873 be affirmed and stand in force; and that the defendant do pay to the plaintiffs their costs incurred in the Chief Court of the Punjab subsequently to that decree. The respondent must pay the costs of this appeal.

Appeal allowed.

Agents for the Appellants: Messrs. Johnston, Farquhar and Leech.

Agent for the Respondent: Mr T. L. Wilson.

NOTES.

[A.—*RES JUDICATA* OR PRINCIPLE OF "JUDGMENT OF THE CASE" WITH REFERENCE TO SUBSEQUENT PROCEEDINGS IN THE SAME SUIT.

I. MISTAKEN VIEWS AS TO THE AUTHORITY OF THIS CASE, THE HEADNOTE BEING INCORRECT—

The headnote is incorrect.

This decision has been explained in subsequent cases:—(1881) 6 Bom., 54; (1893) 15 All., 84; (1909) 14 C. W. N., 114, as *not deciding* that there can be no bar of or analogous to *res judicata* in execution proceedings. See the extracts from those judgments given in our footnote at 3 Cal., 58.

II. THE PRINCIPLE—

The principle has been stated thus by Mr. *Hukm Chand* in his *Res Judicata* (1894) at p. 759 (s. 296):—

"Under a principle analogous to that of *res judicata*, a decision in a prior stage of a civil suit or other proceeding in regard to any point, is held to be a bar to a fresh decision on that point in all the subsequent stages of that suit or proceeding." This has been especially applied to execution proceedings.

"A decision at one stage of execution proceedings cannot be questioned at a later stage of the proceedings not because it is *res judicata* under section 13 C. P. C., 1882, but upon general principles of law, for if it were not binding, there would be no end to litigation":—(1881) 8 Cal., 51; (1883) 6 All., 269; (1884) 7 All., 102; (1909) 14 C. W. N., 114.

III. THE AUTHORITY OF THIS CASE—

This case is still an authority as illustrating the cases to which the above principle does not apply:—

(1881) 6 Bom., 54; (1893) 15 All., 84 F. B.; (1909) 14 C. W. N., 114.

The rule understood to be laid down by this case has been stated thus:—

When an execution case is struck off the file or dismissed upon a ground other than a distinct finding that the decree is incapable of execution, or that the decree-holder's right is barred by limitation, or by any other law, or on some ground touching the merits, its dismissal whether termed as dismissal for default or as struck off the file, does not operate to bar a fresh application for execution:—(1893) 15 All., 84 F. B.

affirm the doctrine that a decision at one stage of execution proceedings cannot be questioned at a later stage of the proceedings, not because it is *res judicata* under sec. 13, C. P. C., but upon general principles of law, for if it were not binding there would be no end to litigation. We are, therefore, not prepared to interpret the decision of the Judicial Committee in *The Delhi and London Bank, Ltd. v. Orchard*, 3 Cal., 47, as laying down any general principle of law inconsistent with the principle enunciated in the three subsequent decisions to which reference has been made, and this view we may add has been taken by a Full Bench of the Allahabad High Court in the case of *Dhonkal Singh v. Phakkar Singh*, (1893) 15 All., 84 at p. 98.]

IV. ILLUSTRATIONS—**I. Bar to subsequent proceedings—**

- (a) 1. That application was not time-barred :—(1881) 8 Cal., 51 : 8 I. A., 128; 13 All., 564.
2. That application is time-barred :—(1882) 9 Cal., 65 ; (1881) 6 Bom., 54.
- (b) 1. Liability to attachment and sale of family property :—(1891) 15 Mad., 403.
2. Freedom from attachment :—(1886) P. R. No. 4.
- (c) Construction that decree had awarded future means profits :—(1883) 6 All., 269 : 11 I. A., 37 reversing (1880) 3 All., 141.
- (d) Construction that under the decree interest was payable :—(1884) 7 All., 102 : 11 I.A. 181.

II. No bar to subsequent proceedings—

- (a) Dismissal for non-appearance of parties :—(1909) 14 C. W. N., 114 ; (1893) 15 All., 84 F. B.
 - (b) Dismissal of application which contained alternative prayer to execute two instalments on applicant's expressing his unwillingness :—(1908) 32 Bom., 296.
 - (c) Notice calling upon the respondent to give up possession (in a case of restitution on reversal of decree) :—(1880) 6 Cal., 203.
 - (d) Restoration of application for execution dismissed for default :—(1893) 18 Bom., 429.
 - (e) Where the objection raised to execution was raised not in the character of judgment-debtor but in quite another and independent character which should have been adjudicated on under C. P. C., 1882, s. 331 :—(1889) 17 Cal., 57.
- See also (1900) 28 Cal., 122 ; (1905) 10 C. W. N., 209.

V. OTHER CASES WHERE THE PRINCIPLE HAS NOT BEEN APPLIED—

- (a) "An order *prima facie* only of an executive character could not possibly have the effect of *res judicata* unless the judgment-debtor being called on to dispute, if he wished or if he could, a certain proposition of right and consequential demand of relief or action by the judgment-creditor, had then either failed in his contention to the contrary, or, at any rate, allowed the judgment to go by default" :—*Per* WEST, J., in (1887) 11 Bom., 537.

The same principle is applicable to proceedings in appeal :—(1880) 12 All., 578, See also 6 C.L.R., 127.

- (b) "The doctrine of *res judicata* does not apply when the decree with regard to which a question arises is really different from that with reference to which it had arisen before, as the matter in issue in the two cases will be different" :—*Hukm Chand*.

1. A decree being for the payment of a sum annually for maintenance, dismissal of an application for one year's maintenance no bar to a subsequent application for the amount due under the decree in respect of another year :—(1894) 18 Mad., 482.
2. A decree confirmed on appeal is also deemed to be different from what it was before confirmation :—(1893) 18 Bom., 203 ; (1894) 19 Bom., 258.

B.—INTERPRETATION OF STATUTES.**I. CONSTRUCTION OF THE LIMITATION ACT AGAINST LITERAL SENSE—**

Partition suit, Limitation Act, 1871, Arts. 127 and 143 :—(1883) 7 Bom., 297.

II. RETRO-ACTIVITY OF STATUTES AFFECTING PROCEDURE—

- (a) Law of limitation applicable to execution proceedings is the law at the time and not that at the institution of the suit :—(1883) 7 Bom., 459.
- (b) The Legislature, while possessing the power to divest existing rights, is not to be understood as intending to exercise that power retrospectively to any greater extent than the express terms of, or necessary implication from, its language requires :—(1881) 5 Bom., 653.

- (1) Priority of registered instruments :—(1881) 5 Bom., 653.
- (2) Imprisonment for debt :—(1877) 2 Bom., 145.
- (3) Application to make legal representative defendant :—(1881) 5 Bom., 26.

III. THE MEANING OF "MAY"—

"There is no doubt that in some cases the word '*must*' or the word '*shall*' may be substituted for the word '*may*,' but that can be done only for the purpose of giving effect to the intention of the Legislature".—3 Cal., 57.

The meaning of such words as "*may*" and "*shall be lawful*" is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential and never (in themselves) significant of any obligation".—*Per* Lord Selborne in *Julius v. Lord Bishop of Oxford* (1880) 5 A. C., 214.

"The words '*it shall be lawful*' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so. And the words, '*it shall be lawful*' being according to their natural meaning permissive and enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to show in the circumstances of the case something which according to the principles I have mentioned, creates the obligation."—*Per* Lord Chancellor Cairns in *ibid*.

I do not think the words, '*it shall be lawful*' are in themselves ambiguous at all. They are apt words to express that a power is given; and as *prima facie* the donee of a power may either exercise it or leave it unused, it is not inaccurate to say that, *prima facie*, they are equivalent to saying that the donee may do it; but if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf. Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it."—*Per* Lord Blackburn in *ibid*.

Statutes which authorise persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they '*may*' or '*shall if they think fit*' or '*shall have power*' or that '*it shall be lawful*' for them to do such acts, a statute appears to use the language of mere permission but it has been so often decided as to have become an axiom that in such cases, such expressions may have—to say the least—a compulsory force, and so would seem to be modified by judicial exposition. On the other hand, in some cases, the authorised person is invested with a discretion, and then those expressions seem divested of that compulsory force :—Maxwell, Interpretation of Statutes (4th ed.), p. 360.

See also *per* Cockburn, C. J., in *The Queen v. Bishop of Oxford* (1879) 4 Q. B. D. 245 at 258, 259.

See the following cases where the natural meaning was adopted :—21 Cal., 832; 17 Cal., 329; 15 Bom., 216; 22 Bom., 384; 7 All., 879; and the following cases where an obligatory meaning was given :—4 All., 515; 13 Bom., 37.]

[3 Cal. 58]

IN THE INSOLVENT COURT.

The 21st and 24th August, 1877.

* PRESENT :

MR. JUSTICE KENNEDY.

*In re Murray, an Insolvent.**Ex parte Dwarkanath Mitter.**Insolvency—Order and disposition—Insolvent Act—11 and 12**Vict., c. 21, s. 24*—Goods pledged by insolvent and re-**delivered to him on commission sale.*

M, who carried on the business of a watch and clock-maker in Calcutta, borrowed from *DM* Rs. 6,000, for which he gave a promissory note, and, as collateral security for the payment of which sum, he pledged certain articles consisting of watches, clocks &c., with *DM*. The articles remained [59] for some months in the custody of *DM*, who then re-delivered them to *M* for sale on commission, the proceeds to be applied in liquidation of the debt. *M* gave a receipt for the articles, and some of them were sold by *M* on those terms. On the 2nd of May 1877, *M* filed his petition in the Insolvent Court, and such of the articles as remained unsold came into the possession of the Official Assignee. On an application by *DM* claiming the articles and praying for an order directing the Official Assignee to return them, it was alleged that it was customary for European jewellers in Calcutta to receive articles on commission sale, and it was contended that such receipt did not divest the true owners of possession. *Held*, the articles were rightly vested in the Official Assignee. On the facts, the insolvent was the true owner of the goods. *DM*'s interest ceased when he ceased to have possession of the goods; the receipt in this view only amounted to an agreement to sell and apply the proceeds in liquidation of the debt, and it could have been proved and a dividend recovered on it under the insolvency. Even if the interest of *DM* did not cease, the goods were in the order and disposition of the insolvent, there being nothing to show any publicity or notoriety in the change of possession of the goods. No amount of evidence would convince the Court that there was a custom of purchasing goods from a retail dealer and leaving them with him for commission sale.

Semble.—No such arrangement would be upheld as against the Official Assignee.

THIS was an application for an order that the Official Assignee should make over to the claimant, Dwarkanath Mitter, certain articles which had come into his possession as assignee of the estate of the insolvent.

The affidavit of Dwarkanath Mitter in support of the application stated that, on the 7th of December 1874, the insolvent, who carried on the business of a watch-maker and jeweller in Calcutta, borrowed from him Rs. 6,000, for which he gave a promissory note payable three months after date; and as

“11 & 12 Vict., sec. 24:—And be it enacted, that if any insolvent who shall file his petition for his discharge under this Act, or who shall be adjudged to have committed an act of insolvency, shall voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatever, to any creditor, or to any other person in trust for or to, or for the use, benefit and advantage of, any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, if made when in insolvent circumstances, and within two months before the date of the petition of such insolvent, or of the petition on which an adjudication of insolvency may have proceeded, as the case may be, or if made with the view or intention, by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his discharge from custody under this Act, or of committing an act of insolvency, shall be deemed and is hereby declared to be fraudulent and void as against the assignees of such insolvent.”

collateral security for the payment of which sum, he pledged certain articles consisting of clocks, chronometers, &c., with Dwarkanath Mitter; and those articles remained in his custody for three or four months; that Dwarkanath Mitter subsequently, at the insolvent's request, sent the said articles to the insolvent on commission sale, and obtained a receipt for them; that the insolvent was, according to the custom of the European jewellers in Calcutta, in the habit of receiving articles on commission sale, and some of them were so sold by the insolvent; that, on the 2nd of May 1877, the insolvent filed [60] his petition in the Insolvent Court, and the Official Assignee, among other things, took possession of the articles remaining unsold, and as he declined to make them over to the claimant without an order of Court, this application was made for an order directing their return.

Mr J. G. Aparcar for the claimant, as to the jurisdiction of the Court to entertain such an application as this, and that it was not necessary to bring a regular suit, referred to *Llewellyn v. O'Dowda* (Taylor's Rep., 169). He then contended that the result of the transaction between the claimant and the insolvent was not to effect such a transfer to the latter as would subject the goods to his order and disposition on his becoming insolvent. It was customary to leave articles with tradesmen, as for instance watch and clock makers, and carriage-makers; but the fact of their being so left did not have the effect of inducing persons to give greater credit to such tradesmen, and such articles were not liable, on the insolvency of the trader, to pass to the Official Assignee as being in the order and disposition of the insolvent. It is a well-known custom in Calcutta for jewellers to take goods as agents and sell them on commission sale. In such a case the goods would not be in the order and disposition of the insolvent; see *Priestley v. Pratt* (L. R., 2 Exch., 101). The insolvent was only an agent for sale, and there was no consent that he was to be the reputed owner: see *Smith v. Hudson* (34 L. J., Q. B., 145; per BLACKBURN, J., p. 151); *Load v. Green* (15 M. & W., 216); Griffiths on Bankruptcy, ed. of 1867, p. 463; Lindley on Partnership, 3rd ed., 1193; *Ex parte Brown* (3 Mon. and Ayr., 471 at p. 476); *Ex parte Gledstones* (3 Mon. Dea. and De Gex, 109). See also the class of cases referred to in Lindley on Partnership, 1158, where goods are entrusted for a particular purpose to a person who subsequently becomes insolvent; *Ex parte Waring* (19 Ves., 345); *Ex parte Frere* (Mon. & McAr., 263).

Mr. Piffard for the Official Assignee submitted that there was nothing to show that the goods passed actually into the possession of the claimant. [Mr. Aparcar.—That was I thought [61] admitted.] The desire and intention of the parties was that the goods should be sold as those of the insolvent. They were in the order and disposition of the insolvent, and are rightly in the hands of the Official Assignee.

Cur. adv. vult.

Kennedy, J.—In this case I have no difficulty in determining that the Official Assignee ought not to make over the goods to the applicant, and to direct that he should defend any suit that may be brought against him. I am not so sure that the strongest ground of the assignee's claim is the reputed ownership clause, because so far as I can judge, on the facts, the insolvent was not only the reputed but the real owner. The allegation is, that the goods were pledged to the applicant, who re-delivered them upon certain terms,—that is to say, that the insolvent should sell them; and, as I understood Mr. Aparcar to say, should apply the proceeds in liquidation of his debt. Now, as I take it, at common law, the interest of the pledgee of goods ceased by his ceasing to have possession of them at least by his own consent, and the Contract

Act does not seem to me to change this. It describes pledge as a bailment, and the natural inference is, that when the bailment comes to an end, the pledge does so likewise. We have then the goods in the hands of the insolvent discharged of the applicant's lien and subject only to the terms of the receipt, which, at the outside, only amounts to an agreement to sell the goods and apply the proceeds in liquidation of his debt; for breach of this the applicant could prove and recover a dividend.

Even if, however, the applicant were in a position to put his claim higher, and to rely on his having an interest in the goods, I do not think he can escape the operation of the order and disposition clause.* As Mr. Piffard pointed out, there is not anything to show in what way the applicant took possession of the goods; nothing to point out that publicity and notoriety of change of possession or of ownership which in *Lingard v. Messiter* (1 B. & C., 408) was held so important. It is true that a well-established course of trade as in *Ex parte Watkins* (L. R., 8 Ch., 520) will prevent the mere possession of goods inferring such reputation of ownership as to bring the goods within the statute, otherwise some most useful branches of commerce would become impossible, as for instance commission agency, leasing chattels, and possibly even pawnbroking. But the usage must be well established, *Ex parte Lovering* (L. R., 9 Ch., 624), and above all the transaction must be clearly *bona fide*.

Now, without going into the question suggested in *Ex parte Watkins* (L. R., 8 Ch., 520, at p. 531), which points out the difference of position of goods in a retail shop, I may say that no amount of evidence would convince me that there was a practice or custom of purchasing goods from a retail dealer and leaving them with him for commission sale; and I may further say that I do not think that any arrangement by which in substance and effect one creditor secures a preference as to the proceeds of certain goods over the others by an arrangement which leaves the goods in the manual power of the bankrupt, can ever be upheld. The most formally drawn conveyance, by which the goods were assigned to the creditor with a provision that they were to be returned to the debtor's shop, and then sold by him and the proceeds applied in liquidation of his debt, would fail. Why should this transaction be supported which only differs from that by the real meaning and intention not being clearly and explicitly stated—a difference which does not tend in its favour.

Any other doctrine would, in truth, sweep away the whole principle of the order and disposition clause. I have not been referred to any one single case in which the property in dispute was a personal chattel in the manual possession of the bankrupt, and the claimant claimed it as a mortgagee, where such claim was allowed. The cases of *Spackman v. Miller* (12 C. B., N. S., 659; S. C., 9 Jur., N. S., 50) and *Hornshy v. Miller* (1 E. & E., 192; S. C., 5 Jur., N. S., 938) are intended as complementary to each other. The one shows the result of an arrangement operating as a re-demise of mortgaged goods, and

* [11 & 12 Vict., c. 21, sec. 23:—And be it enacted, that if any such insolvent shall, at the time of filing his petition, or at the time of filing the petition on which an adjudication of insolvency shall be made by the consent and permission of the true owner thereof, have in his possession, order or disposition, any goods or chattels whereof such insolvent is reputed owner, or whereof he has taken upon him the sale, alteration, or disposition as owner the same shall be deemed to be the property of such insolvent, so as to become vested in the Official Assignee of the Court by the order made in pursuance of this Act: Provided that no assignment or transfer of any ship or vessel or any share thereof, made as a security for any debt either by way of mortgage or assignment, duly registered according to the provisions of any Act or Acts of Parliament now in force or hereafter to be passed for the registering of British vessels, shall be invalidated or affected by reason of such possession, order, or disposition of the same as aforesaid.]

thus preventing the pos-^[63]session during the time being with the consent of the true owner, and the other, when the possession is consistent with the mortgage deed. I believe it to be impossible and against the spirit of the Act by any conveyancing device to give a lien for money advanced upon goods previously the property of the bankrupt, and returned to or permitted to remain with him. The power of so borrowing money would be much more dangerous than that of raising money by sales at an undervalue equivalent to the amount which would be advanced on pledge. Such sales would, in many cases, be strong evidence of criminal intention in the original purchaser of the goods, or at any rate would lead to speedy discovery.

Application refused.

Attorney for Dwarkanath Mitter: Baboo P. C. Mookerjee.

Attorneys for the Official Assignee: Messrs. Orr and Harris.

NOTES.

[REPUTED OWNERSHIP OF THE INSOLVENT—

See *In re William Watson & Co., Ex parte Atkin Brothers* (1904) 2 K. B., 753, C. A. — “In our opinion, it is essential before a Court can hold that one man's goods are to be taken to pay another man's debts, because of the reputation of ownership of the bankrupt, that the goods should be held and dealt with by the bankrupt in such manner and under such circumstances that the reputation of ownership must arise It has been couched in various words in the successive Bankruptcy Statutes, but this principle runs through them all, and the statement of Lord REDESDALE in *Joy v. Campbell* (1 Sch. & Lef., 328; 9 R.R., 39) . . . that the true owner must have unconscientiously permitted the goods to remain in the order or disposition of the bankrupt justifies this statement. This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise.”

In the same case it was observed, “It is obvious that in deciding this question as to the consent of the true owner, one cannot leave out of consideration the true relation of the parties. The parties were not in fact vendors and purchasers. There is, as Sir George Jessel pointed out in *Ex parte Bright*, 10 Ch. D., 566, nothing to prevent a principal remunerating his agent by paying a commission depending upon the surplus which the agent can obtain over and above the price which will satisfy the principal; but of course, the sale must not, with the consent of the true owner, take place under circumstances from which customers generally will be entitled to presume that the goods may or may not be the property of the bankrupt.”

This was the case of a commission agency; and it was held on the facts that the reputed ownership did not arise. See also the explanation in the case of *Sharman v. Mason* (1899) 2 Q. B., 679.

See the case of *Punithavelu Mudaliar v. Bashyam Aiyangar* (1902) 25 Mad., 406.]

[3 Cal. 63]

FULL BENCH.

The 26th March, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE KEMP, MR. JUSTICE JACKSON, MR. JUSTICE MACPHERSON, MR. JUSTICE MARKBY, MR. JUSTICE PONTIFEX AND MR. JUSTICE AINSLIE.

The Empress
versus
Burah and Book Singh.*

[In the matter of the Petition of Burah and Book Singh.]

[—1 C. L. R. 161.]

*Jurisdiction of High Court—Act VI of 1835—Act XXII of 1869, s. 9—**24 & 25 Vict., c. 67, s. 22 ; c. 104, ss. 9, 11 and 13—3 & 4**Will. IV, c. 85—16 & 17 Vict., c. 95—17 & 18**Vict., c. 77—Delegation, Power of.*

By Act XXII of 1869, certain districts were removed from the jurisdiction of the High Court, and by s. 5 the administration of civil and criminal justice was vested in such officers as the Lieutenant-Governor of Bengal should appoint. By s. 9† the Lieutenant-Governor was empowered to extend all or any of the provisions of the Act to the Cossyah and Jynteeah Hills. By a notification in the *Calcutta Gazette* of 4th October 1871, the Lieutenant-Governor extended the provisions of the Act to the Cossyah and Jynteeah Hills, and directed that the Commissioner of Assam should [64] exercise the powers of the High Court in the civil and criminal cases triable in the Courts of that district. The two prisoners were tried for murder in April 1876, and were on conviction sentenced by the Chief Commissioner of Assam to transportation for life. On appeal by the prisoners to the High Court, *held*, by the majority of a Full Bench (GARTH, C.J., MACPHERSON and PONTIFEX, JJ., *dissenting*), that the High Court had jurisdiction to entertain the appeal, and such jurisdiction was not taken away by Act XXII of 1869.

Per Curiam.—The Governor-General in Council had power by legislation to remove the districts from the jurisdiction of the High Court.

Per Jackson, Ainslie and Markby, JJ. (KEMP, J., *concurring*).—The Governor-General in Council had no power to delegate his legislative functions to the Lieutenant-Governor of Bengal in the way he had done in Act XXII of 1869. The power of delegation cannot be considered as validated by any long course of practice, nor as sanctioned by the tacit recognition of Parliament : Act XXII of 1869 is therefore so far invalid.

Per Macpherson, J. (PONTIFEX, J., *concurring*).—Such delegation is nowhere expressly prohibited, and does not bring the Act under any of the restrictive provisions of the Indian Councils' Act.

Per Garth, C.J., and Macpherson, J. (PONTIFEX, J., *concurring*).—The power of delegation now questioned had been exercised in many cases for a series of years previous to the

* Criminal Appeal No. 482 of 1876, against an order of Col. Bivar, Deputy Commissioner of Shillong, dated the 24th of April 1876.

† [Sec. 9 :—The said Lieutenant-Governor may, from time to time, by notification in the *Calcutta Gazette*, extend, *mutatis mutandis*, all or any of the provisions contained in the other sections of this Act to the Jintia Hills, the Naga Hills, and to such portion of the Khasi Hills as for the time being forms part of British India.

Every such notification shall specify the boundaries of the territories to which it applies.]

passing of the Indian Councils' Act, and that Act (the framers of which must have been cognizant of such course of practice) must be taken as impliedly approving of and sanctioning such practice, which it would otherwise have declared illegal.

*Per GARTH, C. J., JACKSON, MARKBY and AINSLIE, JJ. (KEMP, J., concurring).—*The High Court has power to question the validity of the legislative acts of the Governor-General in Council.

*Per Macpherson, J. (PONTIFEX, J., concurring).—*The High Court has no such power if satisfied that the act is not within any of the prohibitions of the Indian Councils' Act.

Two prisoners, Burah and Book Singh, were convicted of murder by the Deputy Commissioner of the Cossyah and Jynteeah Hills, and were sentenced to death. On the 23rd of April 1876, the sentence was commuted to transportation for life by the Chief Commissioner of Assam. On the 9th of July 1876, the officer in charge of the Kamrup jail forwarded to the High Court a petition of appeal from the prisoners. The appeal came on for hearing before MARKBY and AINSLIE, JJ., who referred to a full Bench the question whether the High Court had any power to entertain these applications.

[63] On the 12th of September 1874, the reference came on for hearing, and was argued by the Legal Remembrancer (Mr. H. Bell) on behalf of the Bengal Government, before Sir R. GARTH, C. J., KEMP, MACPHERSON, MARKBY and AINSLIE, JJ.

On the 2nd of February, at the instance of the Government of India and before the judgment was delivered, the point was re-argued.

The Advocate-General, Officiating (Mr. Paul), the Standing Counsel (Mr. Kennedy), and the Legal Remembrancer (Mr. H. Bell) for the Crown.

Mr. Phillips for the Prisoners.

The Advocate-General.—The validity of s. 9, Act XXII of 1869, is first questioned. There is a further question as to whether the Governor-General in Council can affect the jurisdiction of the High Court. The latter point is concluded by *Queen v. Meares* (14 B. L. R., 106). [GARTH, C. J.—Confine yourself to the invalidity of s. 9. Mr. Phillips.—*Queen v. Meares* (14 B. L. R., 106) does not cover the point raised here. That case only decides as to the power to subject British subjects to another Court. MARKBY, J.—It does not go so far as to say that the Governor-General in Council may entirely abolish the jurisdiction of the High Court.] 3 & 4 Will. IV., c. 85, s. 43, gives full power to legislate concerning anything except certain matters specified; s. 51 enacts that nothing in the Act shall affect the right of Parliament to legislate for India, and expressly reserves to Parliament control over the acts and proceedings of the Governor-General in Council, and the better to enable that body to exercise the powers reserved, requires that all laws and regulations made by the Governor-General in Council shall be laid before Parliament. There, therefore, exists a complete check over improper legislation. The administrative power to establish Courts has existed unquestioned with the exception of a dictum thrown out by Sir L. PEEL in the case of *Biddle v. Tariney Churn Banerjee* (1 Tay. & Bell., 391; see p. 404), the broad proposition of which is open to question. Many Acts have been passed which it is provided should come into operation on the notification of some person to whom discretion is given to bring [66] the Acts into force. [MACPHERSON, J.—That is a different point.] If it be admitted that the Governor-General in Council has power to depute authority to the Lieutenant-Governor to declare when certain Acts shall come into force, then the High Court has no jurisdiction to entertain this appeal. The Governor-General in Council can say that an Act shall come into force on the

happening of a certain contingency, say the death of a person. [JACKSON, J.—Suppose it be when the province shall have arrived at a certain stage of civilization?] Then the word of the Lieutenant-Governor can be taken. If there be no objection to the principle that an Act shall come into force on a date to be named by the Lieutenant-Governor, then s. 9 would have validity with reference to s. 4. By Act VIII of 1859, the Local Government had power assigned to it to extend the provisions of that Act to any place. The intention of the Government is, that laws and regulations applicable in certain places, being inapplicable in other districts, shall not there have any force until those districts are prepared to receive them. This has actually been done with respect to the Garo Hills. [GARTH, C. J.—I do not agree with you. The Governor-General in Council had not come to any conclusion as to the Jynteah Hills, and had delegated his authority to the Lieutenant-Governor to come to a decision.] The argument now is as to the intention of the Legislature. The Governor-General in Council has the power to say that an Act shall come into operation when the Local Government shall direct—see Act VIII of 1859, ss. 387, 388. The High Court has not the power to try whether or not that power has been rightly exercised—see Sedgwick on Statutory and Constitutional Law, p. 137. The American books refer to Legislature with far more limited power than that of the Indian Legislature. In the *Bhownuggur* case, *Damodar Gordhan v. Deoram Kanji* (I.L.R., 1 Bom., 367; s.c., L.R., 3 I.A., 102) their Lordships of the Privy Council would not allow the political matters (the policy of a measure) to be argued. The High Court has no concern with political questions. The question whether or not a Court has been rightly [67] reconstructed cannot arise before the High Court. The jurisdiction having been once taken away, ceases to exist. By 16 & 17 Vict., c. 95, ss. 19 and 29, and 24 & 25 Vict., c. 67, s. 22, two things are provided,—viz., the power to legislate and that the laws should be made in Council. [GARTH, C. J.—If the power given is to make laws in Council only, where would be the use of that restriction if the Governor-General is at liberty to say that any one in Bengal may have the same power?] The Governor-General in Council could do so. But the question does not arise, as it is not to any one to whom he delegates the authority. Although there is no restriction placed on the subject of legislation, there is no restriction as to the mode of making the legislation operative. If Parliament considers it convenient to delegate authority to administrative officers to carry out measures, why may not the Governor-General in Council do so? There is the same authority with respect to unexcepted subjects as there is in Parliament. [GARTH, C. J.—His power being derivative, the Governor-General in Council has not as much power as Parliament.] Discretion is given to the Lord-Lieutenant of Ireland. Is it a bad law to say that a person of competent capacity shall decide a certain point? Is it a bad law to appoint a law officer of the Crown an arbitrator, when there are Common Law Courts and the House of Lords to which the suitor could go? [MARKEY, J.—Power deputed to the Lord-Lieutenant might be said to be unconstitutional delegation, but no Court of law could question it. The more precise question would arise, whether the delegation was *ultra vires*? The difference is that which exists between a sovereign Legislature and a derivative Legislature.] The question might be as to the subject, not as to the mode of legislation. [GARTH, C. J.—But can the powers given to the Governor-General in Council alone be transferred?] The powers are not transferred; all that there is done is that provision is made how those powers can be brought into force. [GARTH, C. J.—If the Lieutenant-Governor were not to notify any date, there would be no law, criminal or civil.] The word 'may' here does not leave option to

the Lieutenant-Governor. By the wording, the Lieutenant-Governor is bound [68] to extend the Act, but within an unspecified time. Having provided law on a certain subject, the Act gave power to the Lieutenant-Governor to say when it was to come into force. There is no limitation as to ministerial duties. The time when a tax shall be imposed is not defined in an Act, nor the mode of operation, nor what kind of a horse, or what kind of a cart, shall be taxed. So long as the Governor-General in Council keeps within the subjects concerning which he is allowed to legislate, there can be a valid delegation of authority. A sub-agent can bind the principal; *Story on Agency*, 14. *Rossiter v. Trafalgar Life Assurance Association* (27 Beav., 377), *Quebec and Richmond Railway Company v. Quinn* (12 Moore's P. C., 232). Matters wrongly decided and illogically stated will be maintained if the contrary would disturb a settled state of affairs—*Dumpro's case* (1 Smith's L. C., 41., 7th ed.).

There are a number of Acts passed since 1848 under which there has been a delegation of authority. Among them are the following: Acts XXII of 1855; XIII of 1859; XXV of 1861; VI, XIV and XIX of 1863; XXII of 1864; XIV of 1865; XX of 1866; XXIII of 1867. See Maxwell on Statutes, p. 166,

The Standing Counsel.—Act XIV of 1874 repeals Act XXII of 1869. [MACPHERSON, J.—That Act is of no effect, see s. 3. Mr. Phillips.—If the Act is repealed, there is no further necessity to argue.] 24 & 25 Vict., c. 67 (the Indian Councils' Act), conferred powers on the entirely new Legislatures of Madras and Bombay. When this Act was passed, former restrictions were got rid of. 16 & 17 Vict., c. 95, then in force, conferred on the Legislature, after making provision for the appointment of certain Additional Members, powers of making laws and regulations. 24 & 25 Vict., c. 67, shows a desire to extend the powers of the Legislature. That which it can, and that which it cannot do, are strictly defined. The fact that powers given are expressly limited shows that they would otherwise be unlimited. When Parliament passed this Act, a long series of Acts passed by the Governor-General was in existence. The long list [69] of enactments bears very strongly on the construction of this Act. Parliament did not appear to take away the power which had been, rightly or wrongly, professedly exercised. The presumption is that Parliament was cognizant of all concerning which it legislated. There is then that which amounts to legislative sanction. The Governor-General in Council may not have power to give away legislative powers, but it has power to make a law. The law is to make the Lieutenant-Governor do a certain act. He is by statute an executive officer, and can be compelled so to act. [GARTH, C. J.—Then what becomes of the discretion of the Lieutenant-Governor?] If there is an outbreak, say on the Punjab frontier, the Governor-General has power to suspend all laws and leave districts at the will of a General. True, that would be in a case of emergency, but can a Court of law examine into motive? Unless a construction can bear the strain both ways, it is not the true one. Parliament, in the regular course of its legislation, confers the duty on others to make bye-laws, or to fix a time at which a particular Act shall come into force. Parliament has never passed a single word of censure on the Indian Legislature for having adopted the same practice. By 32 & 33 Vict., c. 115, the Home Secretary in England was entrusted with the power to license hackney carriages, and to fix a scale of fares, a power which it has been decided was validly conferred: *Bocking v. Jones* (L. R., 6 C. P., 29, at p. 35). The Legislature is not to contemplate the remote contingency that power may be conferred on an incapable person, but must assume that public officers will do their duty. Take a municipality as an illustration: there are certain acts which would be accounted offences if committed within the boundaries, but not so if without the

boundaries. If a general municipal law were passed, and it was provided it should only apply to certain places mentioned in a schedule to that Act, could not a provision be made that the Act be afterwards extended to other places as they became ready for it? Acts of this kind were passed during the mutiny while Sir B. PEACOCK was legal Member of Council: see Acts VIII of 1857 and XIV of 1857. [JACKSON, J.—The mutiny was an emergency.] No [70] Act is passed unless there is a necessity for it, and these were passed very shortly before the passing of the Indian Councils Act; see Acts XXVIII of 1857; VI and XX of 1858; XX of 1859; 19 & 20 Vict., c. 36. The Peace Preservation (Ireland) Act contained certain sections of 11 & 12 Vict., c. 2, giving power to the Lord-Lieutenant to proclaim certain districts. The Act continued in force until 1870, when another Act was passed. The matter was frequently agitated, and the points well known to the Legislature. If there is injustice done under an Act of the Legislature, indemnity might be afforded. Necessity or emergency for a measure cannot come into question. It is a question of state to be determined by the Legislative Council alone. If the High Court can question the policy of an Act of the Legislature, then it can be questioned by any Munsif's Court.

The High Court sits under a power conferred on Her Majesty by Parliament to establish it; there is a delegation of power when Courts of any description change or modify the practice of pleading. Under what authority are the rules issued? There is no authority contained in the Charter authorizing Judges to issue rules. [GARTH, C. J.—There must be power given to Judges to make rules to carry on work and for new Courts.] But a new Court must follow the common law in its procedure. In Equity Courts in England it is considered necessary to give statutory power. [GARTH, C. J.—The old system of pleading had become the law of the land.] The practice of this Court as of the Queen's Bench is a law of the Court. When the Legislature has once commanded, the question of emergency cannot be questioned: *Phillips v. Eyre* (L. R., 4 Q. B., 225; s. c. on appeal, 6 *id.*, 1). When war is imminent, the Government is charged by the very necessities of the case to take measures. The executive is charged with extended powers. No responsibility is taken away if a minister act in a manner which, under ordinary circumstances, would be illegal; he at once becomes responsible to the tribunal of the country. The authority given to the Lieutenant-Governor was not delegated authority, but [71] derivative. By Act XXXVII of 1855, "The Sonthal Pergunnahs Act," the jurisdiction of the Sudder Court was taken away. The following case and Acts were also quoted. *Levenson v. Queen* (L. R., 4 Q. B., 394); and Acts XIV, XXII, and XXIII of 1836; XVI and XXVI of 1837, as to the course of practice.

Mr. *Phillips* for the Prisoners.—The questions to be argued are: (1) Has the power been validly deputed to the Lieutenant-Governor, *i.e.*, is the Lieutenant-Governor validly authorized? (2) Has the Governor-General in Council the power which he here delegates? Unless the Lieutenant-Governor has been authorized by the Imperial Legislature, he has not been validly authorized. Parliament has shown, by giving express powers, not only that the power of the Governor-General in Council is strictly limited by the Acts, but that the power of delegation claimed had not been given; see 24 & 25 Vict., c. 67; s. 6 (3 & 4 Will. IV, c. 85, s. 70) 8, 17, 18, 23; 24 & 25 Vict., c. 104, s. 18; 28 Vict., c. 15, s. 5. Parliament has not created a Legislature like itself; it has only given certain persons a certain limited power of making laws. Even a Colonial Legislature like itself has not all its powers as incident, and in fact has only the powers conferred: *Doyle v. Falconer* (L. R., I. P. C., 328); *Fenton v.*

Hampton (11 Moore's P. C., 347). [GARTH, C.J.—The cases decide that inherent privileges were not vested, but assume supreme legislative power.] True, but of a limited kind. It is not contended that within limits it has not supreme power. It lies on the Crown to show what power is vested in the legislative assembly. The contention on the part of the Crown is that since the English Parliament delegates authority, the Governor-General in Council has the same power; then the Lieutenant-Governor also will have power to delegate the authority given to him to another. Section 6, Indian Councils' Act, gives certain powers; it shows that the Council had not those powers and that a section giving them was thought to be necessary, and this expressly excepts the making of laws and regulations. The power in a Legislature with affirmative powers is not beyond [72] that which is expressly given; as an incident, the power to the Lieutenant-Governor to extend an Act is not included. A power derived from the Imperial Parliament is limited by the Act giving power. Therefore, unless some authority be shown, the Legislative Council has not the power claimed by it. The Lieutenant-Governor has not the power to call a dead Act into life. The Lieutenant-Governor is deputed to exercise legislative discretion to the extent of seeing whether or not this law, or which portion of it, should be applied. The wisdom or propriety of a measure is not questioned, but the authority of the Governor-General in Council: the English Parliament itself was not at one time supreme: Sedgwick on Statutory and Constitutional Law, p. 123. It is the Governor-General in Council who has authority to make laws and regulations, but here it is not the Governor-General in Council who has been legislating. It is the Lieutenant-Governor who has exercised legislative functions. Ministerial functions can be distinguished from legislative functions, which consist in the legislative consideration of what is necessary. The Governor-General in Council has deprived himself of this power, and has conferred it on the Lieutenant-Governor. Jurisdiction existed in the Supreme Court which was transferred to the High Court. Then by an order of the Lieutenant-Governor the whole jurisdiction of this Court may be withdrawn, leaving the learned Judges drawing their salaries, but as nonentities. There are consequences as serious in holding this to be a valid Act as there may be in holding it to be invalid. [PONTIFEX, J.—Jurisdiction was given by the High Court Charter; the Governor-General could not take away that jurisdiction.] The greater his power, the more necessary to secure the exercise of it by himself. The High Court, which was created by the same power, and which may determine whether he has validly abolished all law, cannot be abolished by him. Absence of express condemnation cannot be construed as sanction by Parliament of an illegal cause. The Parliament is presumed to have before it only their own statutes in *pari materia*—Maxwell on Statutes, pp. 27 and 28; but not all the Indian Acts which show an excess of power. No case goes as far as is required. As to [73] *Leveson v. Queen* (L. R. 4 Q. B., 394) see the report, p. 404. This would give greater force to the user than to a preamble: *Market Harboro Trustees v. The Kettaring Highway Board* (L. R., 8 Q. B., 308), *Wilson v. Knubley* (7 East, 135). This Act, XXII of 1869, cannot be upheld at all, unless the whole is valid. The Civil Procedure Code was hastened as to its operation with respect to provisions which were to have come into force. The general municipal enactment would merely bring more persons into the community, the law existing all the while.

The *Standing Counsel* in reply.—The Governor-General in Council can take away the jurisdiction of the High Court, and can create a jurisdiction identical to that taken away. [MARKBY, J.—Then the High Court of Madras

might have conferred on it jurisdiction over the Jynteeah and Cossyah Hills.] It is prohibited by the provisions of an Act which it cannot touch by express provision; see 24 & 25 Vict., c. 67, s. 23. [GARTH, C.J.—Some members of the Legislature might think it necessary to constitute new Courts more subordinate to the Legislature than they are now.] No great or high power can be conferred without opportunity of abuse, but the check would be rapid enough to stop injury. If the Legislature of a colony being a supreme Legislature thought fit to pass a law enabling to commit for contempt, it could do so. [Mr. Evans as *amicus curiæ* referred to *Rutter v. Chapman* (8 M. & W., 1) and *Grant on Corporations* p. 80.]

Cour. adv. vult.

The following **Judgments** were delivered by the Full Bench :—

Markby, J.—Two persons, Burah and Book Sing, have been convicted on a charge of murder by the Deputy Commissioner of the Cossyah and Jynteeah Hills and sentenced to death. The sentence was commuted to transportation for life by the Chief Commissioner of Assam on the 23rd April 1876.

On the 9th July 1876 the officer in charge of the Kamrup jail forwarded to this Court petitions of appeal from these prisoners, unaccompanied by copies of the judgment.

[74] The first question which arises in the case is, whether the High Court has any power to entertain these applications; and this question is one of so much importance that it has been referred to a Full Bench, and has been on two occasions very fully argued.

The Cossyah and Jynteeah Hills comprise a considerable tract of country on the eastern frontier of Bengal, and they contain a population which, in 1862, was estimated at 120,000. The Jynteeah Hills were formerly under the independent Rajah of Jynteeah. The Cossyah Hills were divided into a number of smaller districts under different rulers. Of the twenty-five Cossyah states, five used commonly to be called "semi-independent," and the remaining twenty "dependent." It is not very clear how this division was arrived at, and it probably has never been accurately ascertained what part of the Cossyah Hills is, and what is not, British territory. But by far the greater portion has long been subject to our Government, and is therefore (21 & 22 Vict., c. 106, s. 1) included in British India.

Prior to 1854, there was a Political Agent of the Cossyah Hills, who exercised the usual powers of a Political Agent with regard to so much of the territory as was under chiefs who were treated as independent; but he also held general powers for the administration of justice in those portions of the territory which had ceased to be independent. Probably, in practice, the difference was of no very great importance, the chiefs being all too insignificant to assert any independent authority. This officer was in command of the Sylhet Light Infantry, and he acted also as the Political Agent in respect of Jynteeah, which, up to the period of the Burmese War in 1824, was independent. During that war the Jynteeah territory was taken under the protection of the British, and the Rajah acknowledged his allegiance. In 1835 the reigning Rajah was deposed for an act of cruelty and his territory was annexed. From the date of this annexation the Political Agent of the Cossyah Hills seems to have exercised the same functions with regard to Jynteeah, as he had hitherto exercised in respect of the annexed portions of the Cossyah Hills. But he still continued [75] to bear the somewhat inappropriate designation of Political Agent of the Cossyah Hills.

In the year 1835, an Act was passed (Act VI of 1835), by which the functionaries in political charge of the "Cossyah Hills" were placed under the control and superintendence, in criminal matters, of the Court of Nizamut Adawlut. From the records of this Court it appears that, on the 16th June 1835, the Court informed the Government of Bengal that the Political Agent of the Cossyah Hills had submitted returns of criminal business for Jynteeah also. The Government replied that the Jynteeah territory was taken possession of on the 15th of March, whilst the Act was passed on the 13th, and that if the Court thought that this did not constitute any objection to their doing so, the Government saw no objection to the Court exercising jurisdiction in Jynteeah, which was accordingly authorized. The Court replied accepting the jurisdiction in Jynteeah from the date of the Act. The arrangement of the duties of the Political Agent of the Cossyah Hills remained as above stated until 1854, when an order was issued by the Governor of Bengal (1st March 1854) to the Commissioner of Assam, communicating his determination to separate the civil functions of the Political Agent in the Cossyah Hills from the command of the Sylhet Light Infantry, and to vest the former in an Assistant Commissioner, subordinate to the Commissioner of Assam, "precisely on the same footing as the other principal assistants in the Province of Assam." The order also intimates that the officer to be appointed would be called "Principal Assistant in charge of the Cossyah and Jynteeah Hills." From that time the Cossyah and Jynteeah Hills, though never formally annexed to the district of Assam, seem to have been treated as part of Assam. All the criminal appeals which in Regulation Provinces would go to the Sessions Judge, went to the Deputy Commissioner of Assam, and were apparently disposed of by him in the same manner as any other criminal appeals in Assam.

In the year 1861, the jurisdiction which had been exercised by the Nizamut Adawlut was transferred to the High Court upon its creation by Her Majesty's Letters Patent. The Code [76] of Criminal Procedure was extended to Assam by a notification of the Lieutenant-Governor of Bengal published in the *Gazette* of 16th November 1862, and though never expressly extended (as far as I have discovered) to the Cossyah and Jynteeah Hills, it was considered to be in force in that district without any further notification; and this it would be, if the view that this district was made a part of Assam were correct.

In the year 1866, the Assistant Commissioner convicted a prisoner, named U Don Dolloi, of an offence under s. 504 of the Indian Penal Code, and bound him over to keep the peace for one year after his release. On appeal to the Deputy Commissioner of the Cossyah and Jynteeah Hills, that officer confirmed the order; but this Court, upon a petition presented by the accused, altered the period for which the party was bound over.

In the year 1869, the Deputy Commissioner of the Cossyah and Jynteeah Hills referred a sentence of death for confirmation by this Court under s. 380 of the Code of Criminal Procedure. The sentence was confirmed, and the prisoner was hanged.

Under these circumstances, there can be no doubt that this Court had at one time jurisdiction in the Cossyah and Jynteeah Hills. The only question therefore is, whether this jurisdiction has been taken away, and this renders it necessary to consider the recent legislation with regard to these districts.

By s. 4 of Act XXII of 1869 (which is called the "Garo Hills Act") the Garo Hills are removed "from the jurisdiction of the Courts of civil and criminal judicature, and from the control of the offices of revenue constituted by the Regulations of the Bengal Code, and the Acts passed by the Legislature

now or heretofore established in British India, as well as from the law prescribed for the said Courts and offices by the Regulations and Acts aforesaid"; and it is provided that "no Act hereafter passed by the Council of the Governor-General for making Laws and Regulations shall be deemed to extend to any part of the said territory unless the same be specially named therein." By s. 5 "the administration of civil and criminal justice and the superintendence of the settlement and realization of the public revenue and of all matters [77] relating to rent within the said territory, are vested in such officers as the said Lieutenant-Governor may for the purpose of tribunals of first instance, or of reference and appeal, from time to time appoint"; and the officers so appointed are, in the administration of justice, to "be subject to the direction and control of the said Lieutenant-Governor, and be guided by such instructions as he may from time to time issue."

By s. 9 the Lieutenant-Governor is empowered to extend all or any of the provisions of this Act to the Cossyah and Jynteeah Hills.

By a notification in the *Calcutta Gazette* of 14th October 1871, the Lieutenant-Governor did extend the provisions of this Act to the Cossyah and Jynteeah Hills; and he also directed that the Commissioner of Assam should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of that district. On the 30th July 1872, rules were issued by the Lieutenant-Governor, under ss. 5 and 9 of Act XXII of 1869, for the administration of justice and police in the Cossyah and Jynteeah Hills, in which no allusion is made to the High Court.

Shortly after this, another power, which had been conferred by Parliament upon the Governor-General in Council, was called into action with reference to these districts. By proclamation of the 6th February 1874 (see *Gazette of India* of 7th February), in exercise of the powers conferred by s. 3 of Statute 17 and 18 Vict., c. 77, the Governor-General in Council took some districts (now forming 'Assam' and including the Cossyah and Jynteeah Hills) under his immediate authority and management, which districts were till then under the Lieutenant-Governor of Bengal. On the same day, by another proclamation, the Governor-General in Council constituted Assam a Chief Commissionership.

By Act VIII of 1874, after a recital that the Cossyah and Jynteeah Hills had been taken under the direct management of the Governor-General in Council and had been made part of the Chief Commissionership of Assam, all the powers then vested in the Lieutenant-Governor of Bengal were (s. 1) transferred to the Governor-General in Council, and the [78] Governor-General in Council was empowered (s. 2) to delegate to the Chief Commissioner all or any of the said powers, or to withdraw the said powers.

But Act XIV of 1874, in which the Cossyah and Jynteeah Hills are specially named, Act XXII of 1869 is repealed, and the Local Government is empowered (s. 6) to appoint officers to administer criminal and civil justice and to regulate the procedure of officers so appointed, but not so as to restrict the operation of any enactment for the time being in force in any of the said districts. And it is also declared (s. 7) that all rules theretofore prescribed for the guidance of officers "for all or any of the purposes mentioned in s. 6 and in force at the time of the passing of this Act shall continue to be in force unless and until otherwise directed." This Act, however, has not yet come into force in those hills, because as yet no notification under s. 3 has been published.

By notification of the 16th April 1874 (see *Gazette of India*, April 18th), the Governor-General in Council, under s. 5 of Act XXII of 1869, made certain

alterations in the rules for the Cossyah and Jynteeah Hills published under the notification of July 30th, 1872, by the Lieutenant-Governor of Bengal, and republished the rules. In these rules no mention is made of the High Court.

It thus appears that the jurisdiction of the High Court was certainly in existence until the passing of Act XXII of 1869. The question then is, has this jurisdiction ceased by reason of that Act, or by reason of anything done by any person under that Act? For the prisoners it is contended (1) that the jurisdiction of the High Court as established by Parliament cannot be wholly abolished by any authority in this country whatsoever; (2) that if there be any authority which can abolish the jurisdiction of the High Court, it is only the Governor-General in Council exercising legislative powers at a meeting for the purpose of making laws and regulations who can do this; and that in this case the assumed abolition was not by the authority, but by the Lieutenant-Governor of Bengal acting under the powers given to him by Act XXII [79] of 1869, which powers, it is contended, were not validly conferred.

With regard to the first question, the jurisdiction of this Court in the Cossyah and Jynteeah Hills was a jurisdiction vested in the Nizamut Adawlut at the time of its abolition, and it thus falls within the 2nd clause of s. 9 of the 24 & 25 Vict., c. 104. It is, therefore, in my opinion, expressly made subject by that clause to the legislative powers of the Governor-General of India in Council, or (to use a phrase which is more convenient) to the Legislative Council of India.

I have given fully my reasons for this construction of the High Courts' Act in *In the matter of the Petition of Syed Feda Hossein* (I. L. R., 1 Cal., 431), to which reasons I still adhere, and in which I understand the other members of the Full Bench substantially concur.

It is necessary, therefore, to consider the second objection taken on behalf of the prisoner. This objection is met by the Crown in three different ways:—First it is said, that the Act of 1869 does itself actually take away the jurisdiction of this Court. Secondly, that even if it does not do so, it evinces a final determination of the legislative authority that this jurisdiction shall be taken away, and that it only leaves it to the Lieutenant-Governor to fix the exact date of the Act coming into operation; no discretion being vested in him as to whether the Act shall come into operation or not. Thirdly, that even if the Lieutenant-Governor be vested with a discretion to determine whether or no the jurisdiction of this Court shall be taken away, still there is nothing which renders such a delegation of authority illegal.

The first and second of the three propositions put forward on the part of the Crown depend upon what is the true construction of Act XXII of 1869. The Act is a very peculiar one. It recites that "it is expedient to remove the Garo Hills from the jurisdiction of the Civil, Criminal, and Revenue Courts and offices established under the General Regulations and Acts, and to provide for the administration [80] of justice and the collection of revenue in the said territory." The Act is to be called "The Garo Hills Act, 1869," and it is to come into operation "on such day as the Lieutenant-Governor of Bengal shall by notification in the *Calcutta Gazette* direct." Then by s. 3, "on and after such day," that is to say, when the Act comes into operation in the Garo Hills, Act VI of 1835, so far as it relates to the Cossyah Hills, is to be repealed. Then ss. 4 to 8 deal exclusively with the Garo Hills, and s. 9 gives the power already adverted to, to extend all or any of the provisions of the Act to the Jynteeah Hills, the Naga Hills, and to such portion of the Cossyah Hills as

for the time being forms part of British India. It is contended that s. 3, which relates to the repeal of Act VI of 1835, came into operation, so far as regards the Cossyah Hills, when the Lieutenant-Governor brought the Act into operation in the Garo Hills; that there was no discretion left as to bringing the Act into operation in the Garo Hills, and that by the repeal of Act VI of 1835 the jurisdiction of this Court, as created by that Act, was destroyed. Assuming, for the present, the correctness of the other parts of this argument, still, in my opinion, the last proposition is incorrect. When Act XXII of 1869 was passed, the jurisdiction of this Court in the Cossyah Hills in no wise depended upon Act VI of 1835. It depended upon the 24 & 25 Vict., c. 104, s. 9. Act VI of 1835, in so far as it conferred jurisdiction upon this Court, was wholly obsolete. Moreover, as already shown, the jurisdiction of the Nizamut Adawlut was, after some discussion, extended to both the Cossyah and Jynteeah Hills, and the jurisdiction of the High Court, which is co-extensive, has been exercised in both tracts accordingly. But s. 3 of Act XXII of 1869 is expressly confined to the Cossyah Hills. The result, therefore, of this construction of Act XXII of 1869 would be that, whilst it takes away our jurisdiction in the Cossyah Hills, it leaves it in the Jynteeah Hills. This is very improbable. Ever since the year 1835 both these tracts have been under one administration forming the district of one Deputy Commissioner. The reason [81] why the Legislature was desirous to get rid of the Act of 1835 at all events is not perhaps at first sight quite obvious. But it was, I believe, as follows :—As to that large portion of the Cossyah Hills which lies within British territory, the Act was, as I have said before, obsolete. As to any small portion of the Cossyah Hills, if there should be any, which might be considered as not within British territory, the Act, though in terms applicable thereto, could not be enforced. It was, therefore, an Act which it was proper to repeal so far as the Cossyah Hills were concerned, whether our jurisdiction remained or not. I am, therefore, clearly of opinion, notwithstanding the reference to the Cossyah Hills in s. 3 and the repeal of Act VI of 1835, that the Act of 1869 does not itself take away the jurisdiction of the High Court either in the Cossyah or in the Jynteeah Hills.

Nor do I think that the Act, taken as a whole, evinces a final determination on the part of the Legislature that the jurisdiction of the High Court shall be taken away. I will assume that if it did so, there would be then nothing to prevent the operation of the Act. I will assume that the operation of an Act complete in all its parts, may be suspended by the Legislature until something is done by an officer of Government. This might be considered merely as a method of promulgation, and not as any delegation of authority at all. It would be the same as if the Act had been directed to come into operation on its being printed at length in the *Calcutta Gazette*. If, therefore, this be the true construction of the Act, I am not prepared, as at present advised, to say that it could not operate. As regards the Garo Hills, the Act (always excepting s. 8, which presents special difficulties of its own which I need not now consider) may, I think, bear this construction. But as regards the Cossyah and Jynteeah Hills, the Act cannot, I think, be so construed. The frame of the Act as to the Garo Hills and as to the Cossyah and Jynteeah Hills is entirely different. If the Legislature had had the same final intentions as to removing the Cossyah and Jynteeah Hills from the jurisdiction of the ordinary Courts as it may, I think, notwithstanding s. 2, be considered [82] to have had in respect of the Garo Hills, the preamble of the Act would not have been limited to declaring the expediency of removing the Garo Hills only from the jurisdiction of those Courts. It would have declared the expediency of removing

the Cossyah and Jynteeah Hills also. It is true that the preamble of an Act cannot limit the express words. But here the express words are in accordance with the preamble. The power to bring the Act into operation generally is conferred by s. 2. The power to extend the Act to the Cossyah and Jynteeah Hills is given quite separately and in different language by s. 9; and it is not a power to extend the Act simply, but to extend "all or any" of the provisions of the Act. The Lieutenant-Governor might, for example, have applied ss. 6 and 7 to the Cossyah and Jynteeah Hills, but not s. 4, in which case our jurisdiction would have remained as before. It cannot, I think, be said that a power of extension so conferred makes the Lieutenant-Governor the mere ministerial officer who is to promulgate the Act. It vests in the Lieutenant-Governor a double discretion: first, whether the Act shall come into operation in the Cossyah and Jynteeah Hills at all; and secondly, if so, what portion of it shall there operate. I do not mean to say that this is all the discretion vested by the Act in the Lieutenant-Governor. He may by s. 8 apply or not apply to these territories all or any portion of any law applicable to other parts of Bengal. But this portion of the Act is not now immediately before us. I am at present only considering s. 9, and what discretion that section leaves to the Lieutenant-Governor as to the application to the Cossyah and Jynteeah Hills of s. 4. Reading s. 9 by itself, the discretion appears to me to be absolute. Reading the whole Act, I can find no words which can carry any further inference than this—that the Legislative Council, when it determined it to be expedient to remove the Garo Hills from the jurisdiction of the ordinary Courts, at the same time contemplated the possibility of its being expedient to remove the Cossyah and Jynteeah Hills from this jurisdiction also. But this they left an entirely open question to be decided by the Lieutenant-Governor of Bengal.

[83] It is not of course in any way necessary now to establish that there is no legislative discretion left to the Lieutenant-Governor as to the application of this Act to the Garo Hills. But it is, I think, desirable to show that the discretion (if any) under s. 2, and the discretion under s. 9, are wholly different both in kind and degree. For this purpose we may consider the matter in this way. It is just possible to conceive that the Lieutenant-Governor of Bengal might not choose to issue the notification under s. 2, and that the Governor-General in Council might not choose to compel him to do so. The Legislature would then have been helpless; the Act would never have come into operation at all; it would have wholly miscarried and the intention of the Legislature would have been defeated. But would the intention of the Legislature have been defeated if the Lieutenant-Governor had given the notification under s. 2, and had not extended s. 4 of the Act to the Cossyah and Jynteeah Hills? I think not. In the one case the Legislature counted on the action of the Lieutenant-Governor as a certainty; in the other case, they left him to act or not as he pleased. Then again, the moment the Act came into operation by the issuing of the notification under s. 2, the jurisdiction of the ordinary Courts in the Garo Hills was destroyed by the imperative words of s. 4. But even when the Act had been thus brought into operation there is still not a single imperative word applicable to the Cossyah and Jynteeah Hills at all. Even then it is only said that the Lieutenant-Governor "may from time to time extend" to certain districts "all or any of the provisions of the Act." What ground is there for saying that the intention of the Legislature would have been defeated if the Lieutenant-Governor had declined to exercise any portion of these powers?

Another way of looking at s. 9 was suggested in the course of the argument. It was said that s. 9 might be looked at merely as dealing with a

question of boundaries ; that all the districts mentioned in the Act, the Garo Hills, the Cossyah and Jynteeah Hills, and the Naga Hills were conterminous, and that in such wild and barbarous districts as these it would be impossible for the Legislature to fix the exact limits of the [84] application of the Act. I think this suggestion does not accord with either the geographical or the historical facts. Although the Garo Hills and the Cossyah and Jynteeah Hills and the Naga Hills are contiguous, they are three entirely separate districts. The Garo Hills belong to the Commissionership of Cooch Behar, the Cossyah and Jynteeah Hills and the Naga Hills to the Commissionership of Assam. The boundary between the Garo Hills, the Cossyah and Jynteeah Hills, and the Naga Hills is generally well defined. In point of size the three districts are about equal, the Cossyah and Jynteeah Hills being rather the largest. The policy of the Government has always been to keep the Garo Hills out of the jurisdiction of the regular Courts, and these Courts have never established their jurisdiction in that district. On the other hand, the policy as to the Cossyah and Jynteeah Hills was to bring them under the ordinary jurisdiction of the Courts ; and this jurisdiction was fully established and in action without inconvenience from 1835 up to 1871. The Garos are said to be wild and barbarous tribes, whom the Government in 1869 were still endeavouring to reclaim to the habits of civilized life. No such assertion, as far as I am aware, could be made with regard to the inhabitants of the Cossyah and Jynteeah Hills. The district is a peaceable one ; the inhabitants of it carry on peaceful pursuits. There are within it two considerable European stations, one of which is the seat of the Local Government of Assam. There are also many Europeans living in the Cossyah and Jynteeah Hills, most of them in the service of Government, but some are settlers. The determination, therefore, to exclude the ordinary Courts of law from the Garo Hills would depend upon considerations having no application whatever, or at least only a very modified application, to the Cossyah and Jynteeah Hills. Moreover, there was a special cause which led to the legislation of 1869 as regards the Garo Hills. There had been a decision of this Court, which in effect decided that the Government had been wrong in treating certain portions of the Garo Hills as not within the jurisdiction of the ordinary Courts of justice. It was to counteract the result of this decision that the Act of 1869 was passed. It was in fact an Act passed to legalize the [85] *status quo*. But the same Act, when introduced into the Cossyah and Jynteeah Hills, instead of continuing a state of things already in existence, entirely revolutionized the long-established administration of the district. It threw back people who had been living for thirty-five years under a regular and settled administration according to established laws into a condition which every one would acknowledge to be only suitable to a people just emerging from barbarism,—that is to say, a condition in which all the powers of Government were centred in the hands of a single individual. This may have been necessary. I do not presume to say that it was not so. But there is nothing in the frame of the Act of 1869, or the circumstances of the case, which would lead me to suppose that simply because this was done in the Garo Hills it was necessarily intended to be done in the Cossyah and Jynteeah Hills also.

I think, therefore, that the Legislature did not decide by Act XXII of 1869 that in the Cossyah and Jynteeah Hills the jurisdiction of the ordinary Courts should be excluded ; that it did not express any opinion whatsoever upon that question, but that it left the decision of it to the absolute and uncontrolled discretion of the Lieutenant-Governor.

This being the view that I take of Act XXII of 1869, it becomes necessary to consider whether it falls within the legislative powers of the Governor-General

of India in Council to delegate to the Lieutenant-Governor of Bengal the power of determining whether or no a particular district of British India shall remain subject to the jurisdiction of the High Court. *

Now in order to ascertain this we must go back to that which is the root of the whole matter, the 24 and 25 Vict., c. 104, s. 9, which (as we are all agreed) alone makes the High Court subject to any legislative control in this country; and the question comes to this. When Parliament made the High Court subject to this legislative control, did it thereby intend to enable the Indian Legislative Council to transfer that control to another person, or did Parliament intend that that control should be exercised by the Legislative Council of India itself?

The argument that such a transfer of authority may take place has been put by at least one of the learned counsel who [86] argued this case for the Crown on very high grounds. It is said that the legislative powers of the Governor-General of India in Council mentioned in s. 9 of the 24 & 25 Vict., c. 104, are those legislative powers which are conferred by the Councils' Act (24 & 25 Vict., c. 67); that except as regards the seven heads specifically mentioned in s. 22 of the latter Act, the Indian Legislature has a power co-equal with that of Parliament; that there is no restriction as to the mode of legislation; that the power of the Indian Legislature to delegate its authority is no more to be questioned than the power of Parliament to do the same; and that every possible and imaginable power of Parliament not specially excepted in the Councils' Act is conferred. Stress was also laid on s. 45 of 3 and 4 of Will. IV, s. 85, which provides that laws made by the Indian Legislature shall have the same force as an Act of Parliament.

This question although not, as I shall hereafter show, devoid of authority, has never been discussed at length, as far as I am aware, by any English Judges. The task of laying down the principles upon which such a high and important question is to be determined is an extremely difficult one, and I approach it with the greatest diffidence. But it is, nevertheless, one which in the present case I am bound to attempt.

Before proceeding to consider the general question, I will consider an argument which was addressed to us, in order to show that the Courts of law have no jurisdiction to enter upon a consideration of this question at all.* It was said that, if there be any limits to the legislative powers of the Governor-General in Council, they are political limits, and not legal ones, and that the question I am about to consider is a political one upon which Courts of law are not empowered to enter. All doubt upon this part of the case may, I think, be cleared up by a consideration of the difference between a sovereign or supreme and a subordinate or restricted Legislature. No one would contend that the Indian Legislature is itself sovereign. It exercises sovereign powers, but by delegation only, and is subordinate to Parliament. This is made clear by the 3 and 4 Will. IV, c. 85, s. 51, which is applicable to the present Legislative Council (see 24 and 25 Vict., c. 67, s. 2), and which reserves to Parlia-[87] ment the full power still to legislate for India, and to "control, supervise, and prevent all proceedings and Acts whatsoever of the Governor-General in Council." And it is well known that Parliament does exercise a control as regards the affairs of India which it does not exercise in any other dependency of the British Crown. The Indian budget is annually laid before Parliament. Indian questions are frequently there debated on; and inquiries are constantly being there made by committees and otherwise into the conduct of affairs by

the Government of this country. Now, the reasons why Courts of law cannot examine the validity of Acts passed by a sovereign or supreme Legislature, have no application whatsoever to the Acts of a subordinate or restricted Legislature. Of course, within its competency, the Acts of a subordinate or restricted Legislature are, to use the expression of Chancellor KENT, "as absolute and uncontrollable as laws flowing from the sovereign power," (Kent's Com., 448, Vol. I, 11th ed., p. 485), and I may remark in passing that this explains how it is that the Acts of the Indian Legislature, if duly authorized, come to be equivalent to Acts of Parliament. But the question whether the Act is or is not within the competency of the Legislature must, as the same learned author points out, of necessity fall within the province of Courts of law to determine. The same principle was laid down by the Supreme Court of the United States in a case quoted by Chancellor KENT at page 453 (Kent's Com., Vol. I, 11th ed., p. 490). There the Chief Justice points out that the powers of the Legislature are in America (as they are in India) defined and limited by a written constitution, "but," he proceeds to say, "to what purpose is that limitation, if those limits may at any time be passed? The distinction between a Government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if Acts prohibited and Acts allowed are of equal obligation

The theory of every Government with a written constitution forming the fundamental and paramount law of the nation must be that an Act of the Legislature repugnant to the constitution is void. [88] If void, it cannot bind the Courts, and oblige them to give it effect; for this would be to overthrow in fact what was established in theory, and to make that operative in law which was not law. . . . If the constitution be superior to an Act of the Legislature, the Courts must decide between these conflicting rules; and how can they close their eyes on the constitution and see only the law." In order properly to understand these observations and to apply them to the present case, it must be borne in mind that the words 'constitution' and 'constitutional' as here used do not mean precisely the same thing as with us, and the distinction is most important, as upon its due observance depend the exact limits of the competency of Courts of law to enquire into the validity of the Act of a subordinate Legislature. The Parliament of England, although absolutely sovereign and supreme, is restricted by limits which are called constitutional, and we speak of certain principles of the English constitution as being inviolable. But Parliament being in the eye of the law absolute, can do that which a subordinate Legislature cannot do. It can, in the eye of the law, by its own ordinary proceedings, alter the constitution. The proceedings, therefore, of Parliament can never be questioned upon constitutional grounds by Courts of law. The constitutional restriction has, *ex hypothesi*, been already cut away by paramount authority before the question arises. But not so where there is a written constitution issuing from an authority superior to that of the Legislature whose functions it defines. There the constitutional restrictions always operate until the superior authority has removed them, and the Courts of law are bound to give effect to them. Moreover—which is most important, as showing that the question to be decided is, in the strict sense of the word, a legal and not a political one—the restrictions here, as in America, exist in a written form, so that the only question the Court has to determine is the ordinary one—what was the intention of the sovereign power when it created the subordinate Legislature? I desire it to be fully and clearly understood that I treat this as an ordinary question of construction of an Act or Acts of Parliament, and I do not intend to enter into any political considerations whatsoever.

[89] I also desire to say that I in no way countenance the doctrine which has been put forward by some eminent authorities, but which I believe to be now exploded, that Courts of law can question the validity of Acts of the Legislature upon general considerations of religion, morality, natural justice, the so-called social contract, or other similar grounds. I have repudiated this doctrine already in the case of the *Queen v. Ameer Khan* (6 B. L. R. 482), and I do so again. Where an Act has once been passed by a Legislature which is supreme, I consider it to be absolutely binding upon Courts of law. Where it is passed by a Legislature the powers of which are limited, it is not the less binding, provided it be not in excess of the powers conferred upon the limited Legislature. I may seem to some persons to be here repeating mere truisms, but I know by experience how much one is liable to be misunderstood when speaking upon such subjects as these.

Being, therefore, of opinion that it is not only within our power, but that it is our duty to say whether the authority given to the Lieutenant-Governor to take away the jurisdiction of this Court was validly conferred, I proceed to consider the general and important question, whether the Councils' Act enables the Legislative Council of India to transfer to others the powers which Parliament has conferred upon itself.

Now, what is the broad principle generally applicable to all cases where an authority is given to one person to do acts on behalf of another, which authority involves personal trust and confidence in the agent, and is to be exercised by him in a particular manner? It will, I think, be admitted that the agent is bound himself to perform the acts for which he is authorized according to the manner indicated; and that he cannot transfer to others the confidence reposed in himself. No doubt, this principle has been generally laid down with reference to dealings between private individuals, but it appears to me to be equally applicable to the case of public functionaries. Parliament has said that the Governor-General of India, together with certain other specified persons whose qualifications are [90] mentioned, may make, at meetings duly constituted, laws for the people of India. To that extent it has delegated its own sovereign authority to Indian Legislature. But, undoubtedly, this delegation of authority was made in view of the special qualifications of the persons in whom this power is reposed, and of the safeguards which arise from the publicity and deliberation of the proceedings of a legislative body which can only transact business at meetings duly convened and constituted. Did Parliament intend to be itself the sole judge of what persons were thus qualified, and what safeguards were necessary for that purpose; or did it intend to leave to the Legislature here the power to substitute any persons whom they might consider sufficiently well qualified and any safeguards which they might consider sufficiently effectual? That is the question we have to decide.

The only ground upon which, as it appears to me, it can be maintained that the Indian Legislative Council may transfer to others the powers entrusted to itself is the broad and general ground upon which it was placed by the learned Standing Counsel, Mr. *Kennedy*, who argued with great force and ability that the power to do this is involved in the power to make laws. It was pointed out that there is a difference between a general power to make laws and a particular power, for example, to grant a lease or to execute a deed. If I give a man a power to execute a deed, and he transfers that power to some one else, he has done something clearly not authorized by the power which was

restricted to the single act of executing a deed. But where Parliament has conferred upon a Legislature the general power to make laws, the only question can be, is the disputed Act a law? If it is, then it is valid, unless it falls within some prohibition. I think that this argument is sound, and that it must be met if the validity of Act XXII of 1869 is denied.

Now, first, as to this Act being a law, I am clearly of opinion that it is not a law in the proper sense of the word. I am at present only speaking of the Act so far as the Cossyah and Jynteah Hills are concerned. As to those hills, in the view that I take of it, this Act commands no one to do or to forbear [91] from doing anything. It is simply a signification that a particular person may in those hills either do or not do certain things as he likes. That it is not a law in the ordinary acceptance of the word: I will not take the definition of 'law' as given by so accurate and precise a writer as Austin, since it may perhaps be objected that his views cannot be applied to British Acts of Parliament. But no one will make this objection as regards Blackstone, and how do we find that Blackstone defines a law? He says, a law "is that rule of action which is prescribed by some superior and which the inferior is bound to obey" (Vol. I, p. 38). Tried by this test Act XXII of 1869 is not a law. I need not here advert to the distinction between substantive and adjective law, the ultimate object of both being the same; nor do I say that amongst the multitudinous varieties of meaning which have been attributed to the term 'law,' a mere permission to legislate could never be called a law. Any authoritative expression of intention might, by some persons under some circumstances, be called a law. But when a Legislative Council was constituted in India distinct from the Executive Council with power to make laws at meetings held for the purpose, I think it was clearly intended to restrict the Legislative Council to the exercise of functions which are properly legislative, — that is, to the making of laws which (to use Blackstone's expression) are rules of action prescribed by a superior to an inferior, or of laws made in furtherance of these rules. The English Parliament is not so restricted. It is not only a legislative but a paramount sovereign body, and many of its Acts are not laws according to Blackstone's definition, though as being authoritative expressions of intention they might be sometimes so called. The Indian Legislative Council cannot, in my opinion, do all that Parliament can do, even where there is no express prohibition. The powers concentrated in Parliament are in India divided between the Executive and the Legislative Councils. The Executive Council alone has the superintendence, direction, and control of the whole civil and military government of the territories and revenue of India (3 & 4 Will, IV, c. 85, s. 39). The [92]. Legislative Council has the power of making laws only. In England also no doubt, as in India, the executive functions of Government are generally exercised by a body distinct from Parliament, by what (in a special sense) is called the "Government"; but there is no legal impediment to Parliament taking upon itself executive functions, and the executive authorities are all responsible to Parliament for the way in which they exercise their executive powers. Indeed, to some extent, Parliament does exercise purely executive functions, as, for example, when it fixes the amount of the naval and military forces, or appropriates the public revenues. The difference in India is this. That the Executive Council and the Legislative Council are two co-ordinate and independent bodies, each having its own separate functions with which the other cannot legally interfere. For these reasons, I think that the Legislative Council, when it merely grants permission to another person to legislate, does not make a law within the meaning of the Act from which it derives its authority.

I have discussed this question with reference only to the word 'laws.' The Act of Parliament uses the expression "laws and regulations." No reliance was placed in the argument on the use of the additional word, and I think myself that it is merely redundant.

But I quite admit that, in order fully to appreciate the powers of the Indian Legislature, we must not fasten our attention solely upon the meaning of a single word. We must look to the whole Act, and gather from it what were the intentions of Parliament in this respect. Indeed, we must look further. In order properly to understand the frame and intention of the Councils' Act we must consider the whole action of Parliament with regard to legislation in India from the year 1833 down to the present time. In the year 1833, by the 3rd & 4th Will. IV, c. 85, s. 43, the Governor-General in Council was empowered to make laws and regulations. Under this Act there was but one authority in India, "the Governor-General of India in Council." There was not as now a separate Council for making laws and regulations. But by s. 48 all laws and regulations were to be made at some meeting of the Council at which the Governor-General and at least three of the ordinary members of Council were assembled; and at which alone the legal member of Council (as he was called) was entitled to vote. By s. 40, the Governor-General in Council was expressly permitted to authorize the Governor-General alone to exercise all the powers which might be exercised by the Governor-General in Council, except the power of making laws and regulations.

From this time nothing occurred, as far as I am aware, to affect the constitution of the legislative authority in India, until the year 1853, when by the 16th and 17th Vict., c. 95, the constitution of the Legislative Council was entirely altered by the addition of members who did not belong to the Executive Council. A distinction between the legislative and executive functions of Government is observable in the Act of William the Fourth, but this Act puts the distinction upon much clearer ground. It puts those functions into the hands of two separate bodies. Owing to the power which the Executive Government has over the appointment of members, and for other reasons, its influence in the Legislative Council is still supreme. But the change in the constitution of the Legislative Council introduced by this Act is, nevertheless, of importance as emphasizing the distinction between legislative and executive functions. There is also no doubt that henceforth a conflict of opinion between the Executive and Legislative Council was, theoretically at any rate, no longer impossible.

In the next year, Parliament, by the 17th and 18th Vict., c. 77, granted to the Executive Council power to take any district under its own immediate authority, and to give all necessary directions respecting the administration of such districts or otherwise to provide for the administration thereof: provided always that no law or regulation should be altered except by laws made by the Legislative Council. This power to issue orders and directions is, no doubt, to some extent a legislative power, and the Act shows how very cautiously provision was made by Parliament for a change in the legislative machinery in India. It is to be observed also that this very limited power is conferred not upon the Legislative Council but upon the [94] Executive—a peculiarity which, as we shall see, is preserved through all the Acts of Parliament relating to this subject.

The next Act is the Councils' Act. That Act re-confers the general power of making laws and regulations for the whole of India upon a Legislative Council somewhat differently constituted from what it had been previously,

but still one quite distinct from the Executive Council. The Act provides how the members of the Legislative Council are to be appointed; how they are to resign their offices; and, for the validity of acts, notwithstanding certain defects in the constitution of the Council, it declares that the power of making laws shall be exercised by the Council only at meetings duly constituted in the manner directed by the Act; it provides* how meetings of the Council are to be convened and adjourned, and how rules for the conduct of business are to be made, and one important rule for the conduct of business is, by s. 19, laid down by Parliament itself. It is also remarkable that the Indian Legislature does not exercise absolute control over the rules for the conduct of its own business, nor any control over its own adjournments; the first is partly, and the second entirely, under the control of the Executive Government. The Act also confers a somewhat more restricted, but still, as far as it goes, general, legislative authority upon Local Councils in Madras and Bombay. Then, dealing with the subject of a change in the legislative machinery, the Act empowers the Governor-General in Council, that is the Executive Council, by proclamation to establish local Legislative Councils in other parts of India, each of which would possess, in regard to its own particular district, a general power to make laws similar to that possessed by the Local Councils established by the Act. Thus we find provision in the Act for the establishment and constitution of, and the conduct of business by, three Legislative Councils. We also find power to create new Local Councils given to the Executive; and it is also provided how these Local Councils are to be constituted and how they are to conduct their business. As to any other changes in the legislative machinery the Act is wholly silent.

The next Act is the 33 Vict., c. 3, expressly passed to make better provision for ordinary laws in certain parts of India. [93] It was found, no doubt, that the machinery of even a local Legislature was too cumbrous for certain outlying districts, and this Act, accordingly, enables the Executive Government, under certain special restrictions, to make regulations (the word 'laws' is not used) in a particular manner without any resort to the Legislative Council. But this can only be done in those parts of India as to which the Secretary of State in Council shall declare the provisions of the Act applicable. In short, the Act provides a very special and guarded method of doing that which it is now said that the Indian Legislature may do without limit or restriction.

We see, therefore, that these Acts of Parliament nowhere confer any express power upon the Indian Legislature to change the machinery of legislation in India, but they do confer that power subject to important restrictions upon the Executive Government. Now Parliament, in conferring this power upon the Executive Government, necessarily proceeded upon one of two views. Either it considered that the Indian Legislature had power to change the machinery of legislation in India, or it considered that it had no such power. In other words, Parliament, when these Acts were passed, either considered that it was making the sole and only provisions which existed for changing the legislative machinery in India, or it considered that it was conferring powers which need only be resorted to when the Executive Government could not obtain the powers which it required from the Legislative Council. I have come to the conclusion upon reading these Acts of Parliament, that Parliament considered itself to be making the only provisions which existed for changing the machinery of legislation otherwise than by an Act passed by itself. In the first place, whatever theoretical difficulty might be imagined as arising out of a conflict between the Executive and Legislative

Councils, I do not think that any one ever seriously contemplated that any such difficulty could occur. The existence of the Legislative Council secures publicity and deliberation in regard to the legislative action of Government. But the actual power of Government still remains for all practical purposes with the executive. I do not think, for example, that Parliament passed such an Act as the 33 Vict., c. 3, [96] merely in view of such a contingency as a conflict between the Executive and Legislative Councils. In the next place, though it is not impossible, I think it unlikely, that powers to make fundamental changes in the constitution would have been placed by Parliament simultaneously in the hands of two co-ordinate and independent bodies. In case of these two bodies working harmoniously, such a double power would be useless. In case of their working inharmoniously, such a double power would, as it seems to me, be objectionable. The very fact, therefore, that Parliament bestowed this power on the Executive Government of India seems to me to show that it did not already exist in the Legislature. But after all, what is most important, I cannot reconcile the language of these Acts of Parliament with the existence of the power now claimed for the Legislative Council of India. We must consider what the nature of the claim really is. It is nothing less than this, that the constitution of India as created by Parliament in these Statutes is a merely provisional one; that all the directions as to the mode of exercising legislative authority are only to remain in force and effect so long as the Legislature may choose that they should do so. That the separation which these Statutes make between the exercise of legislative and executive functions may be nullified, and all the powers now held by the Legislature may be retransferred to any executive officer it may select, whenever it pleases to do so. The Legislature may, indeed, still continue to exist, but it may abrogate all its functions by transferring them to some one else. I do not so read these Acts of Parliament. I think that Parliament intended the provisions which it made for the exercise of legislative power in India to be permanent until altered by itself, and that it did not intend to give the Indian Legislature power to repeal them. It may be that there is not much in India to which the term 'constitution' can be properly applied. But there is something. The laws must now be made publicly and with deliberation. I do not think this provision either worthless or unimportant, and its worth and importance is greatly increased by the fact that it is the only protection which exists in this country against hasty and arbitrary legislation. The Counsel for the Crown argue [97] that this protection may be swept away by the Indian Legislature, and its powers of legislation placed in the hands of a single individual. I do not think so. I think this protection was provided by Parliament for the people of India, and that it is only under the express authority of Parliament itself that they can be deprived of it.

Moreover, if we consider at one view the Acts of Parliament which have been passed during the last forty years, we cannot help seeing that there has been a considerable conflict of principles in dealing with Indian legislation. At one time there was an attempt to place the legislative authority for the whole of India in a single council. This authority has been in part decentralized by the establishment of local councils; and from time to time, in respect of certain districts, the legislative authority, after having been once separated from the executive, has been, under the express authority of Parliament, again confounded with it, and all powers without distinction have been again placed in the hands of the Executive Government, where they originally resided. I believe that there is no doubt what the origin of this conflict and of

these changes was. Whilst it was considered desirable to secure for the people of India that the functions of legislation should be separated from the other functions of Government and should be performed with publicity and deliberation, it was found impossible that this should be done by a single council, or even, entirely so, by a general council with the assistance of several local councils. Parliament has, therefore, from time to time relieved these bodies from the pressure of an extreme difficulty. We even know that to avoid the slow and tedious method of regular legislation the executive authorities did, in former times, assume the power to legislate otherwise than in the regular manner for certain districts of India. This was done to a large extent in the non-regulation provinces. But in the whole course of the controversy which has thus arisen, and the pressure thus felt, I have never seen the claim distinctly put forward, that the right to change the legislative machinery in India was included within the general power to make laws, and was one which Parliament had entrusted to the discretion of Indian legislative councils. [98] As far as I am aware, this easy and simple solution of the difficulty, namely, that these bodies have the general power to transfer their legislative authority to others has never been before asserted; and no direct attempt to change the machinery of legislation in India by any Indian legislative council has ever yet been made.

Upon the whole, therefore, it seems to me that the fair and reasonable conclusion is this,—that Parliament has provided for the exercise of the legislative authority of India by certain councils at meetings duly constituted; further that, if any change in the legislative machinery is necessary, Parliament has provided how and by whom that change is to be made; that the power to make this change is vested by Parliament in the Executive Government alone, no such power being vested in any of the legislative councils. These arrangements for the exercise of legislative authority and for the changes in legislative machinery depend upon five Acts of Parliament; the 3 & 4 Will. IV, c. 85; the 16 & 17 Vict., c. 95; the 17 & 18 Vict., c. 77; the 24 & 25 Vict., c. 67; and the 33 Vict., c. 3. The Indian Legislature is expressly forbidden to make any law which shall repeal or in any way affect the provisions of any one of these five Acts. Four of these Acts are expressly named in the prohibitions,—one in the first head of prohibition and three in the second. The remaining one is included in the general prohibition contained in the sixth head. In the view that I take, the Indian Legislature cannot change the legislative machinery in India without affecting the provisions of these Acts of Parliament which created that machinery, and if it does in any way affect them, then, *ex consensu omnium*, its Acts are void.

On both grounds, therefore, both because Act XXII of 1869 is, as regards the Cossyah and Jynteah Hills, not a law, and because if it is a law it is one which the Legislative Council of India is expressly prohibited from making, I should hold that it is so far void.

I have dealt with this case upon the broad grounds upon which Mr. Kennedy put it. He boldly claimed for the Indian Legislative Council of India the power to transfer its legisla-[99]tive functions to the Lieutenant-Governor of Bengal. Indeed, as I understood him, the only restriction he would admit was that the Legislative Council could not destroy its own power to legislate, though I see no reason why he should stop there. The Advocate-General did not, I think, go quite so far. But in my opinion there is no narrower question which can be substituted for the broad and general question which the learned Counsel put and which I have considered. There are no

words in the Acts of Parliament upon which legislative authority could be made transferable in one class of cases and not in others. Of course, I do not for a moment suggest that every time discretion is entrusted to others there is a transfer of legislative authority. Every Act of the Legislature abounds with examples of discretion which is entrusted to the judicial and executive officers of Government, the legality of which no one would think of questioning. And there may be particular cases in which it would be a matter of considerable difficulty to say whether or no the discretion conferred was of the legislative kind. When the difficulty arises we must deal with it. But in the present case we have not to cope with this difficulty. By the express words of 24 & 25 Vict., c 104, s. 9, it is only by legislation that the jurisdiction of this Court can be taken away. Whoever, therefore, takes away the jurisdiction of this Court must exercise legislative authority for the purpose. I have stated my reasons in an earlier part of this judgment for holding that it was wholly by the Lieutenant-Governor, and not in any sense or to any extent by the Indian Legislative Council, that the jurisdiction of the High Court was assumed to be taken away. The broad and general question seems to me, therefore, necessarily to arise—can the Legislature confer upon the Lieutenant-Governor this legislative power?

I now come to a decision which, as it appears to me, strongly fortifies the conclusion I have come to as to the powers of the Indian Legislature. Indeed, it is a decision which I rely upon far more than my own reasoning, and which we must overrule if we are to adopt the construction of the Councils' Act contended for by the Crown. In the year 1850 a suit was brought in the late Supreme Court against a servant of the Commissioners [100] for the Improvement of the Town of Calcutta for the illegal seizure of a buggy. The defendant justified the seizure under Act XVI of 1847, and certain rules which the Commissioners had made under that Act, alleging that the plaintiff had not paid the carriage tax assessed upon him by the Commissioners. The plaintiff demurred to the plea, raising a question as to the legality of these rules. The first judgment was delivered by the Chief Justice Sir LAWRENCE PEELE as the judgment of himself and Sir JAMES COLVILLE. On that occasion the Court intimated a strong opinion that, if these rules varied the law, they were void notwithstanding that they were made under the express authority of an Act of the Legislature. When, after an amendment of the pleadings, the same question again arose, Sir LAWRENCE PEELE gave the joint judgment of himself, Sir JAMES COLVILLE, and Sir ARTHUR BULLER. I have referred to the Registrar's book and this shows (which the report in Taylor and Bell does not) how the Court was constituted on the two occasions on which the case was before it. The important passage is the first paragraph in the second judgment, and is to be found at page 479 of the Report in Taylor and Bell. The learned Judges, though they express great doubts whether the rules in that particular case were legal and binding, do not finally decide that point. But they do clearly and unmistakeably lay down as a general principle of law applicable to India that any substantial delegation of legislative authority by the Legislature of this country is void. The actual order made was a second permission to the defendant to amend his plea upon payment of costs. The second amendment was made, but I cannot find that the case went any further, and probably it was compromised. The Act itself was shortly afterwards repealed.

The case was very fully argued on two occasions, the defendant being represented by the Advocate-General and the Standing Counsel, and it is in all respects an authority which seems entitled to the very greatest weight.

I am also disposed to think that if the American reports were available to us, we should find some authority there on this part of the case. There are several decisions of the American Courts referred to in a note to Kent's Commentaries, page 504. [101] One cannot be quite sure without seeing the report *in extenso* how far these decisions go, but they seem to me to support the view that Act XXII of 1869 is, as regards the Cossyah and Jynteeah Hills, not a law.

It was asked in the course of the argument what was to be done in the case of emergency, and whether the Legislature might not do that which was necessary to meet an emergency? And assuming the answer to this question to be that the Legislature might do what was necessary, it was then argued that the Court could not enquire whether the emergency existed or not, for of this the Legislature was the sole judge. In fact, whilst asking us to dismiss all political considerations, the learned Counsel ask us to decide this case on the ground of political necessity. But we have nothing to do with any such question at all. Upon an emergency in which danger to life and property is involved, the law as it stands, and without any alteration, gives increased and exceptional powers to the executive. In extreme cases the executive may suspend the operation of all laws. But I am not aware that such emergencies in any way affect the powers of the Legislature; certainly not unless the Legislature were actually overawed.

Lastly, it was said that whether the Indian Legislative Council can or cannot lawfully delegate the power to make laws, it had done so for a long series of years, and a long list of Acts passed between 1845 and 1868 has been handed in to us, all of which, it is said, must be treated as instances of delegation of legislative authority, if Act XXII of 1869 be so treated. It was then argued that Parliament must have known what the Legislature of this country had been doing, and, had it not approved what was done, would have used language which would have placed the illegality of these proceedings beyond all possible doubt. I have some difficulty in dealing with an argument based upon an assumption of fact in a matter of this kind. I imagine that Parliament, when legislating for India, is dependent mainly upon such information as may be imparted to it by the Secretary of State, or by individual members who have a special acquaintance with this country. The position is, in fact, substantially the same in this as in all other cases where [102] the subject of legislation is not one of every-day experience. If the information thus obtained were not found to be sufficient, special inquiries would then be directed. Whether in the particular case under consideration Parliament did really arrive at a knowledge of the particular provisions in these Acts which are now relied on, I am at a loss how to determine. I cannot, however, think that we need enter upon this inquiry. For even if we presume knowledge, still to infer ratification from silence would lead to consequences which seem to me inadmissible. Upon one particular point Parliament expressly refers to the practice here, and no doubt, therefore, was so far acquainted with it. In s. 25 of the Councils' Act it is recited that doubts have arisen as to the power to make laws for the non-regulation provinces, otherwise than at regular meetings of the Legislative Council in conformity with the 3 & 4 Wm. IV, c. 85. The section then goes on to give validity to laws that had not been so made. But it has never been contended that this recital and this ratification have legalized the previous practice. On the contrary, the accepted view has, I believe, always been that the previous practice was put an end to by this very Act. Speaking of this very practice in a minute recorded in 1868, Sir HENRY MAINS says—"this system, of which the legality had long been doubted, was destroyed by the Indian Councils' Act. No legislative authority now exists in India which is not derived from this Statute." But if the argument of tacit

recognition which I am now considering be correct, how is it possible to escape the conclusion that all the vague powers, half legislative, half executive, previously exercised in the Non-Regulation Provinces are valid and subsisting powers? The argument seems here to stand on its strongest ground.

Nor do the Acts contained in the list which was handed in appear to me to afford (as was asserted) so many clear and undisputed instances of a transfer of legislative authority. I must guard myself against being drawn into a final expression of opinion as to the construction of Acts which are not properly before us. I must also observe that the argument only extends to Acts passed prior to the Councils' Act. It is not, and could not be, contended that the Indian [103] Legislature can have increased its own powers by any recent usurpation. This gets rid of the two Acts most relied on,—namely Act XXIII of 1861, s. 39, and Act XXV of 1861, s. 445.* Neither of these Acts had been passed when the Councils' Act received the Royal assent, though, probably, they were passed before the Councils' Act came into operation. I may also observe that these sections only confer powers on the Executive Government to extend the Acts to Non-Regulation Provinces. But we know that as to these districts certain exceptional notions were at that time held which are now exploded. As to those Acts which were passed prior to the Councils' Act becoming law, Act VIII of 1859, s. 385, † and Act XIV of 1859, s. 24, ‡ also relate only to Non-Regulation Provinces. Act VII of 1845 only empowers the Local Government to make rules respecting the levying of water rates and so forth for canals which have been constructed at the expense of Government. Act XXXV of 1850 and Act XXXVI of 1857 give to the Local Government powers which are not legislative, but may be judicial. Act XVIII of 1853 seems to me merely to give power to fix the limits of cantonments. Act XVII of 1854 reserves to the Governor-General in Council powers which he would have had without this reservation. Act XXI of 1855, Act XX of 1856, Act XXIV of 1859, and Act

* [Sec. 445:—This act shall come into operation in the Presidencies of Bengal, Madras, and Bombay on the first day of January 1862, but shall not take effect in any part of the Territories in British India not subject to the General Regulations of Bengal, Madras, or Bombay, until the same shall be extended thereto by the Governor-General of India in Council, or by the Local Government to which such Territory is subordinate, and until such extension shall have been notified in the Gazette.]

† [Sec. 385:—This Act shall not take effect in any part of the territories not subject to the general regulations of Bengal, Madras and Bombay, until the same shall be extended thereto by the Governor-General of India in Council or by the Local Government to which such territory is subordinate, and notified in the "Gazette" (Supplemented by Act XXIII, 1861, s. 39 and by Act IX, 1863, s. 1.)]

‡ [Sec. 24:—This Act shall take effect throughout the Presidencies of Bengal, Madras, and Bombay, including the Presidency Towns and the Straits' Settlement; but shall not take effect in any Non-regulation Province or place until the same shall be extended thereto by public Notification by the Governor-General in Council or by the Local Government to which such Province or place is subordinate. Whenever this Act shall be extended to any Non-regulation Province or place by the Governor-General in Council, or by the Local Government to which such Province or place is subordinate, all suits which within such Province or place shall be pending at the date of such notification or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted within such Province or place after the expiration of the said period, shall be governed by this Act and by no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding.]

Amended by Act XIV, 1862 an Act of temporary operation and since defunct.]

V of 1861 are more difficult to construe. It would certainly have been safer to treat them as what are called General Clauses Acts, and for the Legislature in each case to have sanctioned their extension. But I may observe generally as to the provisions which these and many other Acts contain for the making of rules by the Executive Government in conformity with the Act, that we have the very high authority of the Judges who decided the case of *Biddle v. Tariney Churn Banerjee* (1 Tay. & Bell, 390 ; see p. 404), that the power to make such rules may be largely conferred without any delegation of legislative authority. Act XXIX of 1857 does not seem to me to confer any legislative powers at all. Act XXIX of 1858 was passed to meet a pressing [104] emergency during the mutiny, and ought not, I think, to be taken as a precedent. Act XIII of 1859, s. 5,^{*} and Act IX of 1860, s. 9,[†] are in my opinion of very doubtful validity. I am not sure that they have ever been acted upon. It is by no means easy to ascertain this, for it is one of the peculiar results of this method of legislation that there is no information upon the subject contained in the Statute book. But this I know that I have often heard the validity of these provisions questioned. Upon the whole, the list of Acts prior to the passing of the Councils' Act does not seem to me to show any clear practice of transferring legislative authority which Parliament can be said to have known and recognized.

Before leaving this list I must observe that it contains a number of Acts which were evidently inserted under an entire misconception as to the nature of the difficulty which the Crown has to meet in establishing a claim now put forward on behalf of Indian Legislature. It has never been doubted that the Legislature may confer discretion of the most extensive kind upon the executive officers of Government. I have already adverted to this, and but for the misconception which this list discloses, I should not have thought it necessary to advert to it again. But it cannot be too clearly understood that no one denies that the Indian Legislature may entrust to the executive officers of Government power, for example, to regulate public processions and to keep order in places of public resort. And the insertion of this provision (Act XIII of 1856, s. 77) in the list handed up only shows how entirely the question before us may be misunderstood. No one would think of challenging such a provision as this, as being beyond the powers of the Indian Legislature. If my view of the law threw any doubt upon the power of the Indian Legislature to pass such an Act as this, I should abandon it at once. But surely it is not necessary to insist at length upon the difference between the delegation of a power to keep order in the public streets, and the delegation of a power to abolish all the existing Courts of justice in a large district, and to substitute such new ones as the *delegatus* may deem advisable. All that can be said is, that [105] there may be a difficulty in some cases in saying whether the Act amounts to a transfer of legislative power. There would be precisely the same difficulty in drawing an exact line between the functions of the legislative and the functions of the executive council—between the powers which Judges possess to make

- * [Sec. 5 :—This Act may be extended by the Governor-General of India in Council, or by the Executive Government of any Presidency or place, to any place within the limits of their respective jurisdictions. In the event of this Act being so extended, the powers hereby vested in a Magistrate of Police shall be exercised by such officer or officers as shall be specially appointed by Government to exercise such powers.]
- Act may be extended by Government.

Supplemented by Act III, 1863, of the Madras Council.]

- † [Sec. 9 :—This Act shall take effect only in those districts or places to which it shall be extended by order of the Governor-General of India in Council, or of the Executive Government of any Presidency or place.]
- Operation of Act.

rules of procedure, and the power which they do not possess to make rules of substantive law. But this does not prove that these distinctions do not exist or that they are not to be observed. We are, as I have already pointed out, not now called upon to deal with difficulties of this kind. If we are ever called upon to do so, I do not doubt that the utmost endeavour will be made to avoid impeding the useful action of the Legislature. I say with confidence that this Court (the only one of which I have a right to speak) has always shown the greatest care and circumspection in questioning the validity of Acts passed by the Indian Legislature. On the present occasion it has been pressed very strongly that the view of the law which I take would lead to the most disastrous consequences. Nothing has been adduced in support of this statement, which appears to me quite unfounded. I would gladly have refrained from expressing any opinion upon these Acts at all, but not being able to do so, I am compelled to admit that there are some provisions in some of the Acts passed by the Legislative Council the legality of which, upon the view of the law to which I adhere, may be doubtful. But I say distinctly that there is no ground whatever for the sweeping assertion which has been made that, on this view of the law, a very large proportion of these Acts must be at once pronounced to be illegal. No such consequences followed from the decision of *Biddle v. Tariney Churn Banerjee* (1 Tay. & Bell, 390), and my decision goes no further. The only proposition of law which I lay down is, that the Legislative Council of India cannot confer any power to legislate upon the Lieutenant-Governor of Bengal.

In my opinion, our jurisdiction in the Cossyah and Jynteah Hills is now the same as it was before the notification was issued by the Lieutenant-Governor, and we ought, therefore, to send [106] for the record of this case, in order to see whether the appeal should be admitted.

Kemp, J.—I concur in the judgment of Mr Justice MARKBY.

Ainsley, J.—By 3 & 4 Will. IV, c. 85, s. 43, the Governor-General in Council had power to make laws and regulations for repealing, amending, or altering any laws or regulations whatever then in force or thereafter to be in force in the Indian territories of Her Majesty or any part thereof, and to make laws and regulations for all persons and all Courts of justice and the jurisdiction thereof, and for all places and things whatsoever throughout the whole and every part of the said territories, with certain reservations; and by s. 45 all laws made as aforesaid were to have the force and effect of Acts of Parliament.

By 16 & 17 Vict., c. 95, s. 22, provision was made for the better exercise of the powers of making laws and regulations by the addition to the Council of the Governor-General of certain persons as legislative councillors; and by s. 23 it was enacted that the powers of making laws or regulations vested in the Governor-General in Council should be exercised only at meetings of the said Council at which a certain number of members and certain particular members should be present.

By 24 & 25 Vict., c. 67, s. 2, the 43rd section of the Act of William IV, and the 22nd and 23rd sections of the Act of 16 & 17 Vict. are repealed, but the 45th section of the former is maintained in force, save so far as the same may be altered by or be repugnant to this Act. Ss. 9 and 10 provide for the constitution of a Legislative Council, and s. 15 restricts the power of making laws and regulations to meetings of the Council at which a certain proportion of members is present; by s. 6 the Governor-General alone is authorized in certain cases to exercise all the powers of the Governor-General in Council except

the power of making laws and regulations. S. 22 re-enacts the provisions of s. 43 of the Act of William IV, with the [107] addition that the power is capable of being exercised at meetings of Council for the purpose of making laws and regulations, at which by s. 19 no other business can be transacted, and except at which by s. 15 no laws or regulations can be made. S. 25 validates certain laws and regulations theretofore made otherwise than at meetings of a Legislative Council in respect of the Non-Regulation Provinces. By s. 23 the Governor-General, in cases of emergency, may make ordinances for the peace and good government of the Indian territories of Her Majesty or any part thereof, to have effect for six months only, and subject to be controlled or superseded by a law made at a meeting of the Legislative Council. Ss. 34 and 45 restrict the power of making laws and regulations conferred on subordinate Legislatures so that as in the case of the Council of the Governor-General it can only be exercised at a meeting for the purpose of making laws and regulations, and in no case can they modify Acts of the Imperial Parliament.

The 1st section of 33 Vict., c. 3, provides, that in respect of any part of the territories under the Government or Administration of any Governor, Lieutenant-Governor or Chief Commissioner to which the Secretary of State shall from time to time by resolution declare the provisions of the section to be applicable, the Governor, Lieutenant-Governor or Chief Commissioner as the case may be, may propose drafts of regulations for the peace and good government of such parts to the Governor-General in Council, which, on receiving his assent and being duly published, shall have the force of laws made at a meeting of the Legislative Council.

There is further a provision in 17 & 18 Vict., c. 77, s. 3, by which the Governor-General in Council (with the sanction of the Court of Directors of the East India Company) could by proclamation take under the immediate authority and management of the Governor-General in Council any part of the territories under the Government of the East India Company, and thereupon could give all necessary orders and directions respecting the administration of such part, or otherwise provide for the administration of the same; but this is coupled with a proviso that no law in force at the time in such [108] part should be altered or repealed except by a law made by the Governor-General in Council.

The Imperial Parliament has thus carefully declared the mode in which legislation by the Government of India is to be carried on. Ordinarily it is to be by laws made at meetings of the Legislative Council of the Governor-General; under emergencies and for the limited term of six months, by the Governor-General alone; and in respect of particular places, to be defined by the Secretary of State, by the Governor-General in (Executive) Council on the proposal of the Local Government.

When Act XXII of 1869 was passed, the last provisions had not come into existence. This Act was passed by the Governor-General in Council under the general powers conferred by s. 22 of the Indian Councils' Act, subject to the limitation specified in that section.

The question is, whether the Supreme Indian Legislature did itself, directly or by necessary implication, exclude the Coosyah and Jynteeah Hills from the territorial jurisdiction of the High Court. I confine myself to this one matter which is all that we need consider for the purposes of the appeal before us at the present stage of the proceedings. I understand we are all agreed that such exclusion is within the powers of the Legislature.

I think it did not do so, but that it left the question of such exclusion unsettled. The preamble and title of the Act speak only of the Garo Hills; the Cossyah Hills are not mentioned until s. 9 is reached, except that in s. 3 it is said that, from the date of the notification provided for in s. 2, Act VI of 1835 (so far as it relates to the Cossyah Hills) shall be repealed. With this exception, the first eight sections refer exclusively to the Garo Hills. Then comes the 9th section, which empowers the Lieutenant-Governor from time to time, by notification in the *Calcutta Gazette*, to extend all or any of the provisions of the other sections to the Jynteelah Hills, the Naga Hills, and to such portion of the Cossyah Hills as for the time being forms part of British territory.

This provision for a separate notification makes it clear that no part of the territory mentioned in s. 9 is affected by [109] the Act in consequence of the notification provided for in s. 2; and that if the Act has any operation there, it is simply as the result of the will of the Lieutenant-Governor. The repeal of so much of Act VI of 1835 as affects the Cossyah Hills from the date when the Act came into force in the Garo Hills (namely, the 1st March, 1870) is of no practical importance; this much of the Act was wholly obsolete. The Courts of Sudder Dewany and Nizamut Adawlut, to which powers of superintendence had been given by the Act, had ceased to exist; and by the 9th section of the High Courts' Act (24 & 25 Vict., c. 104) this Court had been vested with the same powers that the former Courts had. That the Government of India in the Legislative Council should take the opportunity of repealing this obsolete Act at the same time that it was dealing with the law applicable to the Garo Hills, is not to my mind sufficient ground for saying that the Legislature in September, 1869, made a declaration in respect of the Jynteelah, the Naga, or the Cossyah Hills similar to that which it had made in respect of the Garo Hills. As to these last, certain provisions were absolutely enacted, and all that was referred to the Lieutenant-Governor was to fix a day from which they should take effect.

The preamble declares the expediency of dealing with the Garo Hills, but says not a word about the others. The notification necessary to start the operation of the Act in respect of the Garo Hills has no effect in the Cossyah and other hills. Whether or not the Act shall ever come into operation at all in the latter, and if so, the extent to which effect shall be given to it, is left entirely to the discretion of the Lieutenant-Governor. The 2nd and 9th sections are not framed in the same form. The first directs that the Act shall come into operation and that the Lieutenant-Governor shall fix a date of commencement, and merely leaves the particular date to be determined by the Lieutenant-Governor as is commonly done when the introduction of a new law requires some adjustment of the administrative machinery.

The fixing of such date is a ministerial not a legislative act; but the determination whether the law shall be applied at all [110] is not a ministerial, but a legislative act. As this determination was not arrived at by the Supreme Legislature, but was remitted to the discretion of the Lieutenant-Governor, it cannot be said that the Legislature excluded the Cossyah and Jynteelah Hills from the jurisdiction of the High Court; it went no further than to say that if at any time the Lieutenant-Governor shall think fit to exclude them he may do so. In fact, the Lieutenant-Governor did not avail himself of the power for two years after the passing of the Act, whereas he issued the notification under s. 2 within five months from that time, and it rested entirely with him to determine whether he ever would avail himself of it, and if so, in what district and to what extent. He might possibly have determined only to apply the provisions of s. 5, relating to the public revenue and rent, and of s. 7, as to

cesses, in one tract, while he applied the whole law in another. The Supreme Legislature could have no knowledge beforehand of what would be the results of the passing of the Act. It certainly cannot be said that the four hill tracts named in the Act were all in the same condition at the date of the passing of the Act of 1869, so that what was good law for one was necessarily applicable to the others; if this had been so, the frame of the Act would have been different from what it is. If then it was uncertain whether the jurisdiction of this Court in the Cossyah Hills would ever be taken away at all, it cannot be held that it was actually taken away by the Supreme Legislature in the Act of 1869, and that all that was left to the Lieutenant-Governor was to make arrangements accordingly and to fix a date for the commencement of the operation of the Act.

It is consequently necessary to ascertain whether the delegation of power to the Lieutenant-Governor to remove the Cossyah and Jynteeah Hills from the jurisdiction of this Court by a legislative declaration was within the powers of the Legislative Council. On this point, the language of s. 22 of the Councils' Act appears to me to leave no doubt.

Power is given to the Governor-General in Council at meetings for the purpose of making laws and regulations to [111] alter any laws and make laws for all persons, places, and Courts of justice in the Indian territories of Her Majesty: provided, *inter alia*, that such laws shall not in any way affect any of the provisions of the Councils' Act.

The law under consideration is a law made undoubtedly at a meeting of the Legislative Council of the Governor-General, and so far a good law; and if it does not fall within one of the seven exceptions specified in s. 22, it has by the 45th section of 3 & 4 Will. IV, c. 85, all the force and effect of an Act of Parliament; but if it does fall within one of those exceptions, this last-mentioned enactment gives it no force at all. S. 22 of the Councils' Act having been substituted for the earlier provisions on the same subject (3 & 4 Will. IV, c. 85, s. 43, as modified by 16 & 17 Vict., c. 95, s. 23), the words of s. 45—"all laws and regulations made as aforesaid"—only apply to laws properly made under s. 22 of the Councils' Act, and not within one of the exceptions.

The Act of Parliament requires that, ordinarily, all laws shall be made only at a meeting of the Council of the Governor-General held for the sole purpose of making laws and regulations, and at which certain persons are present. When laws are to be made otherwise, there is a specific provision according to the nature of the case, but these exceptional provisions are made by Parliament itself and not left to the discretion of the Indian Legislature; and it is and has long been an established rule (s. 70, 3 & 4 Will. IV, c. 85, and s. 6, 24 & 25 Vict., c. 67) that the Governor-General himself shall not by himself, except when specially authorised by Parliament, exercise the power of making laws and regulations. It would not be possible for the Legislative Council validly to divest itself of its own functions and transfer them to the Governor-General alone. A law to such effect made by the Council would violate the provisions of both s. 6 and s. 15, whether that law purported to vest the Governor-General with legislative powers generally or specially, and would therefore, under the express words of s. 22, be *ultra vires*. But if this is so as to the Governor-General, surely it must be so as to the Lieutenant-Governor of Bengal. The same reasons which apply in the [112] one case for restraining the highest officer of the Crown in India from exercising legislative powers alone and for entrusting those powers only to a Council to be exercised at a meeting at which not less than a certain number

of members shall be present, must apply with more force to a subordinate officer ; and s. 15 is as much violated in one case as in the other.

Therefore, in my opinion, the conferring on the Lieutenant-Governor power to remove the Cossyah Hills from the jurisdiction of this Court was *ultra vires*.

If it was *ultra vires*, this Court is bound to take notice of the fact. The power formerly exercised by the Nizamut Adawlut in this tract of country was given to this Court by Act of Parliament (s. 9, 24 & 25 Vict., c. 104), and unless it has been validly taken away we are bound to exercise it.

No doubt the Governor-General in Council, whatever construction be put on the section referred to, has power to put an end to this Court's jurisdiction in this tract of country, but no other authority in India can do so. But if the Governor-General in Council wishes to do it, he must proceed by the exercise of his legislative powers as created or declared by the Councils' Act, and in no other way. The High Courts' Act provides no new mode of legislation, but makes the jurisdiction of the High Courts subject to the legislative powers of the Governor-General in Council, which must be looked for elsewhere. If he shall proceed in any other way, this Court is constrained by the Act of Parliament to continue the exercise of its jurisdiction.

But it is said that this view of the provisions of s. 22 of the Councils' Act is at variance with that taken through a long course of years, as shown by a series of enactments, in which a somewhat similar mode of supplementing the action of the Legislative Council has been adopted.

I think it unnecessary now to express any opinion as to the validity of the Acts referred to. Assuming them to have been validly enacted, their existence does not support the argument that the mode of legislation adopted in Act XXII of 1869 is only that which has been constantly adopted without objection ; and that as it cannot be assumed that this mode of legislation [113] has escaped the observation of the Imperial Parliament, it has the warrant of a tacit approval.

It appears to me that a distinction must be drawn between provisions by which the carrying out of the declared decisions of the Supreme Legislature is furthered, and provisions which give a power to act independently of the discretion of the Council of the Governor-General. As an example of the one, I may take s. 385 of Act VIII of 1859, or s. 445, Act XXV of 1861. These are laws intended to be eventually of universal application in British India (the latter, re-enacted in X of 1872, is now, with very few exceptions, the only law on the subject); the actual introduction of these enactments was in certain tracts of country postponed, and made to depend on the discretion of the Local Government. The Supreme Legislature had considered these laws and adopted them as laws to be eventually in force everywhere ; but instead of declaring that they were to take effect everywhere at once, it was content to declare the ultimate law and leave the Local Governments to advance up to this standard as fast as they conveniently could. When a Local Government declared such a law to be in force, it was merely parting with a power of delay conferred upon it ; it did not make any law ; the law introduced was the law made by the Governor-General in Council with the express intention that it should become the law of the particular tract of country in due time. But Act XXII of 1869 does not stand on precisely the same footing. There was no expression of a determination by or desire of the Legislative Council that eventually the Jynteeah Hills, the Naga Hills and the Cossyah Hills should be reduced to the same condition as the Garo Hills ; at the most it can only be said that there was an

expectation that such a measure might become necessary. But an attempt to provide beforehand for the contingency of such a state of things arising in the former as then warranted the introduction of the measure into the Garo Hills, does not amount to a determination that this was the law which it was desirable to put into force in all these hill tracts; had this been the intention of the Legislature, I should have expected it to have been expressed in plain language.

The provisions of s. 39, Act XXIII of 1861, * do not affect my view of this matter. This section allows a Local Govern-[114]ment, with the previous sanction of the Governor-General in Council, to annex any restriction, limitation, or proviso it may think proper when extending the Code of Civil Procedure to any territory not subject to the general regulations; but this is merely another form of delaying the full extension of the Code. So far as the Code obtains operation, it is still, because the extension is, *pro tanto*, a carrying out of the intention of the superior Legislature that this shall be sooner or later the law in the particular tract of country. As I read the section, no power is given to amend the law itself; it is only a power to keep some portion in abeyance or to make its operation contingent on something external to it, which again is only another form of postponing its full operation.

A very large number of the Acts referred to in the schedule submitted to us of Acts containing delegation of powers is of the same character. The subject of many is limited, but the mode of legislation is substantially the same. The general law on each subject is propounded by the Legislature; the gradual application of it is entrusted to some authority named in the Act. In form, it may be that the law is made for one or more named members of a class with power to extend it to others; but in effect, this is making a law for the class with a power granted to the Local Government to introduce it more or less rapidly as may seem fit. The distinctive feature in my opinion is, that in each of these cases the law is constructive by addition to, or remodelling of, the Statute law then existing as to each class of subjects under the directly exercised discretion of a legislative body; whereas Act XXII of 1869, as far as we are now concerned with it, is destructive, and operates merely to terminate the operation of established laws.

There is another class of Acts in which there is apparently a clear delegation of legislative power. I refer to Acts which contain a provision giving power to make rules or bye-laws, and to impose taxes or fix fees and charges; but these are clearly distinguishable from such an Act as Act XXII of 1869, so far as we are concerned with it now, which is only so far as it gives power to the Lieutenant-Governor to repeal s. 9 of 24 & 25 Vict., c. 104. Whether the powers conferred in these Acts to [115] make rules and bye-laws can in all cases be subdefended, is a matter I need not discuss. All legislation of this class is subordinate to, and in furtherance of, the defined object of each particular Act.

*[Sec. 39 :—When, under the provisions of section 385 of the said Act, the Act is extended to any part of the territories not subject to the General Regulations of Bengal, Madras, and Bombay, it shall be lawful for the Government to which the Territory is subordinate to declare that the Act shall take effect therein subject to any restriction, limitation, or proviso which it may think proper. In such case the restriction, limitation, or proviso shall be inserted in the declaration or notification of such extension. When the Act is extended by the Local Government to any territory subordinate to such Government, and such extension is made subject to any restriction, limitation, or proviso, the previous sanction of the Governor-General of India in Council shall be requisite.]

The case of *Biddle v. Tariney Churn Banerjee* (1 Tay. & Bell, 390), at p. 409, and again at p. 479 of the report, is authority for holding that, while the validity of rules which can be brought within the definition of ministerial acts is undoubted, the validity of other rules such as therein mentioned,—namely, rules imposing a penalty directly, or granting power or compelling discovery,—is open to grave doubt, if indeed the case does not go so far as to rule that they are absolutely invalid. It is foreign to my present purpose to discuss that case; it is enough to show that the delegation relied on does not stand unquestioned, but that there is very high authority for doubting its validity. As I have referred to this case, I take the opportunity of observing that it seems to me strongly to support the earlier part of my judgment. At page 406 the learned Chief Justice, Sir LAWRENCE PEELE, observes: "The Legislature of India, though it possesses large legislative powers, is still a limited Legislature, and exercises a delegated authority of making laws. Independently of the territorial limits assigned to its power of making laws, there are other limits imposed which the Legislature must not exceed; and it is the province of the Courts of justice of the country to decide on the legality of Acts of the Legislature, if a suit be instituted to decide whether the Legislature has or has not exceeded the limits within which it may legislate." Again, at page 479, as I understand the judgment, he assumes as undoubted that delegation of legislative authority by the Indian Legislature is beyond its powers, the question being in each case whether there has or has not been such delegation.

The Acts which are most analogous to the Act under consideration, so far as we have now to deal with it, are few in number; they have been termed deregulationizing Acts.

Act XXI of 1845 was passed while the 3 and 4 Will. IV., c. 85, was in force; the power of legislation was then vested [116] in the Governor-General in Council. This Act does not make any transfer of that power, but simply declares that the same authority in which the legislative power rested, viz., the Governor-General in Council, may by order in Council do certain things. The same remarks apply to Acts VI and XI of 1846.

After the passing of 16 & 17 Vict., c. 95, we come to the Sonthal Districts' Act XXXVII of 1855. This differs in form from Act XXII of 1869, and is distinctly a legislative declaration by the Governor-General in Council. The Lieutenant-Governor has, by s. 6, to give effect to it by proclamation; but this obviously is a merely administrative action. The power to allow an appeal in cl. 1, s. 4, notwithstanding the declaration in that section that all decisions and sentences passed according to the provisions of the Act are final, is a power to relax the stringency of the Act in the direction of the general law.

The Chittagong Hill Tracts' Act XXII of 1860 approaches, in some respects, more nearly to the form of the Act under consideration. Whether any of its provisions are open to question is beyond the scope of my present enquiry. So far as the abolition of the jurisdiction of the Courts of civil and criminal judicature is concerned, the direct and undoubted authority of the Governor-General in Council has been exercised. In the Rohilkhand Act XIV of 1861 there is a slight change of form. While the Supreme Legislature makes a direct declaration in respect of certain tracts specified in the schedule, it gives power to the Lieutenant-Governor, North-Western Provinces, to define the portions of Pergunnas Juspore and Kashipore in the district of Moradabad, which are to be subject to the Act; but it does not give him power to include these pergunnas or not at his pleasure and at such time as he may think fit.

There is no provision for more than one proclamation giving effect to the Act. This Act approaches to, but does not reach, the form of Act XXII of 1869.

Act XXIV of 1864 is wholly different; it validates rules previously made. As far as it empowers the Local Government to extend any Regulation or Act then in force, it may be said to [117] give legislative power, but this is not such a power as is now in question, and whether such powers have been rightly or wrongly given is a matter on which I express no opinion.

On the whole, then, I am of opinion that the jurisdiction of this Court in the Cossyah and Jynteeah Hills has not been validly taken away, and that we are bound to entertain the appeal.

Macpherson, J.—In my opinion the Governor-General in Council has power by legislation to remove from the jurisdiction of this Court a district over which the Court was declared by the Letters Patent to have jurisdiction. That power seems to me to be expressly conferred by s. 9 of 24 & 25 Vict., c. 104—without which section legislation on the subject would be wholly prohibited by the proviso in 24 & 25 Vict., c. 67, s. 22, that the Governor-General in Council shall not have the power of making any law which shall repeal or in any way affect any of the provisions of that Act or of any Act passed in the same session, or thereafter to be passed, in anywise affecting Her Majesty's Indian territories or the inhabitants thereof.

These two Statutes, 24 & 25 Vict., c. 67 and c. 104, were passed within a few days of each other (one on the 1st of August, and the other on the 6th); and I think it clear that it was intended by ss. 9, 11, and 13 of the later Act to preserve to the Governor-General in Council certain legislative powers which otherwise, by reason of the proviso, in s. 22 of c. 67, the Governor-General in Council would not have had. A consideration of the terms of the High Courts Act will show that the matters covered by the three sections 9, 11, and 13—in which alone the legislative powers of the Governor-General in Council are saved,—are the only matters relating to the High Court in respect of which the Governor-General in Council was intended to have legislative powers. And the express saving of these powers in ss. 11 and 13 was necessary, because those sections relate to matters not included or dealt with in s. 9. The Governor-General in Council has no legislative power in relation to the High Court save what is reserved to him by 24 & 25 Vict., c. 104; and the Letters [118] Patent could give no such power not already given by that Statute.

Although I do not doubt that the conclusion arrived at in *Meare's case* (14 B. L. R., 106) was correct, I do not concur in the construction there put upon these two Statutes. I dissent wholly from the theory, which seems to be the basis of the late Chief Justice's decision in *Meare's case* (14 B. L. R., 106), that a declaration of jurisdiction contained in the Letters Patent can be affected by legislation by the Governor-General in Council, because the declaration in the Letters Patent is not a "provision of the Act" within the meaning of s. 22. In my opinion it is a provision of the Act within the meaning of s. 22, and as such the legislative powers of the Governor-General in Council would be wholly barred in respect of it were those powers not given or reserved to the Governor-General in Council by s. 9 of the High Courts' Act. It is only so far as legislative powers are expressly given or reserved by 24 and 25 Vict., c. 104, that the Governor-General in Council has any legislative authority over the jurisdiction, &c., of the High Court. Section 9, however, does seem to me to give the Governor-General in Council plenary powers of legislation as regards the jurisdiction. For I read that section as declaring that the Court shall have and

exercise all such civil and other jurisdiction, original and appellate, and all such powers in relation to the administration of justice in the Presidency, as the Letters Patent shall direct: and save as by the Letters Patent otherwise directed, and subject and without prejudice to the legislative powers of the Governor-General in Council in relation to the matters aforesaid (i. e., all the matters mentioned in s. 9, with which the Crown is authorized to deal in the Letters Patent), the Court shall have and exercise all jurisdiction and every power, &c., in any manner vested in the abolished Courts (Supreme and Sudder) of the same Presidency. The section, in short, vested in the new Court all the jurisdictions and all the powers of every description of the two abolished Courts, except so far as those jurisdictions and powers might be altered or taken away by [119] the Letters Patent or by subsequent legislation by the Governor-General in Council.

This construction of the Statute no doubt leads to the conclusion that the Governor-General in Council has power to alter wholly, and to take away, the jurisdiction of the High Court,—and further, that the Governor-General in Council is the only authority in India by which the jurisdiction or powers of this Court can be altered or in any way affected. Nevertheless, it appears to me to be the right construction: and it is the construction which, as a matter of fact, was invariably put upon the law up to the time of *Meare's case* (14 B. L. R., 106). If it be the right construction, it cannot be questioned that the Governor-General in Council could legally remove the Cossyah and Jynteeah Hills from our jurisdiction.

But it is argued that if the Governor-General in Council had this power, it has not been legally exercised, inasmuch as the Governor-General in Council did not attempt or profess to remove the Cossyah and Jynteeah Hills from the jurisdiction of the High Court, but merely passed an Act authorising the Lieutenant-Governor to remove them if he at any time should think fit to do so. And it is contended that a removal by an order based on the authority thus given to the Lieutenant-Governor of Bengal is not legal.

It is an undeniable fact that the Governor-General in Council did by Act XXII of 1869 empower the Lieutenant-Governor of Bengal at his pleasure to extend the provisions of the Act to the districts in question, and that by virtue of the power so conferred on the Lieutenant-Governor those provisions have since been extended in the manner contemplated.

The first question which here arises is whether the Governor-General in Council having passed such an Act, this Court can decline to recognize or be bound by it, on the ground that it was *ultra vires* of the Governor-General in Council to legislate in such a fashion, i. e., to delegate to the Lieutenant-Governor of Bengal functions which were expressly vested in the Governor-General in Council. In considering this matter, it is necessary to go back a little and see what the legislative powers of the Governor-General in Council really are.

[120] The Statute 3 & 4 Will. IV, c. 85, s. 43, gave the Governor-General in Council power to make laws for repealing or altering any laws or regulations whatever then in force or thereafter to be in force (in British India, &c.), and for all persons of whatever nationality,—and for all Courts of justice whether established by Royal Charter or otherwise, and the jurisdiction thereof,—*save and except* that the Governor-General in Council was not to have power by legislation to repeal or alter any of the provisions of that Act (3 & 4 Will. IV., c. 85) or of any Act to be thereafter passed affecting the East India Company of the said territories, or the inhabitants thereof, &c. This power of legislation was (s. 44) subject to the right of the Court of Directors to disallow any law

which might have been passed, which was thereupon (i.e., if disallowed) to be repealed. By s. 45 it was enacted,—and this section stands unrepealed to the present day,—that all laws made as aforesaid (i.e., by the Governor-General in Council under the powers given by that Act) “shall be of the same force and effect within and throughout the said territories as any Act of Parliament would or ought to be within the same territories, and shall be taken notice of by all Courts of justice whatsoever within the same territories in the same manner as any public Act of Parliament would and ought to be taken notice of : and it shall not be necessary to register or publish in any Court of justice any laws or regulations made by the said Governor-General in Council.”

By the Statute 16 & 17 Vict., c. 95, the Council of the Governor-General for legislative purposes received a new constitution : but the legislative powers of the Council and the effect to be given to its Acts remained as they were under Statute 3 & 4 Will. IV., c. 85.

The Statute 17 & 18 Vict., c. 77, s. 3, empowers the Governor-General in Council, with the consent of the Home authorities, from time to time, by proclamation, to take any district under the immediate management of the Governor-General of India in Council, and thereupon to give all necessary orders respecting the administration of such district, or otherwise to provide for the administration thereof. But it is expressly [121] provided that no law or regulation in force in any such district at the time it is so taken under the immediate management of the Governor-General of India in Council shall be altered or repealed except by law or regulation made by the Governor-General of India in Council.

Then came the Indian Councils' Act, 24 & 25 Vict., c. 67, which again gave a fresh constitution to the Council of the Governor-General for making laws and regulations. This Act, however, to describe it generally, left the legislative powers of the Governor-General in Council unaltered, save that local Legislatures were re-established and certain matters appertaining more peculiarly to the executive were declared (s. 19) not to be cognizable without the previous sanction of the Governor-General. The legislative power, which was taken away from the Presidencies of Madras and Bombay by 3 & 4 Will. IV., c. 8, was, in a modified degree, restored to them ; and the establishment of a local Legislature for Bengal was authorized. The legislative powers conferred on the Governor-General in Council by 3 & 4 Will. IV., c. 85, were left unimpaired, but under the new Act, 24 & 25 Vict., c. 67, were to be exercised for the most part in matters of more general administration and such as affected the interests of the Indian Empire at large. In the preamble of the Councils' Act it is merely recited that it is expedient that the provisions of former acts of Parliament respecting the constitution and functions of the Governor-General in Council should be consolidated, and in certain respects amended. The second section repeals ss. 40, 43, 44, 50, and certain other sections of 3 & 4 Will. IV., c. 85 ; and it is declared that all other enactments then in force with relation to the Council of the Governor-General of India or to the Councils of the other Presidencies shall continue in force, “save so far as the same are altered by or are repugnant to this Act.” Section 22 declares the powers of the Governor-General in Council as regards the subjects of legislation. It is, in truth, a mere re-enactment of the repealed s. 43 of 3 & 4 Will. IV., c. 85, altered formally and with reference to the changes which were being made in the constitution of the Council. It gives the Governor-General in Council power to repeal or alter [122] any existing law of whatever kind, save that it expressly provides that the Governor-General in Council shall not have the

power of making laws or regulations which shall repeal or in any way affect any of the provisions of the Act (24 & 25 Vict., c. 67) itself or any of the then unrepealed sections of 3 & 4 Will. IV, c. 85, and 17 & 18 Vict., c. 77, and certain other Statutes named,—and save also that the Governor-General in Council shall not have power to make laws which repeal or affect any provisions of any Act passed in the then present Session of Parliament, or thereafter to be passed, in any wise affecting Her Majesty's Indian territories or the inhabitants thereof.

The 3 & 4 Will. IV, c. 85, remains in force, except so far as it is expressly repealed or is repugnant to the Councils' Act. Section 45 is still unrepealed, though the Councils' Act repeals the two sections immediately preceding and s. 50 which follows it. And there is nothing in s. 45 repugnant to the Councils' Act. Therefore, it is clear that s. 45 is still in force, and applies to all laws made by the Governor-General in Council under the Councils' Act. Of course an Act passed by the Governor-General in Council in contravention of s. 22 of 24 & 25 Vict., c. 67, would not be an Act duly passed, the legislative powers of the Governor-General in Council being by that section expressly barred in such cases. But an Act passed by the Governor-General in Council under the Councils' Act, and not falling within any of the prohibitions therein contained, seems, under s. 45 of 3 & 4 Will. IV, c. 85, to have the same effect here as an Act of Parliament would or ought to have; and it must be taken notice of by us in the same manner as any public Act of Parliament. If this be so, this Court has no power to question the authority of the Governor-General in Council, if once satisfied that the Act is not within any of the prohibitions of the Councils' Act. For there is no doubt that, had a public Act of Parliament been passed in the same terms as Act XXI of 1869, we should have been bound to accept it without question.

But, if it be open to me to question the authority of the Governor-General in Council to pass a law which does not fall [123] within any of the restrictive provisions of 24 & 25 Vict., c. 67, I am unable to say that the Cossyah and Jynteeah Hills have not been legally removed from the jurisdiction of the High Court. By s. 4 of the Act, the Governor-General in Council did expressly remove the Garo Hills from our jurisdiction, leaving it, however, to the Lieutenant-Governor of Bengal to fix the date from which the removal was to have effect. Then (ss. 5-8) the Governor-General in Council practically left it to the Lieutenant-Governor to provide, as he should think fit, for the administration in all respects of the district, and gave authority to the Lieutenant-Governor to extend to the Garo Hills any law, or any portion of any law, then in force in the other territories subject to the Lieutenant-Governor, or which might thereafter be enacted by the Council of the Governor-General, or of the Lieutenant-Governor, for making Laws and Regulations.

As regards the Cossyah and Jynteeah Hills, after, in s. 3, repealing Act VI of 1835 (which repeal, it may be noted, did not of itself in any way affect the jurisdiction of the High Court over those Hills), the Governor-General in Council by s. 9 empowered the Lieutenant-Governor from time to time to extend, *mutatis mutandis*, all or any of the provisions contained in the other sections of the Act to the Cossyah and Jynteeah Hills. It is left to the Lieutenant-Governor to say whether these districts shall be removed from the Court's jurisdiction or not,—and also, if removed, what law shall be administered in them. No doubt the whole future position of the Cossyah and Jynteeah Hills is left absolutely to the discretion of the Lieutenant-Governor. For all that is really decided by the Governor-General in Council is, that it is fit and proper that the Cossyah

and Jynteeah Hills shall be removed from the jurisdiction of the High Court if the Lieutenant-Governor shall think it right at any time that they shall be so removed. No other matter is actually decided by the Governor-General in Council than that it is right that these districts shall be made over wholly to the Lieutenant-Governor's control, if and when he chooses to take them over. It is impossible to deny that this is practically an entire delegation to the Lieutenant-Governor by the Governor-General in Council of the legislative powers of [124] the Council. But on what precise grounds can I say that such delegation is illegal? The Act does not fall within any of the restrictive provisions of the Statute 24 & 25 Vict., c. 67; and there is no positive law which prohibits such delegation. The question is really one of intention,—what powers did the Supreme Legislature intend to confer on the subordinate Legislature, the Council of the Governor-General of India for the purpose of making Laws and Regulations?

Reading the Councils' Act with the High Courts' Act 24 & 25 Vict., c. 104, it is sufficiently clear that the intention of the Supreme Legislature was that the jurisdiction of the High Court should remain as defined in the Statute, c. 104, except so far as otherwise declared by the Letters Patent or by the legislative enactments of the Governor-General in Council. And it is fairly argued that if the Statutes gave no power of legislation in such matters to any authority in India save the Governor-General in Council, it could not have been the intention that the Governor-General in Council should by legislation confer on the Lieutenant-Governor those powers which it was clearly intended should be exercised by the Governor-General in Council alone. But although I do not doubt that the Governor-General in Council is the only authority in India who can by legislation affect the jurisdiction of this Court, I am not prepared to say that if the Legislative Council of the Governor-General passes an Act declaring that such rules affecting the jurisdiction as the Lieutenant-Governor may make shall have the effect of law, and if rules affecting the jurisdiction are thereupon made by the Lieutenant-Governor, the alteration of the jurisdiction would be otherwise than by the Governor-General in Council in exercise of his legislative powers. For if we hold that the Governor-General in Council must, if the object is to affect the jurisdiction of this Court, do it by the direct act of the Council assembled for the purpose of making laws and regulations, and cannot do it through authority given by that Council to the Lieutenant-Governor or any other functionary, we are in fact legislating and imposing a restriction on the legislative powers of the Governor-General in Council which is not imposed by the Statute.

[125] There are, as I have said, grounds for arguing that the intention was that legislation to affect this Court's jurisdiction should be by the Governor-General in Council directly and not by delegation. On the other hand, the Statute does not expressly say so; and it might have been expected to say so if such had really been the intention, inasmuch as for years prior to the passing of the Statutes of 24 & 25 Vict., powers of legislation had been delegated repeatedly by the Governor-General in Council to the Lieutenant-Governor and other executive officers, and it may be presumed that in framing these Statutes provision would have been made against a repetition of the evil, had it been deemed in fact to be an evil.

Act XXII of 1869 is certainly an exceedingly strong instance of legislation by the Governor-General in Council in a manner amounting to a delegation to the Lieutenant-Governor of Bengal of the legislative powers of the Council. Still powers of a similar nature (though usually not so extensive) have

constantly for years past been given by the Governor-General in Council by legislation to various executive authorities. It is very difficult, for example, to distinguish in principle the present case from that of the Civil Procedure Code (Act VIII of 1859), which by s. 385 took effect in any part of the territories not subject to the general regulations only when extended thereto by the Governor-General in (Executive) Council or by the Local Government to which the particular territory happened to be subordinate. In like manner, the first Criminal Procedure Code (XXV of 1861) took effect in Non-Regulation Districts only when extended to them by the Governor-General in (Executive) Council or by the Local Government to which the territory was subordinate. It is substantially neither more nor less than a delegation of legislative authority to say to the Lieutenant-Governor or any other officer,—“Here is a new Code; but it is left wholly to your discretion to decide whether—and if at all, when—it is to be applied to such and such territories now under your government.” The principle in these and other such cases is really the same as in the case now before us. Yet, such delegations are frequent.

[126] Altogether, I do not think that the passing of Act XXII of 1869 was absolutely *ultra vires* of the Governor-General in Council. And after the course of practice which undoubtedly has been followed in this matter for very many years, I should certainly decline to declare such an Act to be beyond the powers of the Governor-General in Council, unless I considered it clear beyond all question that it was so.

I think, therefore, that we have no jurisdiction to entertain this appeal.

Various important points which I have not touched upon have been discussed in the course of the argument. But in the view which I take of the position of the Legislative Council of the Governor-General with reference to this Court, it seems to me unnecessary to go further into them.

Pontifex, J.—I concur in the judgment of Mr. Justice MACPHERSON.

Jackson, J.—Assenting, as I do, to the decision in *Feda Hossein's case* (I. L. R., 1 Cal. 431), and being therefore of opinion that the jurisdiction of the High Courts can be affected by legislative action of the Governor-General of India in Council, and by no other authority in this country, I have only to consider whether our jurisdiction has been validly taken away, and whether, if we should think otherwise, we are competent to give effect to our opinions.

It is contended on behalf of the Crown that the jurisdiction of this Court over the Cossyah and Jynteeah Hills was put an end to by a notification of the Lieutenant-Governor of Bengal, dated 14th October 1871, which notification purports to have been issued under the authority of the 9th section of an Act of the Governor-General in Council, called Act XXII of 1869, which received the assent of the Governor-General on the 24th September of that year.

It is further contended that the clause of this Act which empowered the Lieutenant-Governor to issue such proclamation is a law made by the Governor-General in Council under the [127] authority of 24 & 25 Vict., c. 67; that by virtue of clause 45, 3 & 4 Will. IV, c. 85, a law so made is of the same force and effect in India as any Act of Parliament, and that, consequently, neither this nor any other Court in India is competent to inquire into the validity of the Act or to question the mode in which the Legislature carries out its conclusions.

I will address myself first to the latter branch of this argument, and for this purpose it is necessary to state what my opinion is regarding the constitution and powers of the Indian Legislature.

This body is composed of the members of the Executive Government, with the addition of certain persons (not to be less than six or more than twelve in number) nominated by the Governor-General as members of the Council for the purpose of making laws and regulations only. It derives its powers from Parliament and from no other source (see Forsyth's Cases and Opinions on Constitutional Law, page 17; see also 1 Harington's Analysis, Part I, section 1), and those powers are to be exercised in a particular manner and are compassed by certain bounds.

The powers in question, sparingly granted at first, subjected originally, and down to 1834, to the necessity of registration in the Supreme Courts, and thereafter to the inspection and control of both Houses of Parliament, were gradually enlarged by successive regulating Acts, until they reached their present limits. They are now defined by the Statute known as the Indian Councils' Act, 1861. By that Act the Council, when constituted for legislative purposes, was declared absolutely incapable of transacting any business or entertaining any motion other than the consideration and enactment, or the introduction, of measures of a legislative kind, except that it might amend the rules for the conduct of its business which had been made before it came into existence. The legislative powers committed to the Governor-General in Council are described, and the restrictions on them set forth, in the 22nd clause of the Statute.

It was observed during the argument that there is a distinction between the grant of powers which are absolute, except as to matters expressly reserved, and that of powers extending [128] only up to certain limits, not beyond; it was contended that the former of these was the description applicable to the powers of the Indian Legislature. It seems to me that the contrary is the case for the following reasons:—The section which defines and guards by various provisos the powers conferred for legislative purposes, is thus entitled, "Extent of the powers of the Governor-General in Council to make laws and regulations at such meetings." It is no doubt one of the rules for construing Statutes that no weight is to be allowed to the marginal notes, nor should I refer to this one, but that the powers for like purposes entrusted to Governors in Council are similarly defined in ss. 42 and 43, and such defining clauses are afterwards referred to in s. 48 as provisions *limiting* the power of the Governors in Council.

The powers expressly conferred by s. 22 are—

"Subject to the provisions herein contained to make laws and regulations, for repealing, amending or altering any laws or regulations whatever now in force, or hereafter to be in force, in Indian territories, and to make laws and regulations for all persons, and for all Courts of justice whatever, and for all places and things whatever within the said territories and for all servants of the Government of India within the dominions of Princes or States in alliance with Her Majesty."

This language appears to me to contemplate the exertion and exercise of the legislative mind of the Council in relation to the subject-matters indicated, and not to include the enabling of any person or any body of persons to repeal laws at their pleasure, or to make laws for Courts of justice or the like.

But before pursuing this topic further, I return to the question of the competency of this Court to discuss the validity of the Act; and on this point I think that one argument may be derived in favour of the opinion which I hold from the very provision of the Act of Will. IV, on which the advisers of the Crown have placed so much reliance. If we are to interpret the 45th section of that Statute in the way contended for, and the words are given the fullest

sense of which they are susceptible,* it would be necessary to hold that an Act of the Indian Legislature once passed, whether it observed or transgressed the provisos, would be good and valid until repealed, for the words [129] of the section are "that *all* laws and regulations made as aforesaid (which means, *vide* s. 44, 'by the said Governor-General in Council made') so long as they shall remain unrepealed shall be of the same force and effect," &c.

Now, it is not contended that a law and regulation made by the Governor-General in Council, forbidding the Secretary of State from borrowing money in England for the service of India, or altering the Mutiny Act, would be valid, or would have any force or effect, and therefore some limitation must be put upon the sweeping terms of s. 45. But it seems manifest that Parliament must have had in mind the possibility and propriety of such laws being questioned on grounds apart from the breach of any of the provisos contained in s. 22.

For s. 24 expressly provides that—

"no law or regulation made by the Governor-General in Council . . . shall be deemed invalid by reason only that it affects the prerogative of the Crown ;"

and s. 14 provides that—

"no law or regulation made by the Governor-General in Council, *in accordance with the provisions* of this Act, shall be deemed invalid by reason only that the proportion of non-official members hereby provided was not complete."

Clearly, therefore, in these cases it was thought necessary to protect the laws in question from being called in question, and the place of question must certainly have been the Courts in this country.

From these premises, therefore, —the limited character of the Legislature, the conspicuous absence of sovereign or even general powers, the language of the Statute in s. 48, and the provision against challenge on specified grounds, —I deduce the opinion that the Courts in India must have the power of examining the Acts of the Indian Legislature for the purpose of inquiring whether they have been made in accordance with the limited (though doubtless extremely large) powers conferred by a Parliament, and also in the manner prescribed by Statute ; and further, that the effect and force attributed to such Acts by s. 45 of 3 & 4 Will. IV, c. 85, belong only to laws passed under those same conditions.

[130] But it is further contended that if the Courts have any such power, it can only apply to the provisions touching forbidden subjects, or to those connected with the enacting machinery which are contained in the Statute, and that it cannot extend to criticising the mode in which the Legislature thinks fit to carry out its intentions. If this were so, my answer to the objection would be that, in the case before us, the Legislature has expressed no intention at all, but has merely given anticipative sanctions to any course which the Local Government may at any time think fit to take in reference to a matter as extensive and important as any matter can be. But I think this Court is bound, where its jurisdiction is concerned, and more especially in a matter of criminal jurisdiction, to examine every objection to the validity of an Act, not of course in a captious spirit, remembering indeed that it is under the Legislature, but also that both are the creatures of Parliament.

I have already said that the language of the 22nd clause of the Indian Councils' Act appeared to me not to warrant the handing over to any specified person the power to repeal or to make laws, and it is manifest that such is the

effect of s. 9, Act XXII of 1869. It in fact enables an authority quite distinct from the Government of India, in either its legislative or its executive capacity, to abolish if it thinks fit all tribunals and all constituted authorities in a given tract of country, and to do so at any future time, and with reference to a condition of things not even approximately understood by the Legislature. In point of fact, the discretion entrusted to the Lieutenant-Governor was not exercised till more than two years after the passing of the Act—was not exercised at all by the Lieutenant-Governor in office when it was passed, nor even was that Lieutenant-Governor a member of the Council which passed it; for the Act, as is well known, was passed at Simla, where, by Statute, the Lieutenant-Governor of the Punjab, and not the Lieutenant-Governor of Bengal, sits in the Indian Legislature.

It seems to me, therefore, clear that the mind of the Governor-General in Council was not, and could not, have been applied at all, for legislative purposes, to the circumstances of the [131] Cossyah and Jynteeah Hills in or about October 1871, and that he did not by any law, at that or any other time, take away the jurisdiction of the High Court. The Legislature being competent to take away by a law this Court's jurisdiction, might also, no doubt, by a law declare that at the end of two years such jurisdiction should cease; but it made no such law, and evidently had not made up its mind upon the subject one way or the other.

Bentham, in his *Chrestomathia* (Vol. VIII, Works, page 94, Note), defines a law as—

“ a discourse expressive of the *will* of some person or persons to whom, on the occasion and in relation to the subject in question, whether by habit or express engagement, the members of the community to which it is addressed are disposed to pay obedience ;”

and he gives a very similar definition elsewhere (Vol. III, p. 215). A regulation can be hardly a less positive or determinate expression of will enforced by sanction. If a *law* includes a declaration that a given person may do, or not do, a particular thing as he chooses, and if the permissive enactment in s. 9, Act XXII, is a lawful exercise of the legislative power conferred on the Governor-General in Council, then it would be equally within that power to enact that it should be competent to the Lieutenant-Governor to abrogate and to re-introduce at his pleasure the whole of the existing law in every part of the Lower Provinces. That, it will doubtless be said, would be a lawful but an absurd and culpable stretch of legislative power; and it ought to be assumed that no such extravagance could emanate from the Governor-General in Council; but in truth the case supposed is not by many degrees removed from the case before us, only the character of such an Act is palpable when applied to our own case, which escapes observation when it refers to a distant and little known object. At any rate, the argument for the Crown is capable of being pushed to the most dangerous lengths; and if the case appeared to me only doubtful, I should think it more reasonable to conclude that Parliament had not intended to allow a latitude which might, though it presumably would not, be so abused.

• But there are other reasons which, as I think, point with equal plainness to the same conclusion. Parliament itself seems [132] to have commented on this matter, in some places indirectly, in others directly.

The 25th section of the Indian Councils' Act recites that it has been doubted whether the Government of India had the power of making rules or laws for the non-regulation Provinces otherwise than by way of formal

legislation; and it then proceeds to validate all such rules or laws made prior to the passing of this Act. Now, irrespectively of what seems to me the unmistakable provision in favour of past rules only, it occurs to me to ask why, if the powers of the Indian Legislature have as wide an extent as is claimed for them, resort was had to the authority of Parliament in this matter? Why should not the Governor-General in Council have passed an Act legalizing such rules of previous date, and permitting them for the future? It was, it seems to me, because its powers were considered unequal to that strain, and because Parliament, in legalizing the past, thought it not right to sanction the practice in the future.

A somewhat similar measure of those powers is presented by the enactment of the Statute 34 & 35 Vict., c. 34, which, it seems to me, in the view contended for on the part of the Crown, would have been at least in part superfluous.

These declarations of the British Parliament seem to me, on the one hand, to indicate a distinct view as to the powers of the Indian Legislature, and on the other, an equally distinct determination that every relaxing of the strict rule as to the form of legislation should emanate from itself. In short, it seems to be clear that, after the passing of the Indian Councils' Act down to 1870, all legislation of every part of British India was required to be by laws passed at a meeting for making laws and regulations. That undoubtedly was, and probably continues to be, the opinion of Sir Henry Maine, for it is plainly so stated in a paper of his written in 1868, which he has published as an appendix to his work on Village Communities. And on this point I think myself justified in referring to the despatch of Sir Charles Wood in transmitting a copy of the Indian Councils' Act to Lord Canning's Government. I am aware that there is high authority against such references, [133] and also of the danger in some instances of making them, but the despatch is in this instance to be used against the Crown, whose Minister Sir Charles Wood then was; and I believe there is no reason whatever for supposing that the Secretary of State was not on that occasion a perfectly faithful interpreter of the meaning of Parliament, or that the decision of Parliament in this particular was at all other than what the Ministry intended it to be. Sir C. Wood says in paragraph 27 of the despatch (written in August 1861)—"You will observe, however, that henceforth legislative measures affecting any of the territories, regulation or non-regulation under the dominion of Her Majesty at the date of the passing of the Act, must be passed either by the Council of the Governor-General, or by that of the Government to which such territories may be subject." It would be, I think, a very imperfect and unreal compliance with that injunction, if the Governor-General in Council contented himself with a legislative declaration that the Local executive might in a given locality do anything that pleased it.

But further, as in regard to some of these provinces a more convenient and flexible procedure was found to be requisite, and as the remedy was in the hands of Parliament, a further Act was passed in 1870 (33 Vict., c. 3), wherein it was declared to be expedient that provision should be made to enable the Governor-General of India in Council to make regulations for the peace and good government of certain territories in India otherwise than at meetings for the purpose of making laws and regulations; and provision was made accordingly. It cannot have been intended that there should be in existence, simultaneously, two methods of changing the law for such territories, and I should, therefore, consider that for this reason alone the course taken under the Act of 1869, about a year and a half after the passing of the Statute just mentioned, was bad; but I also think it in plain contravention of the Indian Councils' Act.

As to the nature and extent of the legislative powers intended to be conferred on the Indian Government (it is really that) by the Indian Councils' Act, any one who desires to observe how differently Parliament works when it gives complete authority, [134] reserving only its own supreme and paramount right, need only compare that Act with the Statute 30 Vict., c. 3, constituting the Dominion of Canada with its superior and subordinate Legislatures.

One argument, however, which was much relied on, I must not leave unnoticed, although I do not deal very fully with it. Our attention was drawn to a great number of instances in which, beginning from 1844-45, and coming down to the present time, a power had been exercised more or less analogous to that used in the present instance; and with reference to these enactments it was contended, *first*, that a long course of legislation of the permissive or delegatory kind must be taken to have established the practice and therefore the authority of that course; and *secondly*, that inasmuch as many of such enactments were anterior to the Indian Councils' Act, Parliament must be taken to have noticed the course of practice, and by passing it over in silence to have sanctioned what it observed. As to this, it seems to me in the first place that the great majority of the Acts named in the list handed up to us differ so widely from the present one as to be of little value for the purpose of the argument. It often happens, and must often happen, that the usurpation of a power passes unnoticed, or at least unchallenged when the occasion is insignificant, or when the attendant circumstances appear to justify or to excuse the encroachment. To leave to an inferior or a different authority the provision of means for carrying out a law, or to entrust to its discretion the choice of a precise date for putting it in force, appears to me not incompatible with the retention by the Legislature in its own hands of the principal decision as to the policy of the law; and many of the Acts referred to go no further than this trifling delegation. Speaking without any claim to precision, because I have not thought myself bound to go through the list, I venture to affirm that not more than two or three of these instances can be at all classed in importance, and in departure, as I view it, from the statutory powers of the Government of India to legislate, with the present one. And as the questioning of such assumptions of powers is matter of accident not originating with the Courts, no argument can be founded on their having hitherto passed unnoticed by the Judges. With Parliament of course the case is widely different. The sovereign Legislature intervenes when and as it pleases of its own motion or impelled thereto from outside; and if any consent could be inferred from the silence of Parliament the Courts would be concluded. But on such a topic as this I do not think that we are bound to presume the knowledge of Parliament, or that it would be safe to draw so important an inference from its silence. It cannot be said that the practice under consideration has ever been free from doubts as to its legality. Judicial doubts on the subject were expressed in the case of *Biddle v. Tariney Churn Banerjee* (1 Tay. and Bell, 390), to the decision in which case, so far as it went, we are bound to pay the highest respect; and we may feel tolerably certain that if the matter had attracted the attention of Parliament, it would have been dealt with in a manner similar to that adopted in the 25th section of the Indian Councils' Act, that is to say, the doubts would have been recited and the practice legalized either for the past or for all time.

I am unable, therefore, to assume even that Parliament was cognizant of, still less that it intended by silence to approve, the mode of the legislation referred to.

Upon these considerations it seems to me that the notification of the Lieutenant-Governor issued under authority of Act XXII of 1869, s. 9, could

not have the effect of putting an end to the jurisdiction of the High Court. I take it as clear that this Court had jurisdiction in the Cossyah and Jynteeah Hills, because that was a jurisdiction vested in the Court of Nizamut Adawlut at the time of its abolition ; and the result is that, *me judice*, such jurisdiction has not been validly taken away, but still exists.

I wish now to say that when I first committed to writing the views which I held upon this very important question, I found myself to have arrived, by a nearly similar train of reasoning, at the same opinion which my brother MARKBY has expressed with a fullness of treatment and an amplitude of research to [136] which I do not pretend. I might have adopted, perhaps, every word of that exhaustive judgment, but I thought it on the whole more respectful to the Government, as well as more satisfactory to myself, that I should indicate, however slightly, the grounds of my own independent conclusion.

Garth, C.J.—The important questions which we have to decide in this case have now been maturely and anxiously considered by this Court ; and although I regret for some reasons the decision at which the majority of the Court have arrived, it is satisfactory to know that the points have been argued as fully as they could have been ; and that our attention has been called, as I believe it has, to all the available materials which could guide our minds to a just conclusion.

The case has been twice argued,—first by the Legal Remembrancer on behalf of the Government of Bengal : and again, at the instance of the Government of India, by the Advocate-General and the Standing Counsel Mr. *Kennedy* for the Crown, and by Mr. *Phillips* on behalf of the prisoners, whose services the Government have very properly retained for that purpose.

Upon the first point which we have to determine, there is little or no difference of opinion. We are all agreed that the Governor-General in Council could, in the exercise of his legislative powers, have removed the district of the Cossyah and Jynteeah Hills from the jurisdiction of the High Court.

The only question is, whether by the means which they have adopted, they have effectually carried out that object.

The jurisdiction of the Court has certainly not in this instance been taken away by any *direct action* of the legislative body. Act XXII of 1869 did not of itself even profess to take away that jurisdiction. It can only be said to have done so *indirectly*, by conferring upon the Lieutenant-Governor of Bengal what was undoubtedly a very large discretionary power. He was by that Act invested with authority to remove the district in question from the jurisdiction of the High Court, and to abolish entirely at his own discretion and at his own time the laws and the system of judicature which prevailed there. He had also the power of introducing new laws, and of [137] reconstituting a judicial system in accordance with his own views ; or he might, if he had so pleased, have left the district entirely destitute of any laws, or any judicial system whatever.

It may indeed be open to grave doubt, whether, looking only to the Statute from which the Legislature of India derive their powers, it was contemplated by Parliament that they should exercise those powers by conferring on any other person, or body of persons, so large a discretion.

But the question which we have to decide, is, not whether in this instance the Legislature have exercised their powers wisely, or in such a way as Parliament intended that they should exercise them; but—

1st.—Whether they had the power to take away the jurisdiction of the Court by the means which they adopted? and

2ndly.—Whether that is a question which the Courts of this country have a right to determine?

It will be convenient to deal first with the last of these points.

It was argued at the bar, that the power of making laws and regulations which was given to the Legislature of this country by the Councils' Act, was as extensive a power (subject to the restrictions contained in s. 22), as was possessed by the Imperial Legislature; and that any enactment which they were pleased to pass under the name of a law could be no more questioned by the Courts than an Act of Parliament. But it seems to me that a great and dangerous fallacy underlies this argument; because there may be many enactments which the Indian Legislature may pass, and honestly believe that they have a right to pass, but which may, nevertheless, be *ultra vires*, and of no force at all as laws. Suppose, for example, that an Act were passed, which in point of fact infringed one of the restrictions in s. 22, but which the Legislature *bona fide* believed was no infringement: would the belief of the Legislature that they were justified in passing such an Act prohibit Courts of justice from inquiring into the validity of it? Or to take another instance unconnected with the restrictions in s. 22: suppose the Legislature [138] were to pass an Act, by which they authorized certain police officers to arrest a French subject in Chandernagore, and upon the man being arrested in Chandernagore, and brought in custody to Calcutta, he were to institute a suit here for illegal imprisonment,—would the Courts here have no jurisdiction to enquire into the legality of the imprisonment, and would the prisoner be utterly without remedy, simply because the Government had passed the Act, and believed that they had a right to pass it as a law? These instances are of course very clear; but in others considerable doubt might arise as to whether an Act passed by the Legislature was or was not within their powers; and in all such cases, unless Courts of law had jurisdiction to determine this question, the Indian public would have no means of redress, and the Government here would be virtually autocratic.

It may be said, no doubt, that the right which Her Majesty in Council possesses of putting a veto on any Act which is passed by the Legislature, affords some security against any excess of their powers; but it must be borne in mind that the scrutiny to which Indian measures are subjected by Her Majesty in Council, is not so much a legal security, for the purpose of ascertaining whether the Act is or is not strictly within the powers of the Legislature, as a scrutiny of policy and prudence to determine whether the Act is in accordance with the views of the Home Government, and a wise and prudent measure having regard to the interests of the Empire.

I am, therefore, of opinion that it is the province and duty of this Court to determine, whether by the Act of 1869, and the notification in the *Gazette*, which was made in accordance with its provisions, the jurisdiction of this Court has been abolished; and that it is not because that Act has been passed by the Legislature as a law that we are disabled from inquiring into its validity.

No doubt, as soon as the fact is once established, that an Act of the Legislature which has been duly passed is within the scope of their powers,

the Court have no right to inquire into the propriety or wisdom of the law which is established by that Act; but it is not every Act which the Legislature may [139] pass which can legally be considered as a law. Thus to bring the argument nearer home to our present purpose, suppose the Legislature were to pass an Act, transferring the whole of their legislative powers over the Indian Empire to the Governor-General. That, in my opinion, would not be a law at all within the meaning of the Statute. It would simply be an abdication of their legislative powers in favour of the Governor-General, directly at variance with the language and plain meaning of the Councils' Act; and I should say the same of a similar transfer of their powers with regard to any portion of the Indian Empire.

Now I consider that the question in the present case is, whether that portion of the Act of 1869 which relates to the Cossyah Hills, is a law properly so called, or a mere transfer of the powers of the Legislature to the Lieutenant-Governor of Bengal.

I quite agree with my learned brothers, that this is a question of construction, and one to be determined not only by reference to the Councils' Act itself, but to other Acts of the Imperial Legislature which may be found to have a bearing upon the subject, and to other important considerations, to which I shall presently refer.

If the Act of 1869 stood alone, as the only instance of its class, and we had only to determine whether the transfer of power to the Lieutenant-Governor which is thereby made was such a law as the Councils' Act authorized, I confess I should feel more doubt upon the question. But having regard to the course and character of the legislation which has been going on in this country and in England with reference to this country, for the last forty years, it appears to me that the Imperial Legislature have themselves put a construction upon the Councils' Act, which (so long as it is not inconsistent with the language of the Act itself) we are bound in duty to adopt, however much it may be opposed to our first impression; and I quite think also, that every reasonable intendment, which can legally be made by this Court in favour of the validity of the acts of Legislature, should undoubtedly be made.

Now, upon looking back through the Acts of Council since the year 1833, when the East India Company's Charter Act [140] was passed, it seems to me impossible to resist the conclusion that the principle and the course of action which has constantly been pursued by the Legislature of this country, is precisely that which is now called in question in the Act of 1869.

By the Act of 1833 the legislative powers which were then conferred upon the Governor-General in Council were in the same language, and (for the purposes of the present case) to the same effect, as those given by the Councils' Act in 1861; and from the time when that Act passed, the Governor-General in Council has constantly been in the habit of exercising those powers through the instrumentality of high officials and public bodies, in whom a large discretion has been vested for that purpose; and when we consider the extent and variety of the business of the Legislature, it is difficult to see how without such machinery they could effectually discharge their functions.

It would seem almost impossible in a country like British India, so vast in extent, so various in its population, its laws, and its customs, that the Legislature could perform its multifarious duties satisfactorily, without entrusting to the Executive Government; to the Governors of provinces, or to other high officials, and representative bodies, a considerable share in the working out of

their manifold and comprehensive measures ; and it would also seem impossible that they should do this effectually without vesting in those high personages and bodies a large amount of discretionary power.

Moreover, it must be borne in mind that whatever important trusts are thus created by the Legislature, they are by no means absolute or irrevocable. Her Majesty in Council can put a veto upon any Act of the Governor-General in Council which her advisers may not approve, and the Government here are always in a position to see how the powers which they have conferred are being exercised, and if they are exercised injudiciously, or otherwise than in accordance with their intentions, or if, having been exercised, the result is in any degree inconvenient, they can always by another Act recall their powers, or rectify the inconvenience. Now, it will be sufficient for my present purpose that I should refer to a few only of the Acts of [141] Council which were passed by the Legislature, between 1833, the year of the East Indian Charter, and the passing of the Councils' Act in the year 1861 ; and I would refer in the first place to the Procedure Codes of 1859 and 1861 as being remarkable instances of the course of action to which I have alluded.

The Civil Procedure Code of 1859, which effected a great change in the law, was only applied in the first instance to the Regulation Provinces of Bengal, Madras and Bombay ; and under the provisions of s. 385, it was not to take effect in any other parts of India, until it should be extended thereto by the Governor-General in Council, or by the Local Government of any Non-Regulation territory. Thus the Lieutenant-Governors of Non-Regulation Provinces were empowered at their own discretion, and at their own time, to extend, each to his own territory, the provisions of a Statute which not only introduced an entirely new procedure into the Civil Courts, but contained enactments which affected very materially the rights, liberties, and property of the subject ; and by Act XXIII of 1861 (which was passed in the same year as the Councils' Act) the Local Governments of Non-Regulation Provinces were invested with a much larger discretion ; because they were by that Act authorized to introduce the same Code into their respective provinces, subject to such *restrictions, limitations, and provisos* as they might think proper.

Then again, by Act XXV of 1861, the Criminal Procedure Code, a similar power was given to certain Local Governments of introducing at their own option the provisions of that Code into their respective territories ; and this Act not only introduced new modes of procedure, but contained many enactments which made a very material change in the criminal law.

It seems to me impossible to deny that these Acts did in fact confer upon the Local Governments of Non-Regulation Provinces, precisely the same kind of power, although different in degree, as by the Act of 1869 was vested in the Lieutenant-Governor of Bengal ; they placed entirely in the hands of the Local Government of those Provinces the right of abolishing at their pleasure the old system of procedure, and of introducing a new system, which very materially changed the law, and [142] affected the rights and liberties of the inhabitants of those Provinces. And the Civil Procedure Code of 1861 went further, because it gave the Local Governments a power to alter or modify the Code in any way they might think proper, and so to introduce a different law into their respective Provinces from that which was in force in the Regulation Provinces.

And there were many other Acts passed during the period which I have defined, in which the Legislature proceeded upon the same principle, although the powers conferred by those Acts might not have been so extensive as in the two instances which I have just named. Thus, Act II of 1835 gave the Bengal

Government full power to issue any instructions which it might think proper for the control and guidance of the Courts of Assam and Cachar. Act VI of 1835 contained similar provisions with regard to the Courts in the Cossyah Hills. Act XXI of 1845 authorized the Governor-General in his executive capacity to place any of certain specified territories under a totally different system of law from that to which they were then subject. Act IX of 1846 empowered the Madras Government to make laws for the regulation of the Madras Harbour. Act XVI of 1846 conferred upon certain Commissioners the right of making bye-laws for the town of Calcutta. Act XI of 1848 gave the same Commissioners still larger powers of a similar kind. Act I of 1852 empowered the Bombay Government to make laws for the regulation of the Bombay Harbour. Act XXII of 1860 affords a more striking illustration of the same principle. By that Act the Chittagong Hill Tracts were entirely excluded from the jurisdiction of the ordinary Courts, both civil and criminal, and from the control of the revenue laws and officers; and they were placed entirely in the hands of the Lieutenant-Governor of Bengal, who was to appoint what Courts and officers he thought proper, and give what instructions he pleased for the governance of such Courts and officers. And again, Act XIV of 1861 contained similar provisions with regard to the Rohilkund Hill Tracts: placing the administration of justice and the management of the revenue in the hands of the Lieutenant-Governor of the North-West Provinces.

[143] Now all these Acts amount in one sense to a transfer of legislative power, because in each of them the Legislature entrusts to some other person or body of persons the making of laws and regulations which it might have made itself. Thus, instead of making laws for the regulation of the harbours of Madras and Bombay, it has transferred the power of making those laws to the Local Governments. Instead of introducing the Procedure Codes into the Non-Regulation Provinces, it has left the introduction of those Codes to the discretion of the Local Governments. Instead of organizing a system of judicature and revenue laws for outlying districts such as Assam and the Chittagong and Rohilkund Hill Tracts, it has transferred to the Local Government the duty of making laws for these districts.

The difference between the transfer of authority in all these cases and in that which we are now called upon to decide, appears to me one of degree only, not of principle; and if Courts of justice had to determine in each of such cases how far the Legislature might or might not go in the creation of these important trusts, and in conferring powers upon high officials, which they might have exercised themselves, the task would not only be one of extreme difficulty, but must lead in my opinion to most inconvenient results.

Has then the Legislature of this country been proceeding all these years upon a principle unwarranted by law? Has it been abdication its proper functions and transferring powers which it had no right to transfer? The answer to this question will be found in the Councils' Act of 1861. That Act has put a construction upon the meaning of the Indian Charter of 1833 which it seems to me almost impossible to misunderstand.

It cannot seriously be supposed that the Imperial Parliament, when it was reconstituting and strengthening the Legislative Council in 1861, conferring upon it fresh powers, and subjecting it to restrictions which had not been previously imposed, could have been in ignorance of the mode in which the powers of legislation, which had existed for nearly thirty years, had been

exercised by the Governor-General in Council.* The Acts of that Legislature had been regularly transmitted to England [144] for the approval of Her Majesty in Council. They were well known to the authorities at the India House. They had been considered by Her Majesty's advisers; and many of them, more especially the Procedure Codes, had been carefully discussed and considered both in England and in this country. The Act of 1859 was prepared and passed under the auspices of Sir BARNES PEACOCK; and the Acts of 1861 were also passed at the time when he was not only Chief Justice of the High Court but also a Member of Council.

It cannot be supposed, therefore, that if the provisions of those Acts had been contrary to law, or even questionable, they would have escaped the vigilance of Sir BARNES PEACOCK, whose keen perceptions and long experience both as a legislator and as a judge, rendered him peculiarly capable of detecting any such illegality. Nor, on the other hand, can it be supposed that the Imperial Parliament would have renewed in the Councils' Act of 1861 the legislative powers which the Governor-General in Council had so long exercised, if they had disapproved of the course of action which the Legislature had been pursuing. The fact that with the knowledge of the circumstances which they must be assumed to have possessed, Parliament did in the Councils' Act renew the powers which were given by the Act of 1833, appears to me to amount to a statutory acknowledgment that the course of action which had been pursued by the Legislature in the exercise of those powers was one which the Act had authorized.

As regards the case of *Biddle v. Tariney Churn Banerjee* (Tay. & Bell, 390), which has been relied upon by Mr. Justice MARKBY, I need only say that, although I entertain the greatest respect for the learned Judges who took part in that decision, I cannot help considering that the view which they took in that case of the powers of the Legislature has been since virtually disregarded by the Legislature itself, and overruled by the Imperial Parliament by the construction which they have put upon the Act of 1833. I believe that at the time when that case was decided, it was generally supposed that the power of the Legislature to [145] transfer its authority was very limited. If that case were now law to the full extent of the decision, it would follow that a great many Acts of the Legislature which have been acted upon as laws for years past, and are acted upon now, were altogether illegal.

I am, therefore, of opinion that Act XXII of 1869, the principle of which I cannot distinguish from that of the Acts which I have mentioned, was a law which the Legislature were justified in passing, and which did, in conjunction with the notification which was made under it, effectually remove the districts in question from the jurisdiction of the High Court. But as the majority of the Court are of a contrary opinion, the appeal made by the prisoners will be entertained, and the records will be sent for.

[* The Privy Council observed :—

" If their Lordships were to adopt the view of the majority of the High Court, they (unless distinctions were made on grounds beyond the competency of the judicial office) would be casting doubt upon the validity of a long course of legislation, appropriate, as far as they can judge, to the peculiar circumstances of India; great part of which belongs to the period antecedent to the year 1861 and must therefore (as Sir Richard Garth well observed) be presumed to have been known to, and in the view of, the Imperial Parliament when the Councils' Act of that year was passed."—L. R., 3 A. C., 907; L. R., 5 I. A., 196; I. L. R., 4 Cal., 172 (1883).]

It is much to be desired that this adverse judgment, and the vast importance of the question which it involves, may induce the Government of India to take this case, if it is open to them to do so, on appeal to the Privy Council.

NOTES.

[Reversed by the Privy Council in *Empress v. Burah*, 4 Cal., 172: 5 I. A., 178: 3 C. L. R., 197. For notes, see our Notes to that case.]

[3 Cal. 145]
FULL BENCH.

The 12th September, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE JACKSON,
MR. JUSTICE MACPHERSON, MR. JUSTICE MARKBY,
AND MR. JUSTICE AINSLIE.

Gobind Chunder Koondoo and others.....Plaintiffs
versus
Taruck Chunder Bose and others.....Defendants.*

[1 C. L. R. 35.]

Res judicata—*Act VIII of 1859, s. 2—Suit for rent.*

The plaintiffs brought this suit to establish, as against the defendants, their title to certain land in the occupation of a tenant. In a previous suit instituted by one of the present defendants against the tenant for rent, one of the present plaintiffs (representing the right now claimed by all of them) intervened as the defendant, on the ground that he was the person entitled to the rent, and failed to establish his claim. *Held*, following the Full Bench case [146] of *Hurri Sunkur Mookerjee v. Muktaram Patro* (15 B. L. R., 238: s. C., 24 W. R., 154), that the plaintiffs in this suit were barred by the judgment in the former suit.

When once it is made clear that the self-same right and title is substantially in issue in two suits, the precise form in which either suit was brought, or the fact that the plaintiff in the one case was the defendant in the other, became immaterial.

THIS case was referred to a Full Bench by GARTH, C.J., and MITTER, J., by the following order :—

“ This was a suit brought by the plaintiffs to recover possession of a one-anna share of a certain jote. In the year 1871, the plaintiffs claimed to be entitled to a 15-anna share of the said jote, and the defendant No. 1 to a one-anna share thereof. In that year the superior landlord of the jote sued some persons other than the defendant No. 1 for rent of the entire jote, and obtained a decree against them, under which the said tenure was put up for sale, and purchased by the defendant No. 4, who again sold the same share to all the plaintiffs in the name of the plaintiff No. 1. The defendant No. 1 then brought a suit (No. 1174 of 1872) for arrears of rent of the one-anna share against the occupying tenant of the jote, Mohun Chunder Doss, in which suit the plaintiff No. 1 intervened as a defendant, upon the ground that he, and not the present defendant No. 1, was entitled to the rent claimed. Thereupon the question was raised in that suit, whether the then plaintiff (the defendant No. 1), or the then defendant (the present plaintiff No. 1) was entitled to the rent as owner of the one-anna share; and that question was adjudicated upon and decided against the present plaintiff. The intervening defendant in that case (the present plaintiff No. 1) claimed to be the owner of the entire jote, by

* Special Appeal No. 794 of 1876, against a decree of Baboo Srinath Roy, Subordinate Judge of Zilla Furreedpore, dated the 14th of February 1876, affirming a decree of Baboo Unnoda Nath Mozoomdar, Officiating Munsif of Bhunga, dated the 6th July 1875.

virtue of the said sale to him on behalf of all the present plaintiffs; and the only question in this suit is, whether the plaintiffs (by virtue of that sale) are the owners of the one-anna share of the jote as against the defendant No. 1, the plaintiff in the former suit?

"Both the lower Courts have held that the plaintiffs are barred by the judgment in the former suit (by virtue of [147] s. 2, Act VIII of 1859), upon the ground that the self-same question which was there raised and decided is also raised in this suit.

"The question has now come before us on special appeal, and as there appear to be conflicting decisions of this Court upon it,—see *Mussamat Inderbutte Koor v. Shaikh Muhboob Ali* (24 W. R., 44), *Mohima Chunder Mozoomdar v. Asradha Dosse* (15 B. L. R., 251, note; s. c., 21 W. R., 207), *Deokee Nundun Roy v. Kuli Pershad* (8 W. R., 366),—and as the point is one of general importance, we think it right to refer the question to a Full Bench.

"The question is, whether, under the circumstances stated, the plaintiffs are barred by the judgment in the former suit?"

Baboo Obhoy Churn Bose for the Appellants.

Baboo Bungshidhur Sen for the Respondents.

The following cases were referred to in the course of argument:—*Mussamat Inderbutte Koor v. Shaikh Muhboob Ali* (24 W. R., 44); *Mohima Chunder Mozoomdar v. Asradha Dosse* (15 B. L. R., 251, note; s. c., 21 W. R., 207); *Deokee Nundun Roy v. Kuli Pershad* (8 W. R., 366); *Dhonaye Mundul v. Arif Mundul* (9 W. R., 306); *Shib Pershad Panah v. Muddun Mohun Doss* (15 W. R., 415); *Aukhil Chunder Mookerjee v. Shib Naram Ghose* (15 W. R., 527).

The Judgment of the Full Bench was delivered by

Garth, C.J.—I am of opinion that in this case the plaintiffs are barred by the former judgment. It is to be observed that the present suit is not to recover khas possession of the property in question. The land is in the occupation of a tenant, and the plaintiffs' only object is to establish their title to it as against the defendant No. 1. We have, therefore, to see whether the right and title which is the subject of claim in this suit was not the very same right and title which was in issue between the same parties, and determined in the former suit. When once it is made clear that the self-same right and title was substantially [148] in issue in both suits, the precise form in which the suit was brought, or the fact that the plaintiff in the one case was the defendant in the other, becomes immaterial.

Now, in this instance, the plaintiff in the former suit is the same person as the defendant No. 1 in this; and he sued to recover from the occupying tenant the rent of the property now in dispute. In that suit one of the plaintiffs (representing and claiming the same right under the same title which is now claimed by all the plaintiffs) intervened as a defendant, and he resisted the then plaintiff's claim to the rent, upon the ground that he (representing the present plaintiffs' interest) was entitled to it as the owner of the property. An issue was, accordingly, framed in that suit, as to whether the then plaintiff (the present defendant No. 1) was entitled to the rent as owner of the property in question as against the then defendant who represented the present plaintiffs. This question was contested between them in that suit upon the same title and materials which are now brought forward in the present suit, and the only difference is, that the plaintiff in that suit is the defendant in this.

On the other hand, it is argued by the appellant, that the claim in the former suit was for rent against the tenant; that the only issue in that case

was whether the plaintiff was entitled to that rent, and that the question of title raised by the intervening defendant was only incidental to the main issue. But as between the plaintiff and the intervening defendant the question, and the only question, was that of title, and as the defendant in that suit chose to intervene and to raise that question between himself and the plaintiff, he, and those whom he represented, must take the consequences of their intervention.

Our decision in this case will be found entirely in accordance with the views expressed by the Full Bench in the case of *Hurri Sunker Mookerjee v. Mukhtaram Patro* (15 B. L. R., 238; s. c., 24 W. R., 154).

The appeal will be dismissed with costs.

NOTES.

RES JUDICATA.

I. CONSEQUENCES OF ADDITION OR INTERVENTION OF PARTIES, PRO FORMA AND OTHERWISE :—

- (a) (1) *The bar of res judicata applies* :—(1877) 3 Cal., 145.
- (2) *First suit, A against B for rent. C intervened on the ground that he was entitled thereto but failed; second suit, for possession by C against A under a butwara before the first suit, res judicata applied* :—(1878) 3 Cal., 705.
- (3) *Title against different sets of tenants, intervenor bound* :—(1878) 2 C. L. R., 33.
- (b) *When the bar does not apply*—
 - (1) *First suit by A against B and C, claiming certain property as tenant of C; decided in B's favour; second suit by C against B for possession of the same property held not barred.*
 - "The conduct of the suit was not in his hands; and if it had been abandoned by the plaintiff so as to cause it to be dismissed, it could not reasonably be held that this suit was barred" :—(1886) 12 Cal., 580 F. B.
 - (2) In 12 Cal., 580 "the distinction is pointed out between formal and necessary defendants. There must be a conflict of interests among the defendants and the judgment must define the real rights and obligations of the defendants *inter se*" :—(1900) 25 Bom., 74; (1886) 11 Bom., 216; 18 All., 65. See (1891) 14 Mad., 325; (1892) 15 Mad., 264; (1894) 18 Mad., 164; (1904) 27 All., 59.

II. THE PRESENCE OF OTHER PARTIES IMMATERIAL :—

First suit, by A against B for rent dismissed on B's allegation that C and D were his landlords; second suit by A against B, C and D for possession; the question of title was held to be res judicata :—(1882) 12 C. L. R., 38. See also 3 Cal., 705; 2 C. L. R., 33.

III. THE ARRAY OF PARTIES AS PLAINTIFFS OR DEFENDANTS IN THE SEVERAL SUITS IMMATERIAL :—

First suit, A against B for possession based on title dismissed; subsequent dispossession by A; second suit, by B against A for possession, title held res judicata :—(1900) 5 C. W. N., 234. See also (1877) 3 Cal., 145; (1878) 3 Cal., 705.

IV. AS BETWEEN LANDLORD AND TENANT :—

- (a) *Title to different plots of same holding* :—(1881) 6 Cal., 715—9 C. L. R., 216; (1882) 9 Cal., 120.
- (b) *Title against different sets of tenants, intervenor bound* :—(1878) 2 C. L. R., 33.
- (c) *Title to rent* :—(1877) 3 Cal., 145; (1878) 3 Cal., 705.

V. COMPETENCY WITH REFERENCE TO SUBSEQUENT SUIT :—

See 11 Cal., 301 P. C. reversing (1880) 6 Cal., 406; (1880) 5 Cal., 832.]

[149] ORIGINAL CIVIL.

" The 27th July and 27th August, 1877.

PRESENT :

MR. JUSTICE KENNEDY

Jugomohan Haldar

versus

Sarodamoyee Dossee.

Hindu law -- Partition -- Share of mother on partition among sons -- Deceased son.

On a partition among her sons, a mother is entitled to obtain a share as representative of a deceased son, as well as one in her own right.

SUIT for partition of a house and premises, 32, Anundram Doss's Street in Calcutta. One Jayakrishna Haldar died in 1835 intestate, leaving a widow, the defendant Sarodamoyee, and five sons, the defendant Krishnamohan, Gopinohan and Harimohan since deceased, the defendant Rajonimohan, and the plaintiff. At the time of his death he was entitled to a fourth share in certain property, of which the house and premises in suit formed part, and of which he and his three brothers had been in joint possession. After Jayakrishna's death, namely in 1846, a partition of the joint property was come to, and on such partition the house and premises in suit were allotted to the representatives of Jayakrishna, who since had lived as a joint Hindu family subject to the Dayabhaga law. Harimohan, one of the sons, died in 1848 unmarried and intestate, and his mother Sarodamoyee succeeded to his share of the property as his heiress and representative. Gopinohan, another of the sons, died in 1855 intestate, leaving his widow, the defendant Soudamini Dossee, his heiress and representative. The suit was brought by Jugomohan, one of the sons, against Sarodamoyee, Krishnamohan, Soudamini Dossee, and Rajonimohan, for a partition of the property. The plaintiff submitted that, as one of the five sons of Jayakrishna, he was, subject to the share to be allotted to Sarodamoyee as mother of the said five sons as aforesaid, entitled to one equal fifth share in the said house and premises, and that the said house and premises ought to be divided into six equal parts, of which one ought to be allotted to him in severalty : but that provision ought to be made for the partition and division of the share to be allotted to Sarodamoyee between the persons entitled thereto at her death. After hearing [150] evidence, a decree was made for partition. The only question material to this report was as to the portion to be allotted to Sarodamoyee,-- namely, whether she was entitled both to her own share and the share of her deceased son Harimohan.

Mr. Bonnerjee and Mr. Stokoe for the plaintiff.

Mr. Jackson and Mr. J. G. Apcar for the defendant Krishnamohan.

The other defendants did not appear.

Kennedy, J.—In this case it seems that I have omitted to give judgment on a question as to the right of a mother on partition amongst her sons to obtain a share as representative of a deceased son, as well as a share in her own right. This question was reserved at the conclusion of the judgment, and

I thought I had already delivered judgment upon it; but I had certainly considered the question and come clearly to the conclusion that she is so entitled.

The Dayabhaga, Chapter III, s. II, para. 31, says -- "The equal participation of the mother with the brother takes effect if no separate property has been given to the woman, but if any has been given she takes half a share." I do not think that the share which a mother takes as representing her deceased son is separate property which has been given to her. The Sanskrit of this text I find in the Vyavastha, 1st edition, page 420, to be स्त्रीधनादाने which Baboo Shama Churn translates, I presume correctly, स्वामि प्रभृति स्त्रीधन नादित्ते "on the husband and the rest not giving stridhan." There is, therefore, no exception for property possessed by the wife save in the case of stridhan, and under the Bengal school of law and the Bengal decisions on the Mitakshara, inherited property is not stridhan, whatever controversy there may be under the other schools or in other treatises; see *Chotay Lall v. Chinnoo Lall* (14 B. L. R., 235, at p. 244). Even, therefore, if the words आदाने have not the precise force of gifts expanded by the [151] Bengali gloss into gifts by the husband and the rest, I think that this could not be looked upon as coming within the exception.

Attorney for the Plaintiff: Mr. *Gillanders*.

Attorney for the Defendant Krishnamohan. Baboo P. C. *Mookerjee*.

NOTES.

[SHARE OF FEMALE MEMBERS ON PARTITION. —

1. This case has been approved in (1908) 36 Cal., 75. "That ruling of KENNEDY, J., is founded on the text in the Dayabhaga Ch. III s. II p. 31 and there appears to be no doubt as to its correctness."

2. The grandmother is entitled to a share in a partition between grandsons and great grandson. — (1904) 31 Cal., 1065 8 C. W. N., 763.

3. See, with reference to the Bengal view that such share is not stridhan, the remarks of WEST, J., in (1836) 11 Bam. 285 P. B.]

[3 Cal. 151] *
 FULL BENCH.

The 19th July, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE L. S. JACKSON,
 MR. JUSTICE MACPHERSON, MR. JUSTICE MARKBY, AND
 MR. JUSTICE AINSLIE.

Lungessur Koorer..... Plaintiff

versus

Sookha Ojha.....Defendant

and

Radhay Kishan.....Plaintiff

versus

Kali Misser.....Defendant.†

*Jurisdiction—Rent Suit under Rs. 100—Special Appeal—Bengal Act VIII
 of 1869, ss. 33, 34, 102—Act VIII of 1859, s. 372.*

Held, by the Court (JACKSON, J. dissenting), that no appeal lies to the High Court from the decision of a District Judge in a suit for rent under Rs. 100, when no question of right to enhance or vary the rent of a ryot or tenant, nor any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, has been determined by the judgment.

THESE two cases were referred for the opinion of a Full Bench by JACKSON and WHITE, JJ.

The referring order in Special Appeal 1026 was as follows :—

Jackson, J.—This is an appeal against a judgment of the District Judge of Sarun made on appeal against an original judgment of the Munsif of Chumparun in a suit brought [132] by the plaintiff for recovery of Rs. 52 and 9 annas principal with interest, being arrears of rents. The Judge having reversed the decision of the Munsif, the plaintiff comes before us on special appeal, and objection is taken on behalf of the respondent that, under the provisions of s. 102 of Bengal Act VIII of 1869, no second appeal to this Court will lie, the suit being a suit for rent in which no question "of right to enhance or vary the rent of a ryot or tenant, or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto," has been determined by the judgment. This section will, undoubtedly, apply, and inasmuch as the judgment under consideration is one which, unless restricted by any provision of law, we should certainly reverse, it is impossible to avoid considering the question whether the special appeal is in fact taken away by the section referred to. The pleader for the respondent having submitted his objection has not thought fit to support it by any argument, and has left it to us to dispose of without any assistance from him.

* Special Appeal, No. 1026 of 1876, against a decree of E. Drummond, Esq., Judge of Zilla Sarun, dated the 13th of March 1876, reversing a decree of Baboo Matadin, Munsif of Chumparun, dated the 18th of December 1875.

† Special Appeal, No. 2862 of 1876, against a decree of E. Gray, Esq., Officiating Judge of Zilla Patna, dated the 29th of July 1876, affirming a decree of Baboo Nepal Chunder Bose, Second Munsif of Patna, dated the 16th of December 1875.

This matter is not new, because, unquestionably, numbers of appeals to this Court have been dismissed on this ground, the Division Bench before which the appeals came having considered the section a valid bar to a special appeal. As at present advised, I myself and my brother WHITE are both of us inclined to think that the section does not take away the appeal to this Court. But, as the contrary opinion has been repeatedly acted upon by this Court, we are bound to refer the case to a Full Bench, and as the matter will be fully argued there, it is only necessary to state briefly the reasons which make us think that the appeal is not taken away by the section in question.

The authority of this Court to entertain special appeals, and the right of suitors to profer such appeals, is provided for by s. 372 of the Civil Procedure Code, which provides that "a special appeal shall lie to the Sudder Court from all decisions passed in regular appeals by the Courts subordinate to the Sudder Court on the ground of the decision being contrary to some law or usage having the force of law, or of a substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in the decision of [153] the case upon the merits." The Court which heard the regular appeal in the case now before us is the Court of the District Judge, which is unquestionably a Court subordinate to the High Court, and, therefore, a special appeal will lie unless any law for the time being in force provided otherwise. The provision relied on as taking away the special appeal is s. 102 of Beng. Act VIII of 1869. Now that section does not, in express terms, take away this power of appeal, for it says:—"Nothing in this Act contained shall be deemed to confer any power of appeal in any suit tried and decided by a District Judge originally or in appeal, if the amount sued for, or the value of the property claimed, does not exceed one hundred rupees, in which suit a question of right to enhance or vary the rent of a ryot or tenant, or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, has not been determined by the judgment."

I am clear that the special appeal given generally by s. 372 of Act VIII of 1859 cannot be taken away by implication, but only by express provisions restricting the general right; and even if we were of opinion that the Bengal Legislature intended to take away any right of special appeal, the question would arise whether that Legislature, under the powers conferred on it by the Statute of 1861, could take away the jurisdiction of this Court.

Now, in the very important case lately decided by this Court—*Queen v. Burah and Book Singh* (I. L. R., 3 Cal., 63)—it was, I think, conceded on behalf of the Crown and assumed in the judgments delivered by the learned Judges, that the only authority which could take away the jurisdiction of the High Court was with the Governor-General in Council.

It was suggested by the vakeel for the appellant in this case that the class of suits to which this appeal belongs is a special class relating to special subjects, and that it was the creation of the Bengal Legislature; and that, therefore, the right of appeal would not exist unless it was expressly provided for by the Legislature which created it.

Suits for rent have been within the cognizance of Courts in [154] British India ever since, I believe, the foundation of that empire, and between the years 1799 and 1859, subject to a double jurisdiction,—that is to say, to the Court of the Collector, and then by a sort of appeal, to the Civil Court. By the Act of 1859, the double jurisdiction was abolished, and then suits for rent became cognizable by the Revenue Courts alone. But the Act (X) of 1859 made the orders of the Revenue Courts and also of the District Courts subordinate

to them, subject to final appeal to the Sudder Court; and this Court, when established, undoubtedly inherited the jurisdiction of the Sudder Court. The effect of the latter enactment, Beng. Act VIII of 1869, has been to throw rent suits into the great mass of litigation cognizable by the Civil Courts under the first section of the Civil Procedure Code. The present suit, therefore, being cognizable by the Civil Courts, and being heard in appeal by a Court subordinate to the High Court, there is, I apprehend, nothing in s. 102 of the Beng. Act to take away the right of appeal, and such right can only be restricted by competent legislative authority.

This view is not new to me. I have often considered it, and in the case of *Brojo Misser v. Ahladi Misran* (13 B. L. R., 376; s. c., 21 W. R., 320) these doubts were intimated in these words in my separate judgment; "For these reasons I think that whatever exemption from appeal is conferred by that section is limited to the decisions of District Judges." In saying that I left myself free for the future consideration of this question.

For these reasons I think that the efficacy of s. 102 ought to be referred for the decision of a Full Bench.

Special Appeal No. 2362 was a similar case in which the suit was for a sum below Rs. 100; and an objection was taken that no appeal would lie, and it was ordered that it should be referred to the Full Bench with Special Appeal No. 1026.

The two accordingly came together before the Full Bench.

In Special Appeal No. 1026:--

Baboo Sreenath Banerjee for the Appellant.

Baboo Doorga Pershad for the Respondent.

[155] In Special Appeal No. 2362:--

Baboo Amorendronath Chatterjee for the Appellant.

Baboo Kally Mohun Dass and Boodh Sem Singh for the Respondent.

The argument in the first case only is given. The question being in the nature of a preliminary objection to the hearing of the appeal, the respondent began.

• Baboo Doorga Pershad for the Respondent.—The principal question in this case is whether, under Beng. Act VIII of 1869, s. 102, the High Court has power to hear appeals in the class of cases to which that section refers. Under s. 153* of the previous Act (X of 1859) such suits were cognizable only in the Revenue Courts, and the decision of the Collector was final. Before Act X of 1859 there was an appeal to the High Court, but by that Act the Legislature took away the jurisdiction of the High Court in rent cases, and gave exclusive jurisdiction to the Revenue Courts. Under s. 153 of Act X of 1859,

* [Sec. 153:—In the suits under clauses 2, 4 and 7 of section XXIII, and under section

No appeal from any decree of Collector for money below 100 Rupees unless the decision involves, some question of right to enhance rent or some question relating to a title to land.

XXIV of this Act, tried and decided by a Collector, if the amount sued for or the value of the property claimed does not exceed one hundred rupees, the judgment of the Collector shall be final, and not open to the revision or appeal except as hereinafter provided, unless in any such suit a question of right to enhance or otherwise vary the rent of a ryot or tenant, or any question relating to a title to land, or to some interest in land as between parties having conflicting claims thereto, has been determined by the judgment, in which case the judgment shall be open to appeal in the manner provided in the sections CLX and CLXI of this Act.]

there was no appeal to the Civil Courts, including those in the High Court. Section 160 of that Act points out the cases in which an appeal would lie. The provisions of s. 102 of Beng. Act VIII of 1869 are similar to those of s. 153 of Act X of 1859, and as there was no appeal under the old Act, there can be none under the new one. [JACKSON, J.—The Civil Courts get jurisdiction in these cases by the removal of Act X of 1859, and s. 1 of Act VIII of 1859 takes effect.] Section 33 of Beng. Act VIII of 1869 provides that all suits brought for any cause of action arising under Act X of 1859 and Beng. Act VI of 1862 shall, from and after the commencement of the Act, be cognizable by the Civil Courts according to their several jurisdictions. The jurisdiction given here is a jurisdiction to try suits according to the Code of Civil Procedure, except where it is otherwise provided by the Act—*Poorno Chunder Roy v. Kristo Chunder Singh* (23 W. R., 171); and there [156] being other provisions in the Act as to rent suits, this appeal does not lie. [MACPHERSON, J.—Why don't you argue that the recent Full Bench case of *Bojo Misser v. Ahladi Misrani* (13 B.L.R., 376; s.c. 21 W.R., 320) decided the whole question?] Section 34 of Beng. Act VIII of 1869 provides that, "save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein, shall be regulated by the Code of Civil Procedure." If this section had stood alone, it might be argued that rent suits were included; but s. 102 was enacted at the same time, and it is not necessary to have an express separate enactment in order to take away jurisdiction. Sections 34 and 102 should be construed together. The first portion of s. 102 refers to the state of the law before the passing of the Act. Then neither the High Court nor the District Court had power to hear appeals in rent cases. Now the District Judge can hear an appeal in a rent suit, but the High Court cannot.

Bahoo Sreenath Banerjee for the appellant.—With regard to the case of *Bojo Misser v. Ahladi Misrani* (13 B. L. R., 376; s. c., 21 W. R., 320) the point now before the Court was not decided. [MACPHERSON, J.—Mr. Rochfort raised it in argument.] Section 102 of Beng. Act VIII of 1869 does not remove any power of hearing special appeals vested in the Court under s. 372 of Act VIII of 1859. Nothing is to be deemed to confer a power of appeal where there is no express enactment, and equally nothing is to be deemed to deprive the Court of the power of hearing appeals given by a Statute, the only way by which an existing statutory right of appeal can be taken away is by an express enactment. In ordinary civil suits the Court has jurisdiction to hear special appeals, and as s. 34 of Beng. Act VIII of 1869 does not affect that power, this appeal must lie. The real difficulty is, whether ss. 102 and 34 of Beng. Act VIII of 1869 being read together deprive the Court of the power of hearing special appeals. If suitors have a right, they cannot lose it by a wrong construction put upon an Act. The power that the Court has is not expressly taken away, and cannot be impliedly taken away. [157] The Cossyah and Jynteesh Hills case—*Queen v. Burah and Book Singh* (1. L. R., 3 Cal., p. 63)—decides that Acts of the Bengal Council cannot affect the jurisdiction of the High Court. The High Court derives its powers from the Charter granted by virtue of the Statute 24 and 25 Vict., c. 104. Section 9 of that Statute gives the Court jurisdiction and powers subject to restriction by the Letters Patent and the Acts of the Legislative Council. Therefore, the Bengal

Civil Courts have cognizance of all suits unless specially barred.

* [Sec. 1 :—The Civil Courts shall take cognizance of all suits of a civil nature, with the exception of suits of which their cognizance is barred by any Act of Parliament, or by any Regulation of the Codes of Bengal, Madras and Bombay, respectively, or by any Act of the Governor-General of India in Council.]

Council cannot pass any Act restraining the powers conferred by the Charter *Reg. v. Reay* (7 Bom. H. C. Rep., Cr. Ca., 6); *The Queen v. Meares* (14 B. L. R., 106). Act VIII of 1859 and the old Rent Act were passed in the same year, and s. 23 of the Rent Act provided that rent suits should be cognizable in the Courts of the Collectors of land revenue and in no other Courts. Bengal Act VIII of 1869 removed the bar to rent suits being brought in Civil Courts, and there being no express provision against an appeal to this Court, this Court must have jurisdiction.

Bahoo Doorga Pershad in reply.

The following judgments were delivered by the Full Bench:—

Jackson, J.—In answering on my part the question referred to the Full Bench, I have little to add to the reason which I gave in referring this case. Those reasons, to my thinking, have not been answered. It is suggested that the question raised here has been virtually decided by a long course of practice, and also by the ruling of the Full Bench in the case of *Brojo Misser v. Ahladi Misran* (13 B. L. R., 376; s. c., 21 W. R., 320); and that we ought not, whatever our view might have been, if the question were now raised for the first time, to disturb such a course of practice. It seems to me that, although it is extremely desirable to maintain a long-settled ruling in regard to matters in which the security of titles depends, or even where to arrive at a contrary decision would disturb the practice of inferior Courts, it is not necessary to do so in the present instance, where no man's title can be affected, nor can any possible inconvenience arise by the mere admission of the present appeal. It seems to [158] me that, in the first place, the question has not been expressly raised, and decided by a Full Bench. 2ndly, that if, as I think, the law allows an appeal, we are not competent to deprive the appellant of his right merely out of deference to the practice of the Court, and 3rdly, that to persist in an error, merely because that mistake has been committed for seven years, is a course in which I am not prepared to concur. I would admit this special appeal.

Macpherson, J.—In my opinion the questions which have been referred to us are concluded by the uniform course of the decisions of this Court ever since Beng. Act VIII of 1869 came into force, and cannot now be re-opened. Many thousands of suits under this Act have been disposed of annually, and this Court has never, in any one of the numerous appeals which have come before it in these suits, doubted the power of the Bengal Council to pass the Act. If the uniform course of our decisions during these many years is wrong, it seems to me that it is a matter for the Legislature, and that it is too late for us now for the first time to say that the Act was made without jurisdiction in so far as it touches the High Court as regards the right of appeal or otherwise.

As to the particular issue arising on s. 102, it seems to me also to be concluded by the numerous decisions of the Court. (See for example 18 W. R., 102; 8 B. L. R., 180 and 188; 10 B. L. R., Ap. 29 and 30; 13 B. L. R., 377; and 23 W. R., 17, *per* MACPHERSON, J.), (all taking the same view of the law) ending with the Full Bench case of *Brojo Misser* (13 B. L. R., 376; s. c. 21 W. R., 320), which was heard in March, 1874. The question in that case was, whether an Additional Judge was a District Judge within the meaning of s. 102. The majority of the Court held that he was, and therefore that, under that section, no appeal lay. Mr. Justice JACKSON held that he was not, and therefore that the appeal did lie. But the report of that case does not show that any of the Judges doubted the effect to be given to s. 102, or conceived

that, in cases falling within that section, there could be any appeal from the decision of the District Judge.

[139] I consider that the matter referred to us has already been settled by these cases.

Markby, J.—I concur in the judgment of Mr. Justice MACPHERSON.

Ainslie, J.—By 24 and 25 Vict., c. 104, s. 9, the High Court is vested with all powers and authorities that may be conferred on it by Her Majesty's Letters Patent, and subject to the legislative control of the Governor-General in Council, with all the then existing powers of the Sudder Dewani Adawlut.

By s. 15 of the Letters Patent of 1862, this Court was constituted a Court of appeal from the Courts from which there was then an appeal to the Sudder Dewani Adawlut, and was directed to exercise jurisdiction in such cases as were then subject to appeal to the Sudder Dewani Adawlut by virtue of any existing law, or which might thereafter be made subject to appeal by any law or regulation made by the Governor-General in Council.

By s. 16 of the Letters Patent of 1865, this Court is constituted a Court of appeal from all Courts subject to its superintendence, and directed to exercise appellate jurisdiction in such cases as were then (in 1865) subject to appeal to it by virtue of any law or regulation then in force.

In 1861, 1862, and 1865 alike, there was at least one class of suits in which the Sudder Dewani Adawlut or the High Court had no power to interfere on special appeal,—namely, the class of rent suits falling within the provisions of s. 153, Act X of 1859. This Court neither inherited a power to interfere in such suits from the Sudder Dewani Adawlut, which had not got it, nor took it as a new power under the first or second Letters Patent.

The words of the first Charter "in such cases as are subject to appeal to the said Court of Sudder Dewani Adawlut" distinctly limit the appellate power of this Court.

Under the second Charter it can only be held, that it gives a power of dealing in appeal with the class of cases now under consideration, if it was given by the laws in force in 1865. The general law of appeal was s. 23, Act XXIII of 1861: but [160] this general law was rendered inoperative in certain cases by s. 153, Act X of 1859, and as by this law there was no first appeal in certain cases, the special appeal section (372, Act VIII of 1859) had nothing to operate upon.

By s. 33, Beng. Act VIII of 1869 the jurisdiction of the Collectorate Courts was brought to an end, and all suits theretofore triable in such Courts

* [Sec. 23 :—Except when otherwise expressly provided in this or any other Regulation

Appeal to lie from all decrees, except when expressly prohibited.

Appeal to Sudder Court to be heard by two or more Judges.

or Act for the time being in force, an appeal shall lie from the decrees of the Courts of original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts. If the appeal lie to the Sudder Court, it shall be heard and determined by a Court consisting of two or more Judges of that Court. If, when the Court consist of only two Judges, there is a difference of opinion upon the evidence in cases in which it is competent to the Court to go into the evidence, and one Judge concur in opinion with the lower Court as to the facts, the case shall be determined accordingly; if in a Court so constituted there is a difference of opinion upon a point of law, the Judges shall state the point on which they differ and the case shall be argued upon that question before one or more of the other Judges, and shall be determined according to the opinion of the majority of the Judges of the Sudder Court by whom appeal is heard.]

were made triable by the ordinary Civil Courts; and by the next section it was provided that the procedure was to be regulated by the Code of Civil Procedure save as in this Act might be otherwise provided. The 102nd section is one of those sections in which a different procedure is provided; and, therefore, unless s. 34 can be got rid of, there can be no special appeal.

It seems to me that s. 372, Act VIII, 1859, does not override s. 34, Beng. Act VIII, 1869. In order to introduce s. 372, Act VIII, 1859, it must be held that the provisions of s. 153, Act X, 1859, were based on the constitution of the Court from whose judgment the appeal was taken away, and not on the character of the suits in which it was forbidden. Such a view seems to me to be distinctly negatived by s. 27, * Act XXIII, 1861, as to which there can be no doubt that the character of the suit is the foundation of the law.

But if the limitation of appeals established by s. 153, Act X, 1859, of the Governor-General in Council, affected suits, and was not in respect of Courts, then s. 372 is as much qualified by s. 153, Act X of 1859, as it admittedly is by s. 271, Act XXIII, 1861, and the change of form introduced by Act VIII of 1869 has not the effect of removing the qualification. Section 34, Act VIII of 1869, as carried out by s. 102, left the jurisdiction of this Court intact, and is, therefore, not open to the objection that no legislative power except that of the Governor-General in Council can alter the jurisdiction of this Court.

If I entertained any doubt on the subject, I should feel bound by the long-established and never-before-questioned (as far as I know) practice of the Court.

Garth, C.J.—But for the long course of practice which has prevailed in this Court since the year 1869, and the Full Bench [161] decision in the case of *Brojo Misser v. Ahladi Mirani* (13 B. L. R., 376; s.c., 21 W. R., 320), I should have been disposed to hold with Mr. Justice JACKSON that a special appeal lay in a case like the present. But I think it so extremely important that the rules of law prescribed by this Court should be settled and uniform, that I am unwilling to disturb a course of practice which, as it seems to me, has been confirmed by a Full Bench decision.

It is true, that in that case the point now before us was not directly argued, because apparently it was not considered arguable; but the decision of it appears to me to have been involved in the Full Bench judgment, because the Court there held that, under circumstances similar to the present, a special appeal does not lie from an Additional Judge to this Court any more than from a District Judge. That ruling does, in my opinion, virtually determine the question now referred to us. The special appeal will, therefore, in conformity with the judgment of the majority of the Court, be dismissed with costs.

* [Sec. 27 :—No special appeal shall lie from any decision or order which shall be passed on regular appeal after the passing of this Act by any Court subordinate to the Sudder Court, in any suit of the nature cognizable in Courts of Small Causes under Act XLII of 1860 (for the establishment of Courts of Small Causes beyond the local limits of the jurisdiction of the Supreme Courts of Judicature established by Royal Charter), when the debt, damage, or demand for which the original suit shall be instituted shall not exceed five hundred rupees; but every such order or decision shall be final.]

[3 Cal. 161]
PRIVY COUNCIL.

The 17th and 18th April, 1877.

PRESENT:

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH AND
SIR R. P. COLLIER.

Forester and others.....Plaintiffs

versus

The Secretary of State for India in Council.....Defendant.

[= 4 I. A. 137.]

[*On appeal and cross appeal from the Chief Court of the Punjab.*]

*Execution—Privy Council Order awarding costs—Interest on costs —
Act XXIII of 1861, ss. 10 and 11.*

Where an order passed by Her Majesty in Council on report of the Judicial Committee awards costs, but is silent as to interest on the costs so awarded, it is not competent to the Court which has to execute the order to direct payment of the costs with interest.

The principle of the decisions in cases arising under ss. 10 and 11 of Act XXIII of 1861, which have established a similar rule of practice in executing decrees passed by the Courts in India, approved.

Interest not provided for in the order of the Privy Council may, however, be allowed in execution where the parties have agreed to submit the matter to the discretion of the Court executing the order.

[162] THIS was an appeal, with a cross appeal, against a decree of the Chief Court of the Punjab, dated the 17th April 1875, passed in execution of an order of Her Majesty in Council, dated the 5th February, 1873.

The order in question was passed in a suit in which the representatives of the late Mr. Dyce Sombre sought to recover the value of certain arms which had been seized in the year 1836 by the Government of India on the death of Begum Sumroo. This suit was originally brought in the year 1848 in the Court of the Zilla Judge of Delhi, by whom it was dismissed with costs in the following year as barred by limitation, his decision being affirmed by the Sudder Court of Agra in the year 1850. These decisions were, however, reversed on appeal to the Judicial Committee of the Privy Council, who, by an order passed in February 1858, remanded the case for trial on the merits, and at the same time directed that the costs of the suit, so far as they had been occasioned by the improper plea of limitation, should be paid to the plaintiffs by the defendant.

This order was only partially carried out, so far as the direction as to costs was concerned; the costs which had been incurred in the Appellate Court were paid, but the costs incurred in the Court of the First Instance were not paid. The case was, however, tried on the merits; and finally came up again to the Judicial Committee on appeal, who, on the 5th of February 1873, after reversing the decision of the lower Courts on the merits, directed that the amount of the costs of the appellants in all the Courts in India be paid to the appellants in India by the respondent.

In execution of this order, the Chief Court of the Punjab passed the order under appeal, by which they awarded to the plaintiffs the whole of the costs incurred by them in the course of the first hearing in the Zilla Court of Delhi, and in the course of the hearing on the merits in the Deputy Commissioner's

Court at Delhi, in the Commissioner's Court at Hissar, and in the Chief Court of the Punjab, but without interest; and also directed the refund of the sum of Rs. 1,014, paid by the plaintiffs, as the defendant's costs in the Zilla Court of Delhi, with [163] interest thereon at 12 per cent. per annum, from the 11th September 1849, the date when it was paid.

The main question raised by the present appeal was as to whether the Chief Court of the Punjab was right in refusing interest on the plaintiff's costs. In the cross appeal objection was taken to interest being awarded on the refund of the sum of Rs. 1,014, the defendant's costs, and to the plaintiffs being allowed any portion of the costs incurred in the Zilla Court of Delhi at the original hearing, except the stamp-fee then paid on the institution of their suit.

Objection was also taken to the date from which interest had been allowed by the Chief Court on the sum of Rs. 5,309.

Mr. Leith, Q.C., and Mr. Doyle for the Appellants. —The order of Her Majesty in Council received effect under the decree of the Chief Court. The Chief Court, in making that decree, was to be governed by the practice of the Indian Courts, which is to allow interest on costs. Costs carry interest in the Indian Courts without any special order, unless the contrary be expressed—see Macpherson's Civil Procedure, 5th edition, p. 232. *Digambaree Dabee v. Nundgopal Banerjee* (1 W. R. Mis., 1); *Haradhun Sanlyal v. Rashmonee Dassia* (2 W. R. Mis., 21); *Singh v. Lalla Kalee Churn* (3 W. R., Mis., 21). [Sir B. PEACOCK.—If there is no direction in the order in Council as to interest, can the Court below award it? Here there is no indication of an intention that the Court below should have any discretion to award interest.] According to the practice in India, a Court executing a decree can award interest although the Court passing the decree has made no order on the point—see *Beer Chunder Joobraj v. Ram Coomar Dhur* (6 W. R., Mis., 26). [Sir J. COLVILLE.—Have you any cases to show what the practice of the Indian Courts has been in dealing with an order of the Privy Council giving costs, but saying nothing as to interest?] I have no case exactly in point, but the decision in *Rajah Leelanund Singh v. Maharajah Luckmissur Singh Bahadur* (13 Moore's I. A., 490) is *in pari materia*. There the plaintiff sued [164] for possession of lands and for mesne profits. The Privy Council, in remitting the cases, ordered that the Court below should direct possession to be given to the plaintiff. The Court below gave possession, but refused to order mesne profits, on the ground that the Privy Council had given no order in respect of these. It was held by the Privy Council on appeal, that the order in Council directing possession to be given carried by its own force the right to mesne profits. [Sir J. COLVILLE.—In that case this Committee did not make any decree, but only a declaration as to the rights of the parties, leaving it to the lower Court to work them out. Here the decree is complete and final.] The practice of the Indian Courts to allow interest on costs continued up to a recent period; but is alleged to have been altered in consequence of the decision of a Full Bench of the Calcutta Court in the case of *Mosoodun Lall v. Bheekaree Singh* (B. L. R. Sup. Vol., 602). The decision in that case seems rather to conflict with the view taken by the Privy Council in the case last cited, and it may be doubted whether it is a correct exposition of s. 11, Act XXIII of 1861. But assuming it to be correct, it does not touch the question of interest on costs, but only decides that interest shall not be allowed in execution on the principal debt, where it is not expressly given by the decree. The later cases of *Rajah Leelanund Singh v. Maharajah Joy Munzul Singh* (15 W. R., 335) and *Maharanee Braro Soonduree Debia v. Anund Moyee Debia* (16 W. R., 302) fail to notice this

distinction. [Sir M. SMITH.—The practice of the Courts should be uniform. Interest on costs can be on no different footing from interest on the principal debt.] We rely on the views expressed by the Privy Council in the case of *Rajah Leelanund Singh v. Maharajah Luchmissur Singh Bahadoor* (13 Moore's I. A., 490).

As to the time from which interest on costs should be reckoned, it was reasonable that it should run from the time when the costs were actually incurred. [Sir J. COLVILLE.—When the decree of a Court of First Instance is reversed by [165] a Court of appeal with costs and interest, the Court in taxing costs does not direct that interest shall run from two dates, from the date of the decree in the lower Court in respect of the costs incurred in that Court, and from the date of the decree in the appeal in respect of the costs incurred by the appeal.] We contend that the order of an Appellate Court reversing the judgment of a lower Court should restore the successful appellant to the position he would have been in had he succeeded at first in the lower Court.

Mr. J. D. Mayne for the Secretary of State.—The order of Her Majesty in Council does not award interest on costs, and the Punjab Court cannot go beyond that order. Whatever may have been the former practice it is now settled law that the Courts in India in dealing with decrees of the Courts of that country could not award interest in execution not provided for by the decree; see the decision of the Privy Council in *Sadasiva Pillai v. Ramalinga Pillai* (15 B. L. R., 383; s.c. L. R., 2 Ind. Ap., 219). There is no difference in this respect between a decree of an Indian Court and an order of Her Majesty in Council. The cases of *Rajah Leelanund Singh v. Maharajah Joy Mungul Singh* (15 W. R., 335) and *Maharajah Brojo Sunduree Debia v. Anund Moyee Debia* (16 W. R., 302) related to such orders. In these cases and in *Lekhray Roy v. Mahtab Chand* (21 W. R., 147) and in *Georoo Doss Roy v. Stephens* (13 B. L. R., Ap., 44; s.c., 21 W. R., 195), it was held that, where the order in Council was silent as to interest on costs, the Court of execution could not award it. The same course had been followed by the High Court of the N.W. Provinces in *Bhoza Rughbur Singh v. Bhoza Itaj Singh* (3 All. H.C. Rep. (1871), 319) in which the Court distinguished the case of *Rajah Leelanund Singh v. Maharajah Luchmissur Singh Bahadoor* (13 Moore's I. A., 490), on the ground that in that case no final decree had been prepared by the Privy Council, the proceedings being merely remitted to the High Court with certain directions as to the decree to be made. In the Madras High Court also it had been decided that it is not competent to a Court executing a decree to add to it by giving interest: see *Kuppa Ayyar v. Venkataramana Ayyar* (3 Mad. H. C. Rep., 121), where the reasons are well given.

But assuming that the Chief Court of the Punjab could have awarded interest, it certainly could not have done so from the time for which the appellants contend. Had the order in Council awarded interest on costs, the interest would have run from the date of the order, not from the date of the reversed judgments of the lower Courts. Under the Statute 1 and 2 Vict., c. 110, s. 17, interest runs, in the Courts in England, on costs forming part of a judgment as well as on the principal debt, but only from the date of entering up judgment: *Pitcher v. Roberts* (2 Dowl. N.S. 394). As to the time when judgment is to be considered as having been entered up, see *Fisher v. Dudding* (3 M. & G. 238), *Newton v. Grand Junction Railway Company* (16 M. & W. 139).

By our cross-appeal we object to the decree of the Chief Court in so far as it orders us to pay Rs. 1,273, being the plaintiffs' costs in the Zilla Court

of Delhi, and to refund with interest the sum of Rs. 1,014, the defendant's costs in that Court paid by the plaintiffs. These items were recoverable under the order in Council passed in February 1858, and had already been made the subject of proceedings in the Courts of the Deputy Commissioner and of the Commissioner of Delhi. The latter had refused to allow the plaintiffs' application as not made within time. As to the time within which the orders of Her Majesty in Council should be executed, see *Kristo Kinkur Ghose Roy v. Burroda Caunt Singh Roy* (14 Moore's I. A., 465; s. c., 10 B. L. R., 101), in which the view of the Full Bench in *Annandamayi Dasi v. Purna Chandra Roy* (B. L. R., Sup., Vol., 506; s. c., 6 W. R. Mis., 69), that the right to enforce the order of Her Majesty in Council is not affected by any law of limitation, was not assented to. [Sir M. SMITH.—The order in Council is not always a decree. The lower Court [167] may have to give the decree which the order directs. Time will then run from the date when the lower Court gives the decree. Sir B. PEACOCK referred to Mr. Macpherson's Practice of the Privy Council, 2nd edition, pp. 149, 150.] We say the claim was barred under Part II, s. 5, cls. 1 and 2 of the Punjab Code. The Commissioner of Delhi, moreover, having so decided in 1865, the matter is *res judicata*.

The Chief Court was wrong in granting interest on refund of costs; see *Rodger v. The Comptior d' Escompte de Paris* (7 Moore's P. C. C., N. S., 314), where the point is expressly decided. There was also an error in the date from which interest had been reckoned by the Chief Court on the refund of Rs. 5,309.

Mr. Leith in reply admitted the error pointed out. It should have been corrected in the Court below, but might be corrected at any stage. The defendant had expressly agreed to be bound by the decision of the Chief Court as to whether the refund of the costs received by him should be with interest, and was bound by that agreement—*Sadasiva Pillai v. Ramalinga Pillai* (15 B. L. R., 383; s. c. L. R., 2 Ind. Ap. 219). The order in Council of 1873 gave the plaintiffs a right to recover their costs in the Zilla Court of Delhi, although their remedy under the order in Council of 1858 might be gone.

At the close of the argument their Lordships' Judgment was delivered by

Sir J. W. Colvile.—These appeals arise out of proceedings taken in the Chief Court of the Punjab to give effect to an order of Her Majesty in Council, made on the 5th day of February 1873. That order was designed to determine finally a litigation which had subsisted for a great many years, first between the committee of the late Mr. Dyce Sombre, and, after the death of that gentleman, between his representatives and the Government of India touching the liability of the Government for a seizure of certain arms and military stores effected upon the death of the Begum Sumroo. It was a peculiar order, because, after reversing the decisions of the Indian Courts declaring the seizure to have been wrongful, and ascertaining the value of the arms and munitions of war, and the amount of the damages to be paid by the defendant to the plaintiffs, it proceeded, with the consent of the counsel on both sides, to direct payment of that sum to be made in this country, leaving nothing to be carried out in India except the final direction as to costs, which was, "that the costs of the appellants in the Chief Court of the Punjab, and in the Court of the Commissioner at Hissar, and in the Court of the Deputy Commissioner of Delhi, be taxed and ascertained by the proper officers of those

Courts respectively, and that the amount of the costs of the appellants in all the Courts in India be paid to the appellants in India by the respondent."

After various proceedings had in the Chief Court of the Punjab, the order under appeal was made. The following are the material passages in it: "The costs taxed and ascertained to have been incurred in India by the plaintiffs, appellants, which shall be payable by the defendant, respondent, amount, as per memorandum at foot, to Rs. 12,354-12-0, but no interest is allowed on such costs"; and "the Court further orders and decrees that the defendant shall refund to the plaintiffs the sum of Rs. 1,014, with interest thereon from the 11th September 1849, to date of payment, at the rate of 12 per cent. per annum; and a further sum of Rs. 5,309, with interest thereon from the 4th August 1865, to date of payment, at the rate of 12 per cent. per annum."

Against this order the appeal and the cross appeal have been brought. The appeal of the plaintiffs is in effect that interest ought to have been allowed upon the 12,354 rupees 12 annas in a certain way. The Judges of the Chief Court of the Punjab had held that, in executing the order of Her Majesty in Council, they were not at liberty to give any interest upon the costs, because the order contained no direction for the payment of interest in respect of such costs, and it may further be observed that the mode in which the plaintiffs in the Court below sought to have the interest which they claimed computed was a very peculiar one. They asked to have the [169] gross principal amount of the plaintiffs' costs, viz., the 12,354 rupees 12 annas, divided into four sums, and to have interest computed on each of such sums from the date of the decree of the Court wherein the costs which is represented had been incurred. So far as their Lordships are aware there is no instance of such a course having been adopted; certainly none has been brought before them during the somewhat lengthy argument which has taken place upon these appeals. The Committee that made the report to Her Majesty upon which the order in Council was made, if it had intended to place, by means of some such direction, the parties in the situation in which it considered they would have stood if everything had been done rightly in the lower Courts, would of course have been competent to do so; but that a Subordinate Court executing an order in Council, which is silent upon interest, is at liberty to interpolate such a very special direction into that order, is a proposition which seems to their Lordships to be wholly unsustainable. It is not necessary for their Lordships to consider from what other date interest should be calculated, because they are of opinion that the Chief Court of the Punjab is right in its conclusion—that where the order in Council is silent as to interest upon the costs decreed, the Judge of the Indian Court which has to execute the decree has no power to direct payment of those costs with interest.

The learned Counsel for the appellants relied upon what they said had been the course of practice in India. In determining what is the existing practice in India, their Lordships think they ought first to consider what are the statutory provisions which govern the present procedure of the Courts in India. Those which are material to the present question are to be found in the 10th and 11th sections of Act XXIII of 1861. The words of the 10th section are: "When the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on the principal sum adjudged, from the date of suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the date of suit, with further interest on the aggregate sum so adjudged, and on the costs of [170] the suit from the date of the decree to the date of payment." This

clause seems to give the Courts a discretionary power to allow interest on costs, rather than to make it imperative upon them to do so. The learned Counsel for the plaintiffs, however, relied on certain decisions of the High Court of Bengal, which they said established that an order for costs necessarily implied that the party in whose favour they were decreed might take out execution for them with interest from the date of the decree to the date of payment. It appears, however, that the more recent and authoritative decisions upon the 11th section of Act XXIII of 1861 are the other way. It is sufficient to mention the case of *Moosoodun Lall v. Bheekare Singh* (B. L. R., Sup. Vol., 602), which was a decision of the Full Bench of the High Court of Bengal; and that of *Kuppa Ayyar v. Venkata Ramana Ayyar* (3 Mad. H. C. Rep., 421) before Mr. Justice BITTLESTON in the Madras High Court. Those cases seem to have established as to decrees of the Indian Courts that the Judges of the subordinate Courts executing those decrees have no right to allow interest unless the decree which is to be executed has specifically directed the allowance of that interest. It was said that these cases, or some of them, related to the principal monies decreed, or to mesne profits; but so far from there being any authority in favour of a distinction between these and costs, the case of *Rodger v. The Comptoir d'Escompte de Paris* (7 Moore's P. C. C., N. S., 314) is an authority for the proposition that a claim for interest on costs in that respect is less favoured than a claim for interest on the principal money decreed. Since the before-mentioned cases have been determined as to the practice of the Courts of India and the powers of the Judges executing decrees of those Courts, the power of a subordinate Court executing an order of Her Majesty in Council has also been considered in the two cases cited from the Weekly Reporter (*Rajah Leelanund Singh v. Maharajah Joy Mungul Singh*, 15 W. R., 335; and *Daharance Brojo Moonduree Debia v. Annund Moyee Debia*, 16 W. R., 302), in which judgment was given by Mr. Justice MITTHER; and it appears, that as to orders in Council, as well as to decrees of the Indian Courts, [171] the existing practice is that interest cannot be given in execution unless it is specially directed to be given.

It appears to their Lordships that the principle of the decisions which have established this practice is sound, and that the plaintiffs have failed to show that the order made by the Chief Court of the Punjab is erroneous in that it has refused to allow interest on the sum of Rs. 12,354-12-0.

• Their Lordships have now to consider the cross appeal. The first point taken on that appeal is, that the defendant has been erroneously charged so much of the 12,354 rupees 12 annas as consists of costs which were incurred in the Delhi Court before Mr. Gubbins, and were dealt with by the order in Council of the 3rd of February 1858. Now, that prior order in Council came about in this way: When the suit was first brought in the Zilla Court of Delhi by the committee of the lunatic, Mr. Dyce Sombre, Mr. Gubbins, the Judge of that Court, dismissed it on the ground that the claim was barred by the Statute of Limitations. His decision was confirmed on appeal by the Sudder Court of Agra. Against both decrees there was an appeal to Her Majesty in Council. The Judicial Committee thought that the decisions were erroneous, reversed them, and directed that the costs of the suit, so far as they had been occasioned by the improper plea of the Statute of Limitations, should be paid by the defendants to the plaintiffs. That order for payment was never wholly carried out. It was partially carried out because the costs incurred in the Appellate Court were paid; but the costs incurred in the Court of First Instance—the Court of Mr. Gubbins—do not appear to have been paid; and it is contended on the part of the defendant

now that those costs cannot properly be given as part of the costs payable under the order in Council of 1873.

It appears to their Lordships wholly unnecessary to consider the arguments which have been addressed to them touching the plea set up in the Courts of the Punjab, that the claim for these unpaid costs was barred by the Statute of Limitations, or the order passed upon it. Whether it would have been proper for their Lordships in any case to express an opinion as to the merits or effect of those orders in such a proceeding as this, is [172] very questionable; but it appears to their Lordships that those orders, taking them at their highest, could only bar the remedy given by the order in Council of 1858 for the recovery of those costs; and that, upon the true construction of the order of 1873, it was the intention of this Committee to give the plaintiffs the whole costs of the suit, so far as they had not been paid, whether incurred in the three Courts in which they are directed to be taxed, or in the Court of Mr. Gubbins. The ordering part of the order in Council directs, not only that the costs in the three specified Courts are to be taxed, but that the amount of the costs of the appellants in all the Courts in India are to be paid to the appellants in India by the respondents; and the judgment of the Committee on which this order was drawn generally expresses that the plaintiffs were to receive their costs of the suit. It also appears that when this matter was discussed in the Court below, Mr. Plowden, who appeared for the defendant, consented to the costs in question being ascertained in that Court, and that thereupon the Court made an order that they should be included in the Rs. 12,354-12, and paid by the defendant to the plaintiffs. This seems to their Lordships to have been a very proper concession on the part of Mr. Plowden, inasmuch as it was equitable that these costs should be paid to the successful party; and reasonable that there should be one order made for the payment of all the costs of the suit, instead of leaving open any questions touching the rights of the plaintiffs under the order in Council of 1858.

Their Lordships, therefore, feel no doubt in affirming the judgment of the Chief Court of the Punjab upon this point.

The next question raised by the cross-appeal was with reference to the refund of the sum of Rs. 1,014. There were three points made upon this item: one, that the principal had already been repaid; another, that it was subject to the same objection as that which has just been disposed of with respect to part of the 12,354 rupees; and the third, that it ought not to have been ordered to be refunded with interest. Of the supposed repayment there is no evidence whatever. In an order dated the 8th April 1875, the Senior Judge of the Chief Court of the Punjab says:—"The Court, referring to annexure D, has now [173] before it a sealed copy of the order of Mr. Gubbins, dated 11th September 1849, showing that the sum of Rs. 1,014 was paid by the plaintiffs for the defendant's costs in that year"; and no suggestion that it had ever been refunded seems to have been made before him. As to the second point, it is sufficient to say that the general obligation of Government to refund whatever they had received in respect of the costs awarded by the erroneous decrees, although there was no positive direction for a refund in the order in Council, having been admitted, and properly admitted, the objection that this particular sum was paid for costs incurred in Mr. Gubbins' Court, cannot, for the reasons already given, be allowed to prevail.

Upon the question whether this sum, and the further sum of Rs. 5,309, ought to have been ordered to be refunded with interest, their Lordships are of opinion that this case stands clear of what is ruled in the final part of Lord

CAIRNS' judgment in *Rodger v. The Comptoir d'Escompte de Paris* (7 Moore's P. C. C., N. S., 314 at p. 331), because they find that, in the proceedings of the Chief Court of the Punjab, there was a submission to the discretion of the Court, whether interest on these sums should be allowed or not. With the exercise of that discretion in the particular case their Lordships are not disposed to interfere, considering that it is but equitable that the party who has received money under a decision afterwards found to be wrongful should account for that money with interest.

It has, however, been admitted at the bar that there has been an error in the mode in which the interest on the Rs. 5,309 has been directed to be computed, by reason of that sum having been received in three different portions, and at three different dates. It will be necessary to correct this error, but as it ought to have been pointed out to the Court below, the variation in the order will not affect their Lordships' order as to the costs of the appeal.

Their Lordships will, therefore, humbly advise Her Majesty to vary the order under appeal so far as it directs interest at the rate of 12 per centum per annum on the sum of Rs. 5,309 to be [174] computed and paid from the 4th of August 1865, by directing that as to Rs. 3,159, part of the said sum of Rs. 5,309, such interest be computed and paid from the 27th of August 1867; that as to Rs. 1,150, other part of the said sum, such interest be computed and paid from the 27th August 1867, and that as to the further sum of Rs. 1,000, being the remainder of the said sum, such interest be computed and paid from the 4th of August 1865; but, subject to such variations, to confirm the said order under appeal, and to dismiss both the appeal and cross-appeal. Both parties being thus found to be in the wrong, there will be no costs of the appeals on either side.

Order varied.

Agent for the Appellants in the appeal and Respondents in the cross-appeal
Mr. T. N. Wilson.

Agents for the Respondents in the appeal and Appellants in the cross-appeals: Messrs. *Lauford and Waterhouse*.

NOTES.

[WHERE DECREE IS SILENT ---

(a) *Mesne profits*—

(1) This principle is not applicable to mesne profits on restitution of property consequent upon the reversal of decree. It is not adding anything to the decree :—(1878) 3 Cal., 720.

(2) Where mesne profits are left to be determined in execution, the amount may vary beyond the claim in the plaint :—(1882) 9 Cal., 112.

(b) *Interest disallowed*—

Following this case :—(1896) 23 Cal., 357; (1896) 22 Bom., 42; (1905) 32 Cal., 494 = 9 C. W. N., 372 1 C. L. J., 118; see also 2 I. A. 219; 9 I. A., 1.

(c) *Future interest*—

See *infra* (1878) 3 Cal., 602 P. C

(d) *Anomalous mortgage decree*—

Decree not to be extended in execution beyond the real meaning of its terms :—(1887) 11 Bom., 537.]

[3 Cal. 174]
APPELLATE CIVIL.

The 30th August and 3rd, 4th, 5th and 14th September, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

M. Pogose (widow and representative of J. G. N. Pogose).....Defendant
versus
The Bank of Bengal.....Plaintiffs.

*Principal and surety—Accommodation acceptor—Discharge of surety
—Equitable mortgage—Trust deed for benefit of creditors—
Eventual remedy of surety—Contract Act (IX of 1872),
ss. 132, 134, 135, 139 - Evidence Act (I of 1872), s. 92.*

In the years 1870 and 1873 A drew certain bills of exchange upon B, which were accepted by B for the accommodation of A, and endorsed by A to the Bank of Bengal. In May 1876, A, by letter, agreed to execute a mortgage of a certain portion of his property, consisting of a share in a Privy Council decree, to B; and in the meantime to hold such property at the disposal of B, his successors and assigns. In the month of June 1876, [175] A became unable to meet his liabilities, and in the month of August following executed a conveyance of all his property to the Official Trustee upon trust for the benefit of A's creditors. The Bank assented to and executed this deed after it had been assented to and executed by some of the other creditors. The deed did not contain any composition with or release by the creditors, nor any covenant on their part not to sue A. In a suit by the Bank against B, as acceptor of the bills—

Held, that B was not precluded by the provisions of s. 132 of the Contract Act and s. 92 of the Evidence Act from pleading that he was an accommodation acceptor only; but

* Regular Appeal No. 70 of 1877, from a decision of C. B. Garrett, Esq., Judge of Dacca, dated the 9th January 1877.

†[Sec. 132 :— Where two persons contract with a third person to undertake a certain liability and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.]

Liability of two persons primarily liable not affected by a private arrangement between them as to suretyship.

‡[Sec. 92 :—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms :

Exclusion of evidence of oral agreement.

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or

Held, that the letter of May 1876 constituted a good equitable mortgage, and that B was not thereafter entitled, as against the Bank, to the equitable rights of an accommodation acceptor.

Held further, that the trust deed did not impair the "eventual remedy" of B, and that therefore he was not discharged from his suretyship under the provisions of s. 139 * of the Contract Act.

THE plaintiffs in this suit sued Mr. Joachim Gregory Nicholas Pogose as the acceptor of certain bills of exchange drawn by Mr. Nicholas Peter Pogose during the years 1872 and 1873, and endorsed by him to the plaintiffs. The defendant died during the proceedings, and the present appeal was prosecuted by his widow. The defendant was at first an accommodation acceptor only, but on the 19th of May 1876, Mr. N. P. Pogose wrote and sent the following letter to him, which, it was contended by the plaintiffs, constituted a good mortgage, and prevented the defendant from pleading that he had received no consideration :—

"DEAR SIR,— In consideration of your having stood my surety from time to time by signing, accepting, endorsing, and otherwise, bills favouring different parties, all for my sole use and benefit, I hereby agree, on demand, to execute to you, your heirs, executors, administrators, and assigns by way of collateral security, to keep you safe and harmless, and for the payment of the amount of the said bills and their renewals from time to time, amounting in all to rupees two lacs thirty-nine thousand and five hundred, a valid and effectual mortgage of the 5 annas 12 gandas and a half share in the Privy Council decree obtained by the late Nujumunnissa Khatun, confirming a decree of the High Court awarding her the possession and mesne profits of the zemindaries and shares in zemindaries, of which the particulars are given at the foot of this letter, and which said share was purchased by [176] me at an execution of decree sale held on the 21st February 1876, at the Court of the Subordinate Judge of Furruckpore, such sale having been confirmed by that officer on the 15th May instant; and I further agree, until the execution of such mortgage, to hold the said 5 annas 12 gandas and a half share of the said decree at your disposal, and at the disposal of your successors and assigns."

In the month of June 1876, N. P. Pogose became unable to meet his liabilities, and the plaintiffs called upon the defendant to pay the amount due upon the bills of exchange accepted by him. On the 9th of August 1876, and before the defendant had paid off any of the bills, N. P. Pogose executed a deed of trust and assignment in favour of the Official Trustee of Bengal, by which he purported to assign all his property, including his estate and interest in the Privy Council decree mentioned in his letter of the 19th May 1876, to the Official Trustee upon trust to realize the same and divide the proceeds equally

modify any such contract, grant or disposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

*Proviso (5).—*Any usage or custom by which incidents, not expressly mentioned in any contract, or usually annexed to contracts of that description, may be proved: provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

*Proviso (6).—*Any fact may be proved which shows in what manner the language of a document is related to existing facts.]

Discharge of surety by creditor's act or omission impairing surety's eventual remedy.

*[Sec. 139:—If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.]

among the creditors of N. P. Pogose. The deed gave the Official Trustee power to manage the debtor's estates or to appoint managers. It did not contain any composition with or release by the creditors, nor any covenant on their part not to sue. Joachim Pogose did not expressly dissent from the deed. The learned Judge of the Court below held that, according to the terms of s. 132 of the Contract Act, the defendant contracting as principal could not plead that he was within the knowledge of the plaintiffs liable as surety unless he was also able to plead that the plaintiffs had accepted him as surety, and therefore gave the plaintiffs a decree; but held also that the defendant continued to be an accommodation acceptor only, and that the trust deed was prejudicial to the rights of the defendant.

From that decision the defendant appealed.

Mr. J. D. Bell, Mr. Branson, and Mr. C. Gregory for the Appellant.

The, Advocate-General, Officiating (Mr. Paul), Mr. Evans, and Mr. Stokoe for the Respondents.

[177] Mr. Bell.—The Bank of Bengal knew that Mr. Joachim Pogose was only an accommodation acceptor, and the Bank, by signing the trust deed, waived its rights as against Mr. Joachim Pogose. Section 132 of the Contract Act embodies the old common law rule as to the liability of principal and surety under guarantees. There is no intention shown anywhere in the Act of altering the principles of equity applicable to negotiable instruments. [GARTH, C. J., referred to *Bailey v. Edwards* (34 L. J., Q. B., 41).] It cannot be contended that it was the intention of the Legislature to absolutely deprive an accommodation acceptor of his right to plead that he was, to the knowledge of the creditor, only secondarily liable. It is competent to the Court to say that there is nothing in the Act to prevent a surety contracting as principal from having the benefit of the sections which provide for the discharge of a surety. The ruling of PHEAR, J., in *Punchamun Ghose v. Daly* (15 B. L. R., 331) is, I submit, not good law; it is opposed to the judgment of the House of Lords in *The Liquidators of Overend Gurney and Co. v. The Liquidators of the Oriental Financial Corporation* (L.R., 7 H. L., 348). That case was not cited to PHEAR, J. It is clear that any dealing by a creditor with the debtor to the injury of the surety operates to discharge the surety: *Croydon Gas Company v. Dickinson* (46 L. J., Q. B., 157); *Polak v. Everett* (45 L. J., Q. B., 369); and *Watts v. Shuttleworth* (29 L. J., Ex., 229). It may be argued upon the authority of *Mayhew v. Crickett* (2 Swanst., 185, at p. 189) and *Smith v. Winter* (4 M. & W., 454, at p. 466), that as Mr. Joachim Pogose did not expressly dissent from the trust deed, his liability was revived. But the case of *Withall v. Masterman* (2 Camp., 178) shows that mere knowledge of the fact would not be sufficient to revive the liability of the surety; there must be assent to the deed. By executing this trust deed the Bank have, in the words of s. 139 of the Contract Act, impaired the "eventual remedy" of the surety himself against the principal debtor; and Mr. Joachim Pogose was, therefore, discharged. As soon as the deed [178] was executed, the Bank lost their right to take proceedings against their debtor, which Mr. Joachim Pogose had a right to require them to do. The trust deed gives property worth ten lacs to the Official Trustee. The Bank can have this realized: they should do equity to the surety and take no steps against him until the property in the hands of the Official Trustee has been applied according to the trusts of the deed. [GARTH, C. J.—How far would such a deed be operative if signed by two or three out of all the creditors?] As soon as the deed is signed by any one of the creditors, he is bound by it. [Mr. Stokoe referred to *Ellison v. Ellison* (1 Wh. and Tudor's L. C., 4th ed., 254; 5th ed., 273).] If one creditor came in under the deed, the

deed would be irrevocable by the debtor : *Acton v. Woodgate* (2 My. & K., 492) and *Mackinnon v. Stewart* (1 Sim. N S. 76, at p. 88). It is not necessary, in order to enable creditors to take under a deed of this kind, that they should be parties to it : (2 Story, Eq. Jur., s. 1036 a). [GARTH, C. J. — Suppose that all the creditors are parties, suppose that two sign and that the rest expressly dissent, is the deed to be binding ? It clearly cannot bind dissentients.] The moment that the deed is made and assented to by one creditor, the trustee and settlor are bound, and the executing creditor gets the benefit.

Mr. *Branson* on the same side.—Section 132 of the Contract Act was not intended to cover such a case as this. It was intended only to cover cases of guarantees and sureties. The common law rule was laid down in *Hollier v. Eyre* (9 C. & F., 1, at p. 45). The equitable principle that a surety appearing to be a principal may show his suretyship, is stated in *Rees v. Berrington* (2 Wh. and Tudor's L. C., 4th ed., 974 ; 5th ed., 992). All that the Contract Act does, is to lay down the rule in *Hollier v. Eyre* (9 C. & F., 1, at p. 45). The equitable principle still subsists as to bills of exchange. There can be no doubt that Mr. Joachim Pogose was a surety only ; he was not dealt with as a principal, and the evidence of the bank manager shows that he knew Mr. Joachim Pogose's position.

[179] The *Advocate-General* for the Respondents.—The construction put on s. 132 of the Contract Act by the learned Judge of the Court below is perfectly correct : that the Act was intended to apply to negotiable instruments appears from the illustration given to this section, which is one regarding a promissory note. This section is an exposition of the law in *Fentum v. Pocock* (5 Taunt, 192), which was the case of an accommodation bill, and the Contract Act applies precisely to such a case as this. The equitable doctrine has been considered to be unjust by many Judges : 2 Latour's Judicial Maxims, 177. At law, an accommodation acceptor is never discharged except by payment, and in this country it is important that this rule should be upheld. The provisions in the Contract Act as to discharge of sureties relate to cases of express sureties only, and not to a case where the parties are primarily liable, and reading the Evidence Act and this Act together, it appears that no evidence outside the cases mentioned in the provisos shall be received to add to the instrument, so that Mr. Joachim Pogose cannot be allowed to plead that he was a surety only. The equity contended for on behalf of the appellant arises independently of the contract : *Pooley v. Harradine* (7 Fil. & Bl., 431) ; but it cannot be held to exist here when it is expressly barred by the Legislature, and therefore the doctrine of the *Ouwend and Gurney case* (L. R., 7 H. L., 348) does not apply to a case under the Contract Act. Such a deed as this, an out-and-out conveyance by a debtor for the benefit of his creditors, is perfectly valid both under s. 240, Act VIII of 1859—*Stephenson v. Baumgartner* (4 Agra H.C. Rep., 104)—and s. 326, and the general law. Neither the debtor nor his creditors could set it aside after it had been executed by the creditors : *Dolphin v. Aylward* (L. R., 4 H.L. 486). Suppose the Bank had not signed the deed : they could not have sued, as the conveyance was good, and the property had passed away from the debtor. The Bank could not have taken the property comprised in the deed in execution ; all that they would have been entitled to would have been a personal decree, or to go against subsequently acquired property. Other creditors [180] executed the deed, and therefore the Bank would not have had any power to get the deed revoked ; that can be done by the debtor if no creditors execute, but not by a creditor : *Dolphin v. Aylward* (L. R., 4 H. L., 486). The "eventual remedy" of the surety is not impaired by this deed ; the meaning of these words in s. 139 of the Contract Act is that the "substantial"

remedy of the surety must be impaired. Now the circumstances under which the deed was executed show that it was for the benefit of the surety. It is contended that the Bank, by executing this deed, lost their right to sue the debtor, and so damnified the surety; but as far as the Bank is concerned, they have lost no remedy. A surety who concurs in an arrangement between the debtor and his creditors, is not discharged by such an arrangement:—*Ex parte Harvey* (23 L. J. Bkey., 26). Mr. Joachim Pogose cannot be treated as having been throughout an accommodation acceptor only. The letter of the 19th May constituted a perfectly good mortgage to him—*Rajkumar Ramgopal Narayan Seng v. Ram Dutt Chowdhry* (5 B. L. R., 264); and as soon as he received this security he ceased to be an accommodation acceptor: *Burdon v. Benton* (9 Q.B. N. S., 843).

Mr. Stokoe on the same side.—Mr. Joachim Pogose was not in the position of a surety contemplated by the Contract Act, and he could not claim the protection provided for a surety by the Act. The Evidence Act and the Contract Act came into force on the same day, and it would be natural to expect that they would deal with cognate subjects in the same way. Now, the only variations of terms allowed by the Evidence Act are those referred to in s. 92. The respondents may show that there was a want of consideration, or that there has been a failure of consideration. There was consideration in this case, and the other provisions in the section do not apply. It is clear, therefore, reading the two Acts together, that Mr. Joachim Pogose could not be heard to say that he was surety only. The case of *Withall v. Masternan* (2 Camp., 179) has been referred to in support of the [181] proposition that Mr. Joachim Pogose's liability was not revived by his assent to the trust deed; but that case merely went on the ground that there was no evidence of assent by the surety. The principle laid down in *Rees v. Berrington* (2 Wh. and Tudor's L. C., 4th ed., 974; 5th ed., 992), and distinctly recognized in *Mayhew v. Crickett* (2 Swanst., 185) and *Tyson v. Cor* (T. & R., 395), was not dissented from. It cannot now be contended that Mr. Joachim Pogose was an accommodation acceptor throughout all the transactions in this case. An accommodation acceptor is one who gets no consideration for his liability. If he gets any consideration at any time, he ceases to be an accommodation acceptor. The case of *Burdon v. Benton* (9 Q. B., N. S., 843) decides that there may be not only consideration for an original acceptance, but also consideration for payment of the bill. Even if Joachim Pogose had no consideration for incurring his liability, yet if he got any consideration subsequently, he could not contend that he was an accommodator. The trust deed and the concurrence of the Bank in it have been put forward by Joachim Pogose as freeing him from his liability, but it is difficult to see how he was prejudiced either by the deed or by the execution by the Bank. The deed purports to be a conveyance to the Official Trustee upon trust to realize the debtor's property and divide it among all the creditors equally. It is evident that, unless there is any positive law which prevents the natural operation of the deed, it must have the effect of preventing the creditors from seizing the property in execution, and therefore of preserving the property until it could be realized to advantage. [GARTH, C. J.—The question is, whether the Bank, by assenting, did not make the deed valid and take away their power of suing Nicholas Pogose?] The surety could have paid the Bank off and insisted on the Bank lending him its name; but the execution of the deed by the Bank had no effect upon their rights as against Nicholas Pogose such as to damage the surety. A surety is not discharged by giving time if the remedies of the [182] surety are not diminished or affected.—*Hulme v. Coles* (2 Sim., 12). The fact that the Bank assented is really not material; the

result of the deed would have been the same, for other creditors had assented, and that would give validity to the deed. It cannot be said that the position of the surety was altered because the Bank also assented. The deed was communicated to the creditors, and is therefore irrevocable by the settlor : *Acton v. Woodgate* (2 My. & K., 492), in which *Garrard v. Lord Lauderdale* (3 Sim., 1) was dissented from. Such a deed as this is valid even though if made with the intention of delaying an execution creditor : *Pickstock v. Lyster* (3 M. & Sel., 371). In considering whether the surety is released, the question always is, whether the deed contains a composition or release. This deed contains neither, and as the debt is still existing, the surety is not released.

Mr. Bell in reply. — It has been argued that, as a subsequent security was given, the accommodation has gone ; but this rule cannot apply when there has been merely a promise to give security as in this case. [GARTH, C. J. — There is a good equitable mortgage, and the property comprised in it could not be conveyed by the trust deed.] I submit that there was only a personal promise here, not a mortgage. The eventual remedy of the surety was impaired by this deed. It is said that Mr. Joachim Pogose could have paid off the Bank and required the use of the Bank's name in suing, but if the cause of action is hurred by having to add other parties, the remedy is impaired. "Eventual" means at any time ; "impair" means damage of any kind whatever ; anything which affects the position of the surety in any way, even to such an extent as would entitle him to nominal damages only.

The Judgment of the Court was delivered by

Garth, C.J. — This suit was brought by the plaintiffs, the Bank of Bengal, to recover from Mr. Joachim Gregory Nicholas Pogose, a sum of Rs. 1,10,687-10-2, being the aggregate amount of principal and interest due upon nineteen bills of exchange, [183] each drawn by Mr. Nicholas Peter Pogose upon and accepted by his cousin Mr. J. G. N. Pogose, payable to the drawer's order, and endorsed by the drawer to the plaintiffs' Bank.

The Court below have decided in the plaintiffs' favour : and as the defendant died pending the proceedings, the present defendant, Mrs. Mary Pogose, his widow and representative, became defendant in his stead, and is prosecuting this appeal.

The defence is, that Mr. J. G. N. Pogose accepted the bills merely for the accommodation of his cousin and without any consideration ; that the plaintiffs were aware of that fact ; and that by consenting to and signing a deed of trust, which Mr. N. P. Pogose made of all his property for the benefit of his creditors, the Bank have discharged the defendant from his liability. An attempt was also made to show that the plaintiffs had also discharged the defendant by giving time to the drawer of the bills ; but we expressed an opinion during the argument that there was really no ground for this contention, and it was accordingly given up.

The plaintiffs' answer to this defence is three-fold. They say—

1st.—That by s. 132 of the Indian Contract Act, the defendant is precluded from showing that he was merely surety for his cousin upon the bills, and that his liability to the plaintiffs cannot be affected by that circumstance ; and further that, by s. 92 of the Indian Evidence Act, he is also precluded from showing that his legal position and liability is different from what it purports to be on the face of the bills.

2ndly.—That, in point of fact, the defendant was not a mere surety or accommodation acceptor without consideration ; and

3rdly.—That the consent to the execution of the trust deed by the plaintiffs did not operate to discharge the defendant from his liability.

Upon the first of these points, the Judge in the Court below has decided the case in favour of the plaintiffs. He considers that the liability which the drawer and acceptor of these bills have undertaken is a joint liability, and that as the 132nd section of the Contract Act provides that, under such circumstances, the plaintiffs are not to be affected by any relation of principal [181] and surety which may exist as between the drawer and acceptor of the bills, the acceptor cannot set up that relation for the purpose of discharging himself from liability; more especially as by law the acceptor is the principal debtor, or party primarily liable upon the bills, and the drawer only liable as his surety.

There certainly seems some difficulty in ascertaining the true meaning of s. 132; but whatever its meaning may be, we are of opinion that it is not applicable to the present case. The liability which is undertaken by the acceptor and the drawer of a bill is in no sense a joint liability. It is true that they each contract to pay the same sum of money, but they contract severally in different ways, and subject to different conditions and it is not because the law of this country allows several persons who have undertaken different liabilities to be joined as defendants in the same suit, that they are to be considered in any sense as having undertaken a joint liability. Upon this point, therefore, we hold that the Judge in the Court below was wrong.

Nor does s. 92 of the Evidence Act present any difficulty in this case. The acceptor of a bill is, no doubt, the party primarily liable upon it, but by the proviso to s. 92 it may be shown that the acceptor never had any consideration for the bill, and that he accepted it for the accommodation of the drawer or some other party. If this were not so, there could be no such thing in India as an accommodation acceptance, because a bill *prima facie* imports consideration, and the acceptor is the party primarily liable, and if any party to a bill were precluded by this section from proving in a Court of law what his real position was as against the other parties, not only would great injustice be the result, but the commercial and negotiable character of bills of exchange in this country would be very materially changed.

We think, therefore, that the defendant was not precluded in this case from raising his defence upon the merits.

But then comes the next question, was the defendant in the proper sense of the term an accommodation acceptor without consideration? We agree with the learned Judge in [135] the Court below in thinking it sufficiently proved that, in the first instance, Mr. J. G. N. Pogose accepted these bills, or others of which these bills were renewals, for the accommodation of his cousin; and we think it also pretty clear upon the evidence that the plaintiffs' Bank had knowledge of that fact. But then it appears that, on the 19th of May 1876, at the time when these bills or the renewed bills were maturing, Mr. N. P. Pogose gave the defendant Mr. J. G. N. Pogose a security for the payment of those and a number of other bills amounting in all to Rs. 2,39,500, in these words:—(Reads letter set out, *ante*, p. 175).

The 5 annas 12½ gandas share in the Privy Council decree, which was the subject of this agreement, appears from the evidence to have been valued at upwards of five lacs of rupees; but allowing for a considerable depreciation of that value on account of the difficulties of sale and the unfortunate circumstances in which the Pogose family have been placed, the property might still be sufficient to meet the whole amount of the bills.

It seems impossible to say that, under these circumstances, the defendant was an accommodation acceptor of these bills without consideration. He has received a very substantial consideration for the acceptances in having these large properties pledged to him to meet his liabilities upon these and other bills to a very large amount. We are of opinion, therefore, that the defendant, although in the first inception of the bills he may have put his name to them for his cousin's accommodation, has since received such a substantial consideration for them as to be no longer in the position of a mere surety, nor entitled as against the plaintiffs, who have advanced their money in good faith upon the security of the bills to the equitable rights of a surety.

Assuming, however, that the defendant was a mere surety, the last question which we should have to determine would be, whether the acquiescence of the Bank in the trust deed of the 9th of August 1876 would operate as a discharge to the defendant. By that deed Mr. N. P. Pogose conveyed to certain trustees the whole of his property, which was not previously [186] mortgaged or disposed of, upon certain trusts for the benefit of his creditors. The trusts declared were of the usual character. The trustees had general powers to manage the property, to enforce and compound debts, &c., due from or to his estate, and to employ at their discretion Mr. N. P. Pogose himself or any other persons for that purpose. The deed did not contain any release by the creditors, or covenant not to sue, and some of the creditors refused to have anything to do with it; but the plaintiffs' Bank, the Agra Bank, and Mr. T. Christian, acquiesced in the arrangement before the deed was executed by Mr. N. P. Pogose: and the plaintiffs' Bank duly executed it afterwards.

In this state of things, it seems clear from the authorities, and in fact it was hardly disputed in argument, that the deed operated to convey Mr. Pogose's available property to the trustees in such sort as to protect it from being sold under any execution against himself; and, under these circumstances, the question arises, whether the acquiescence by the plaintiffs' Bank in such a deed had the effect of discharging the defendant from his liability upon the bills in question. The Judge in the Court below held that it did, on the ground that, by consenting to it, the plaintiffs had disabled themselves from suing Mr. Pogose and taking his person in execution; and that as the defendant had the right to compel the plaintiffs to take proceedings to enforce their claim against Mr. N. P. Pogose upon the bills, the deed had the effect of depriving the surety of one means of enforcing that claim. The Judge considered that the plaintiffs would be prevented from taking Mr. Pogose in execution, because as the trustees were empowered to employ Mr. Pogose in the business of the trust, their powers in that respect would be frustrated by his being taken in execution. But this we think very doubtful. The trustees had a right to employ any other person they pleased besides Mr. Pogose in the business of the trust; and, therefore, his being taken in execution would not really prevent the trusts being carried out effectually.

But there is another ground upon which it seems to us that the rights of the defendant might very materially be affected [187] by this trust deed. It seems clear that, as against the plaintiffs who were parties to it, the property which it conveyed could not be taken in execution under a decree against Mr. Pogose at the plaintiffs' suit. Assuming then that Mr. J. G. N. Pogose was in the position of a surety, the deed would as effectually deprive him of the power of enforcing payment of the debt as against that property, as if the plaintiffs had covenanted with Mr. N. P. Pogose not to take it in execution. Such an act on the part of the creditor would, by the law of England, discharge the

surety, because, whether the surety was really injured or benefited by it, or was likely to be injured or benefited, would not signify. The mere fact of the surety's position being altered by an act of the creditor, without the consent of the surety, would suffice to discharge the surety.

But here the law, as laid down by the Contract Act, places the surety in a different position. By s. 134 the surety is discharged by any contract between the creditor and the principal debtor, by which the debt is discharged or released. By s. 135 any contract between the creditor and the principal debtor, by which the creditor compounds with, or gives time to, or undertakes not to sue, the principal debtor, is a discharge to the surety, unless the surety assents to such contract. And, lastly, by s. 139, any act which is inconsistent with the rights of the surety, is a discharge to the surety, if the eventual remedy of the surety against the principal debtor is thereby impaired. Now, it appears to us that the trust deed, which has been executed in this case by Mr. N. P. Pogose, and assented to by the plaintiffs, cannot be considered either as giving of time, or a composition, or a covenant not to sue within the meaning of s. 135. If it did, we think there would be ample evidence of Mr. J. G. N. Pogose's subsequent assent to prevent the deed from operating as a discharge. The enactment which applies to the present case is, in our opinion, s. 139. The execution of the trust deed by the Bauks, having regard to its effect upon the plaintiffs' remedies against Mr. N. P. Pogose, was an act inconsistent with the rights of the surety, which by the law of England would have discharged him: See [188] *Culvert v. The London Dock Company* (2 Keen's Rep., 638); *The General Steam Navigation Company v. Holt* (6 C. B., N. S., 550), and other cases to the same effect in the notes to *Rees v. Berrington* (2 Wh. & Tudor's L. C., 5th ed., 992). But, under this section, before the act of the creditor can operate as a discharge, it is necessary to look further and see whether by that act the eventual remedy of the surety against the principal is impaired.

For the purpose of solving the question, let us see what the financial position of Mr. N. P. Pogose was at the time when the trust deed was executed. The evidence in the case does not disclose, and perhaps it would be impossible to ascertain with anything like certainty, the amount of his assets and liabilities at that time: but, as far as we can judge, there appeared to be a very fair prospect, if his property were carefully managed, and proper steps were taken to protect it from the cupidity and imprudence of particular creditors, that it would prove sufficient to discharge his debts in full. There is no doubt that his creditors generally had become very much alarmed, and he was being pressed or threatened with legal proceedings from several quarters. His assets consisted mainly of the Privy Council decree which he had purchased; and the whole of his property was of such a nature as not to be readily available for payment of his debts. In order to realize anything like its value, it was absolutely necessary that it should be protected against executions, and that a reasonable time should be allowed for disposing of it in the best market. Several creditors had already sued, and were on the point of obtaining decrees, under which the property might have been put up to forced sale; and as the plaintiffs were by far the principal creditors, and it was of the utmost importance to them that the property should be well guarded and sold to the best advantage, it appears to us that the very best thing which they could have done for their own benefit, and that of Mr. J. G. N. Pogose's, was to consent to the trust deed. That deed, in our opinion, so far from its impairing the [189] defendant's eventual remedies against Mr. J. G. N. Pogose and his property, tended to improve them most materially; and for this reason we

consider that, even assuming the defendant to have been in the position of a surety, the execution of the trust deed did not operate to discharge him.

Upon these grounds we are of opinion that there is no valid defence to this suit, and that the decree of the Court below, although it proceeded upon wrong grounds, should be confirmed.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[I. S. 92, EVIDENCE ACT - INADMISSIBILITY OF EVIDENCE—

Oral evidence was held inadmissible to show that one of the executants signed only as surety for a month; the case of 3 Cal., 174 was distinguished as falling within prov. (1) to Sec. 92, Evidence Act, 1872. (1903) 8 C.W.N., 101.

II. SURETY - DISCHARGE OF -

In (1889) 13 Mad., 172 it was held that unlike 3 Cal., 174, as time was allowed in the case by the creditor to the surety, the case fell directly under s. 135 of the Contract Act.]

[3 Cal. 189]

APPELLATE CRIMINAL.

The 28th November, 1877.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE MITTER.

The Empress

versus

Harai Mirdha and Umed Sardar.

*Criminal Procedure Code (Act X of 1872), s. 263 - High Court, Power of - Jury,
Verdict of acquittal by.*

Where the jury acquitted the prisoners on the charges framed, but found certain facts which amounted to another offence, and omitted to convict the prisoners of that offence, as provided by s. 457 of the Criminal Procedure Code, -held, that the High Court could, on the case coming before them under s. 263 of the Criminal Procedure Code, find the prisoners guilty of such offence.

THIS case was referred to the High Court by the Officiating Sessions Judge of Nuddea under s. 263 of the Code of Criminal Procedure.

The two prisoners, together with four others, were tried before the Officiating Sessions Judge of Nuddea under ss. 302 and 149, and 326 and 149 of the Penal Code. In the case of two of the prisoners, the jury returned a verdict of guilty under s. 326. Two others were found not guilty, but the remaining two, Harai Mirdha and Umed Sardar, though also found not [190] guilty on the charges framed, were found, by a majority of three out of five of the jury, to have been present with the others, but it was added that

* Criminal Reference, No. 223 of 1877, from the order of R. Towers, Esq., Officiating Sessions Judge of Nuddea, dated the 19th September 1877.

they only went for the purpose of rioting, which the jury explained to mean "in order to punish the deceased to a certain extent, but not to go as far as to inflict grievous hurt on him."

The facts of the case were as follows :—

The deceased was not on good terms with the people of the zamindar, amongst whom were the two prisoners; the two prisoners with others went to the house of the deceased, and the deceased was enticed out, and received two wounds, either of which the evidence went to show were sufficient to kill him. The deceased ran some distance after he was wounded, and the two prisoners, Harai and Umed, were identified by several witnesses as having, with others, run after the deceased till he fell. Further, Harai and Umed were named to one Badul, who was present when the deceased made his dying declaration as being amongst his pursuers; and although they set up *alibis* in the Court of the Sessions Judge, yet, when previously brought up before the Deputy Magistrate, they admitted they were present, but denied participation in the outrage.

The Sessions Judge being dissatisfied with the verdict of the jury regarding Harai and Umed, submitted their case to the High Court under s. 263 of the Criminal Procedure Code.

The Junior Government Pleader Baboo *Juggodannund Mookerjee* for the Prosecution.

Mr. G. Gregory for the Prisoners.

Markby, J.—The two prisoners, Harai and Umed, whose case is now before us under s. 263 of the Criminal Procedure Code, were put upon their trial before the Sessions Court on a charge "that being members of an unlawful assembly and in prosecution of the common object of that assembly, they had committed murder." This was a charge under ss. 302 and 149 of the Indian Penal Code. They were also charged "that being members of an unlawful assembly and in prosecution of the common object of [191] that assembly, they had voluntarily caused grievous hurt." This was under ss. 326 and 149 of the Indian Penal Code. Other prisoners were likewise charged at the same time, and the verdict of the jury as regards these two prisoners was a verdict of acquittal upon both these charges; but in answer to a question put to them by the Sessions Judge, they stated that the two prisoners, Harai and Umed, were in the company of two of the other prisoners, whom they found guilty on the second of the charges I have stated, for the purpose of committing riot, but that they did not commit it, and further, that they were not present in order to commit grievous hurt on the deceased, but only to punish him to a certain extent. The Sessions Judge has declined to record the verdict of acquittal as regards these two prisoners, and has referred the case to this Court in order that these prisoners may be convicted under the second of the two charges which I have mentioned. Now we may say that we have been relieved from all difficulty in this case by the course which has been taken by the Government, and which in our opinion has been very wisely and prudently taken. All that the Government now asks for is a conviction under s. 143 of the Indian Penal Code, that is, that the prisoners now before us were members of an unlawful assembly. That really amounts to this, that we are asked now to carry out the legitimate consequence of the finding of fact at which the jury arrived in respect of these two prisoners. If the Sessions Judge had been so minded instead of referring this case to us, he might, as pointed out by Mr. Justice MITTER in the course of

the argument, have pointed out to the jury that their finding was in fact a conviction of an offence under s. 143 of the Indian Penal Code, and that, under the provisions of s. 457 of the Criminal Procedure Code, they were at liberty to find the prisoners guilty under that section. They found the prisoners guilty not of the whole of the offence with which they were charged, but upon that part of the charge which amounts to a different offence. This is not a case in which we were called upon to differ in any way from the conclusion of the jury. We adopt this conclusion, and we are also relieved from the necessity of accurately defining what our powers are under s. 263. Whatever may be the exact position [192] of this Court in dealing with a reference of this kind under s. 263, as to which we express no opinion, we feel no doubt whatever that this Court has a right to convict a prisoner of any offence which the jury could have convicted him of, upon the charge framed and placed before them. Upon the charge as framed and placed before the jury in this case, the jury could have convicted these prisoners of an offence under s. 143. We, therefore, undoubtedly possess that power ourselves. Accordingly we convict these two prisoners of the offence "that they were members of an unlawful assembly, and thereby committed an offence punishable under s. 143 of the Indian Penal Code," and we direct that they be rigorously imprisoned for a period of six months.

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[3 Cal. 192]

PRIVY COUNCIL.

— — — — —
The 7th, 10th, 11th and 12th July, 1877.

PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND
SIR R. P. COLLIER.

The Administrator-General of Bengal.....Plaintiff

versus

Juggeswar Roy and others.....Defendants.

[1 C. L. R. 107.]

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Inadequacy of Consideration — Suit to set aside deed.

A party seeking to set aside a transaction on the ground of inadequacy of consideration, must show such inadequacy as will involve the conclusion that he either did not understand what he was about, or was the victim of some imposition.

THIS was an appeal from a decree of the Calcutta High Court, dated the 25th June 1875, reversing a decision of the Judge of East Burdwan, dated the 11th June 1874.

The suit in which the appeal arises was brought by Robert John Jackson, on whose death the Administrator-General of Bengal, as executor under his will, was substituted on the record as plaintiff, to set aside conveyances executed by the said Jackson of certain lands situated in Bengal, on the ground that he was a minor at the time of the execution, and that he was fraudulently induced by certain of the defendants who stood to [193] him in a fiduciary relation to part with his property, without fully understanding the nature of the transaction and for an inadequate price.

Mr. Cowie, Q. C., and Mr. Doyne (Mr. Lowe with them) for the Appellant.

Mr. Bompas, Q.C., and Mr. Joseph Graham for the Respondents.

The history of the case and the issues raised will be understood from their Lordships' Judgment, which was delivered by

Sir M. E. Smith.—This suit was instituted by Mr. Robert John Jackson, who upon his death has been succeeded on the record by the present plaintiff, for the purpose of setting aside certain conveyances by him to the three first defendants of his interest in Mouzah Luchhipore, in the district of Ranigunge, on the ground, in the first place, that he was under age, and in the second place, that he was induced by the defendants, who were trusted servants, but who had abused their fiduciary character, to part with his property without fully understanding the nature of the transaction, and without adequate consideration. Mr. Robert John Jackson was the adopted son of a Mr. Robert Gwynne Jackson (who will be called Mr. Gwynne Jackson), who appears to have been of European extraction. The date of his adoption is one of the questions in the cause, the plaintiff alleging the adoption to have been about the year 1855, and the defendants, as far back as 1850. Mr. Gwynne Jackson appears to have resided a great number of years in the neighbourhood, and to have been well acquainted with coal mining. He in 1860 was the manager of the coal mines of Messrs. Apar and Company, who, it may be observed by the way, entered into an agreement with Jackson, the plaintiff, to supply him with funds for prosecuting this suit, in consideration of, in the event of his succeeding, his granting them a coal lease.

Mr. Gwynne Jackson left the employment of Messrs. Apar and Company in 1860 on account of their being dissatisfied [194] with him, but he continued afterwards up to about 1867 to some extent in their employment in a subordinate capacity, when he finally left it. He appears to have acquired some property, and to have been interested in other coal mines in the neighbourhood.

Shortly before the year 1860, which is the first date material in this case, Mr. Gwynne Jackson bought certain patni and darpatni rights, including the coals in Mouzah Luchhipore, partly from the defendants. It is not disputed that by a deed bearing date the 20th September 1860, he, being such patnidar and darpatnidar, granted certain sub-tenures by way of darpatni and sepatni, reserving the minerals, to three of the defendants: but one question in the cause has been, whether that deed was executed at the time it bears date, or at a later date, not very clearly indicated on the part of the plaintiff, but which the Judge in the Court below has found to be the year 1869.

Gwynne Jackson made a will in 1858, leaving all his property to his son. Subsequently, in 1863, he executed a hibba, which would have the effect of revoking that will, giving all his property, some of which had been acquired since the date of the will, to his son, and in fact denuding himself of all his property, if that hibba is to be taken as intended by him to be then operative.

The deeds, the subject of this suit, were executed in 1870 and 1871, and the last in 1872. These deeds may be divided into two classes. One class is that in which the plaintiff confirms the darpatni and sepatni rights, which were dealt with by the deed bearing date the 20th September 1860; the other class of deeds, which bear date in 1871, and one of them as late as June 1872, are deeds of sale, whereby he transfers all the superior interest which he had, together with the minerals which had been reserved in the former deeds.

With respect to one of the main questions in this case, which has been already indicated, namely, whether the conveyance bearing date the 20th day of September 1860, was executed then or at a subsequent date, their Lordships have intimated, in the course of the argument, that, on the whole, they concur with [193] the finding of the High Court that that deed must be taken to have been executed at the time when it bears date. If that be so, being prior in time to the *hibba*, it is unaffected by that instrument, and the subsequent deed of 1870, being merely confirmatory of it, and conferring on the defendants no greater interest than they took under it, is obviously of no importance, and may be allowed to stand with it.

The question remains whether the deeds of 1871 and 1872, conveying, as has been before stated, the remaining and superior interest, together with coals, are to be set aside on any of the grounds which have been alleged. With respect to this point their Lordships also intimated, during the course of the argument, that they saw no sufficient reason to differ from the conclusion of the High Court that the plaintiff had failed to sustain the burden of proof which lay upon him that he was a minor at the time of the execution of these deeds.

The question then arises, in the first place, whether it has been shown that the three first defendants (for it should be stated that the two last defendants are the sub-lessees under them) were in a fiduciary capacity or character to the plaintiff at the time of the execution of these deeds, and were therefore in a position to exercise undue influence over him. Upon this question their Lordships also have come to the same conclusion as the High Court. There is indeed some evidence that Haradhun Misser, the father of Juggoswar Misser, and the two Roy defendants, were at times employed in collieries in which (Iwynne Jackson had a share; and there is also some evidence of the latter having acted as his *gomastha* with respect to the property comprised in the deed of 1860, but the decision which their Lordships have come to, concurring with the High Court, on the subject of this deed, in a great measure disposes of this class of evidence. Their Lordships see no reliable evidence on the record that at the time of the execution of these documents by the plaintiff they were in any fiduciary character *quoad* him, or in a position unduly to influence his judgment. If that be so, the question is narrowed to whether a fraud was practised upon him.

[196] It is contended, in the first place, that the nature of the transaction was misrepresented to him; that the defendants represented to him that he was not parting with his mining rights by these deeds, whereas he was, and that the deeds were not explained to him: further, that the sale price was inadequate.

With respect to the deception so alleged to have been practised upon him, the only evidence to be found of it is the evidence of the plaintiff himself, and that evidence is described as untrustworthy by the learned Judge of the inferior Court, who found in the plaintiff's favour. There is no confirmatory evidence of this, and there is contradictory evidence to the effect that the deed was read over and explained to him, and that he understood the language in which it was written.

The question then reduces itself to whether there was such an inadequacy of price as to be a sufficient ground of itself to set aside the deed. And upon that subject it may be as well to read a passage from the case of *Tennent v. Tennents* (L. R., 2 Scot. Ap., 6), in which Lord WESTBURY very shortly and clearly stated the law upon this subject. He says: "The transaction having

been clearly a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration, but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition."

Their Lordships are unable to come to the conclusion that the evidence of inadequacy of price is such as to lead them to the conclusion that the plaintiff did not know what he was about, or was the victim of some imposition. It should be borne in mind that his father, Mr. Gwynne Jackson, was at hand, and their Lordships concur with the view of the High Court, that Mr. Gwynne Jackson, by the *hibba* of 1863, did not intend to denude himself of all his property in favour of his son, whom he represents at that time to have been eight years old, and who could not have been more than twelve or thirteen. It probably was a device for the purpose of defeat-[197]ing existing or possibly future creditors. Gwynne Jackson himself acted in contravention of that deed, for he sold a property soon after its date without any reference to it, and there is evidence that he continued to act as if he were the owner of the property. Gwynne Jackson was very conversant with coal mining and the character of property in the district, and their Lordships are not satisfied that he was unable to manage his own affairs or to give competent advice to his son until the year 1872, in the early part of which he was admitted to a hospital with an incurable disease of which he died in about the middle of that year. He had granted his property to his son by a *hibba*, intending, nevertheless, to keep in his hands the control of it through his life, but very probably intending it to operate after his death in favour of his son. His son, no doubt, had an interest in the property as well as himself, and probably the true view of these transactions in 1870 and 1871 is that they were in substance joint transactions by the father and the son. Their Lordships cannot therefore regard the son at these dates as altogether in the position of a minor without any one to advise him. It may be observed that the deed in 1872 was but the completion of the previous transactions.

Independently, however, of this consideration, it cannot, their Lordships think, be said that the purchase-money was so grossly inadequate that its inadequacy amounts to proof of an imposition upon the plaintiff. It is true that there is some evidence, the value of which it is difficult precisely to estimate, that property with coal sold in the neighbourhood for some years' purchase greater than the number of years' purchase for which this property sold, which was with respect to a portion of it twelve years' purchase, and with respect to another portion of it ten years' purchase; and there is evidence, which perhaps is the strongest on this part of the case, that soon after the purchase by the defendants they let a portion of this property on mining leases at a considerable rental, or more properly speaking royalty. It should be observed, however, that these leases give the power to the lessee to terminate them at any time, and *non constat* how long the high rental would continue.

[198] It has been suggested that the defendants must have known that there was coal under the land, and that they concealed their knowledge from the plaintiff. Even if it were so, putting aside their fiduciary character, and in the absence of any proof of fraud, that would not be enough to vitiate the transaction; but in point of fact their Lordships can find no evidence of this. All the evidence is the other way, namely, that they did not discover the coal until after they had made the purchase; and it may be observed that Gwynne Jackson

himself had tried for coal without being able to discover it. It appears, therefore, to their Lordships that this last ground on which it is sought to impeach the validity of the deeds also fails. *

On the whole, therefore, their Lordships are of opinion that the High Court was right in affirming the validity of these deeds and dismissing the plaintiff's suit; and they will, therefore, humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed with costs.

Appeal dismissed.

NOTES.

[Compare the Indian Contract Act, 1872, sec. 25, Explan. 2:—

An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.]

[3 Cal. 198]

PRIVY COUNCIL.

The 12th, 13th and 25th July, 1877.

PRESENT:

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH,
AND SIR R. P. COLLIER.

Deendyal Lal.....Defendant

versus

Jugdeep Narain Singh.....Plaintiff.*

[3 I. A. 247 = 1 C. L. R. 49]

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

*Hindu law—Mitakshara—Execution—Sale of interest of
one of several co-sharers in a joint estate.*

The right, title, and interest of one co-sharer in joint ancestral estate may be attached and sold in execution to satisfy a decree obtained against him personally, under the law of the Mitakshara, as well in Bengal as in Bombay and Madras.

The purchaser at such a sale acquires merely the right to compel a partition as against the other co-sharers which the judgment-debtor possessed.

[199] *Quere.*—Whether, under the law of the Mitakshara, in Bengal, a voluntary alienation by one co-sharer, without the consent of the rest, of his undivided share in joint ancestral property is valid?

[This headnote is extremely defective. See our Notes at the end of the case for the points decided.]

THIS suit was instituted in the Court of the Subordinate Judge of Gya by Jugdeep Narain Singh as plaintiff against his father Toofani Singh, and Deendyal Lal, the present appellant, as defendants. The object of the suit, as set forth in the plaint, was to recover possession of certain lands which the defendant Deendyal had seized and sold in execution of a decree obtained by him against Toofani Singh, and which he had purchased at the execution sale. The plaintiff alleged in his plaint that the lands in question were joint ancestral property; that the debt in respect of which the decree had been obtained was the personal debt of his father, incurred by him without legal

* For the report of the case in the High Court, see 12 B. L. R. 100: 20 W. R. 174.

necessity, and without the plaintiff's consent; and that, under the law of the Mitakshara, by which the case was governed, the alienation of such property in payment of such a debt was invalid. He, therefore, prayed that the sale in execution should be set aside, and that he should be put in possession. The defendant Toofani Singh made no answer to the plaint. The defendant Deendyal urged in his written statement that, as the plaintiff's father might have other sons born to him, the plaintiff was not entitled under the Mitakshara law to bring an action for possession of the property; that the suit was brought by the plaintiff in collusion with his father Toofani Singh; that the money borrowed by Toofani Singh had been borrowed for necessary purposes, and had been advanced in good faith; that a part of the property in question was not ancestral, but was the separate self-acquired property of Toofani Singh; and that in any event and assuming the property to be joint and ancestral, and the execution sale to have taken place on account of an improper debt, the plaintiff was not entitled to more than a moiety of the joint estate. The Subordinate Judge held that the possibility of the plaintiff's father having other children afterwards born to him was no bar to the action; that the suit was not collusive in the sense of being fraudulent; that in respect of a sale in execution under a decree of Court, no question as to legal necessity could arise; that the execution sale, which was of the [200] right, title, and interest of Toofani Singh, was operative and valid in respect of his share of the joint property; but that the plaintiff under the Mitakshara law was entitled to a moiety of the ancestral property, which consequently did not pass to the defendant Deendyal under the sale. He also found that a portion of the property sold was not ancestral, but self-acquired by Toofani Singh. He accordingly gave the plaintiff a decree for a moiety of such of the property as was ancestral.

This decree was reversed on an appeal by the Zillah Judge, who dismissed the suit on the grounds that a suit for possession was not maintainable by the plaintiff during the lifetime of his father, and that the debt, in respect of which the sale in execution had taken place, was incurred under a legal necessity so as to render not merely the particular share of the property belonging to Toofani Singh, but the whole of the undivided estate liable for its payment.

The plaintiff brought a special appeal to the High Court against this order of dismissal, and a Division Bench (PHEAR and AINSLIE, JJ.), by their decision dated the 14th June 1873 (12 B. L. R., 100), reversed the decree of the Zillah Judge. The effect of their judgment was to hold that as the property was enjoyed jointly by the plaintiff and his father, the latter, according to the Mitakshara law, had no distinct legal right to any portion or share which he could pass to a third party, and that the plaintiff was entitled to recover back the whole property sold in execution. In stating the grounds of their decision, the Court referred to the case of *Mahabeer Pershad v. Ramyad Singh* (12 B. L. R., 90), Regular Appeal No. 209 of 1872, which they had decided on the 17th May 1873, as distinguishable in its circumstances from the present case.

From this decision the defendant Deendyal Lal brought the present appeal to Her Majesty in Council.

Mr. Joseph Graham, for the appellant, contended that the case of *Mahabeer Pershad v. Ramyad Singh* (12 B. L. R., 90), in which the same Judges who tried the present case had enforced an equity in favour of the purchaser at a sale in execution of the interest [201] of a co-sharer in joint family property, conflicted with the decision under appeal. According to the finding of the

Zillah Judge, the decree under which the sale took place was in respect of a debt incurred for necessary purposes. Such debts are charges on the estate—*Hunooman Persad Panday v. Mussamut Babooee Munraz Koonweree* (6 Moore's I. A., 391). The sale in execution was not merely of the personal interest of the plaintiff's father, but of his interest as the manager and representative of the entire estate—*The Court of Wards v. Maharajah Coomar Rumpat Singh* (14 Moore's I. A., 605). [Sir B. PEACOCK.—You brought your action against the father only, the decree was against him only, the sale in execution was of his rights and interest. If you wished to bind the son, you should have made him a party to the proceedings.] We are at the least entitled to possession of the father's moiety of the joint property. The rule of the Mitakshara law against alienation by one of several co-sharers without the consent of the rest applies to voluntary alienations, not to cases in execution. The distinction is recognised in the opinion delivered by the Full Bench in the case of *Sadubart Prasad Sahu v. Foolbush Koer* (3 B. L. R., F. B., 31, at p. 37). As to the manner in which the law is applied in Madras, see Strange's Hindu Law, ed. 1830, Vol. I, p. 202, and the cases of *Virasvami Gramini v. Ayyasvami Gramini* (1 Mad. H. C. Rep., 471), and *Palunivelappa Kaundan v. Mannaru Nalkan* (2 Mad. H. C. Rep., 416). [Sir J. COLVILLE.—The Madras Courts hold that an alienation by one of several co-sharers is good for his own share; they do not go on the distinction between alienation and execution.] The decision of PHEAR and AINSLIE, JJ., in *Mahabber Persad v. Ramyad Singh* (12 B. L. R., 90), recognises the distinction between voluntary alienation and execution. [Sir R. COLLIER.—If the plaintiff recovers possession of the family estate, he recovers under a charge. Sir B. PEACOCK.—He will recover the estate less what his father would have been entitled to on a partition.]

The respondent not appearing, the case was heard *ex parte*.

[202] Their Lordships took time to consider their Judgment which was delivered by

Sir J. W. Colville.—The respondent in this case is the only son of one Toofani Singh, and, the family being governed by the law of the Mitakshara is joint in estate, in the strict sense of the term, with his father. On January 28th, 1863, the father being indebted to the appellant to the amount of Rs. 5,000, executed to him a Bengali mortgage bond for securing the repayment of that sum with interest at the rate of 12 per cent, per annum. The appellant afterwards put this bond in suit, and on May 30th, 1864, obtained a decree against Toofani Singh for the sum of Rs. 6,328-13-8. He took no proceedings to enforce this decree, which was in the form of an ordinary decree for money against the property especially hypothecated; but in September 1870, caused "the rights and proprietary and mokurrari title and share of Toofani Singh, the judgment-debtor," in the joint family property, which is the subject of this suit, to be put up for sale in two lots for the realisation of the sum of Rs. 11,144-6-4, the amount alleged to be then due on the decree; and himself became the purchaser of those lots for the sums of Rs. 900 and Rs. 10,100. Objections were taken to this sale by the judgment-debtor, which, after going through all the Courts, were finally overruled, and the appellant obtained the usual certificate of title, and in January 1871, succeeded in taking possession thereunder of the whole of the property now in dispute. Thereupon, in February 1871, the respondent brought the suit, out of which this appeal arises, for the recovery of the whole property on the ground that, being according to the law of the Mitakshara, the joint estate of himself and his father, it could not be taken or sold in execution for the debt of the latter, which had been

incurred without any necessity recognized by the Shastras or the law. The father was joined as a defendant.

The issues on the merits settled in the cause were —

1. Did Toofani Singh borrow money from the defendant (the appellant) under a legal necessity or without a legal necessity? And are the auction sales and other proceedings taken in [203] satisfaction of the debt all illegal and ought they to be set aside or not?

2. Under the Mitakshara law, is the plaintiff entitled to the entire property sold in satisfaction of his father's debts, or to how much?

3. Was some portion of Mouzah Domrawun personally acquired by the plaintiff's father, or was it acquired by the ancestral funds and property?

A good deal of evidence was given in the Court of First Instance as to the nature of the debt incurred by Toofani Singh, and upon the issue whether it was borrowed under a legal necessity. Upon the face of the bond the debt is ostensibly that of the father alone; there is no statement that the money was borrowed for the purposes of the joint family, or so as to bind co-sharers in the estate. The oral evidence adduced by the plaintiff was directed to show that his father, who had passed five years in jail on a conviction for forgery, had both before and since his imprisonment lived an immoral and disreputable life, not residing with and rarely visiting his family; and that the money was borrowed on his sole credit, and spent by him in riotous living. On the other hand, the defendant (the appellant) brought witnesses to prove that part at least of the money, viz., Rs. 1,500, was expressly borrowed in order to provide for the marriage expenses of one of the daughters of the family; and, generally, that the plaintiff was cognizant of his father's transactions, and the whole debt, one which bound both co-sharers.

The Subordinate Judge does not appear to have thought it necessary to come to any definite conclusion upon the issue. In one passage of his judgment he says: "The sale being held by the Court, it is unnecessary to see whether it was held under a legal necessity or not." In another passage he says: "The sale held by the Court, according to the laws in force, of the ancestral estate, as the rights and interests of the judgment-debtor, cannot be regarded as including the right of the son of the judgment-debtor which he derived under the Shastras; and so far as the plaintiff's share is concerned, the sale cannot be confirmed." This seems to be the ground on which he [204] proceeded; for he gave the plaintiff a decree for one moiety of all the property claimed, except a small portion which he held was the separate acquisition of the father.

On appeal this decree was reversed by the Zillah Judge of Gya, who dismissed the suit on the ground (amongst others) that a legal necessity to borrow the money had been established, and consequently that not merely the particular share of the property that may have belonged to Toofani Singh, but the whole undivided estate was liable for the debt.

The respondent then brought his case before the High Court by special appeal, which, by its decree of the 14th June 1873, reversed the decree of the lower Appellate Court, and ordered that the plaintiff should obtain possession from the defendants of the property which was the subject of suit for the benefit of the joint family. The present appeal, which has been heard *ex parte*, is against that decree.

A good deal of the argument at their Lordships' bar was addressed to the question of the nature of the judgment-debt, and whether or not there was "legal necessity," for the loans of which it was composed. Whatever may be their Lordships' opinion of the finding of the Zillah Judge upon this point, they must, for the purposes of this appeal, treat it as conclusive. The appeal is only from the order on special appeal; and on that special appeal the High Court could not have disturbed the finding of the lower Appellate Court on this question of fact, unless there was no evidence at all to support it. And this, whatever was the character and weight of the evidence, cannot be affirmed.

This issue, however, seems to their Lordships to be immaterial in the present suit, because whatever may have been the nature of the debt, the appellant cannot be taken to have acquired by the execution sale more than the right, title, and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than what was seized and sold in execution, viz., the [205] right, title, and interest of the father. If any authority be required for this proposition, it is sufficient to refer to the cases of *Nugenderchunder Ghose v. Srimutty Ramunee Dossee* (11 Moore's L. A., 241) and *Baijun Doobey v. Brij Bhokun Lal Awusti* (I. L. R., 1 Cal., 133; s. c., L. R., 2 Ind. Ap., 275).

The first and principal question, however, that arises on this appeal is, whether the appellant acquired a good title even to the right, title, and interest of the father; whether under the law of the Mitakshara the share of one co-sharer in a joint family estate can be taken and sold in execution of a decree against him alone. In Lower Bengal, where this question can arise only between brothers or other collaterals (sons not having as against their father in his lifetime, under the law of the Dayabhaga, the rights which they have under the law of the Mitakshara), it is settled law that the right, title, and interest of one co-sharer in a joint estate may be attached and sold in execution to satisfy his personal debt; and that the purchaser under such an execution stands in the shoes of the judgment-debtor, and acquires the right as against the other co-sharers to compel a partition. That a similar rule prevails in the south of India, though the law there administered is founded on the Mitakshara, is shown by two cases decided by the High Court of Madras—*Virasvami Gramini v. Ayyasvami Gramini* (1 Mad. H. C. Rep., 471) and *Palaniivelappa Kaundan v. Manmaru Naikan* (2 Mad. H. C. Rep., 416). The latter case was one in which, as here, the coparceners were father and son. And that the law is to the same effect in the Presidency of Bombay was ruled in the two cases which are reported at pp. 39 and 182 of the first volume of the Bombay High Court Reports (*Gundo Mahodev v. Rambhat*, 1 Bom. H. C. Rep., 39, and *Damodhar Vithal Khare v. Damodhar Hari Sowar*, 1 Bom. H. C. Rep., 182).

All these cases, however, affirm not merely the right of a judgment-creditor to seize and sell the interest of his debtor in a joint estate, but also the general right of one member of a joint family to dispose of his share in a joint estate by voluntary conveyance without the concurrence of his coparceners. This latter proposition is certainly opposed to several decisions of the Courts of Bengal.

[206] In 1869 the question was carefully considered by the High Court of Calcutta. A Division Bench of that Court referred it to a Full Bench in the case of *Sadaburt Persad Sahu v. Foolbush Koer*. The decision of the Full Bench

is reported in the third volume of the *Bengal Law Reports* (3 B.L.R., F.B., 31). The Chief Justice, after reviewing all the authorities, came, with the concurrence of his colleagues, to the conclusion that under the law of the Mitakshara, as administered in the Presidency of Fort William, "Bhagwan Lall," whose act was in question, "had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family." The Full Bench so reported to the Division Bench, and the latter then made its final decree in the cause, which involved many other questions. From that decree there was an appeal to Her Majesty in Council, which was heard *ex parte*. This Committee, for the reasons stated in their judgment (I.L.R., 1 Cal., 226 ; s. c., L.R., 3 Ind. Ap., 7), did not think it necessary or expedient either to affirm or disaffirm the ruling of the Full Bench on this point. Their Lordships said they "abstained from pronouncing any opinion upon the grave question of Hindu law involved in the answer of the Full Bench to the second point referred to them, a question which, the appeal coming on *ex parte*, could not be fully or properly argued. The question must continue to stand, as it now stands upon the authorities, unaffected by the judgment on this appeal."

It is, however, to be observed that even the Full Bench in the case under consideration recognized a possible distinction between the sale of a share in a joint estate under an execution, and an alienation by the voluntary act of a co-sharer, and thought that the former might be valid, though the latter was invalid. In dealing with the first question referred to the Full Bench, the Chief Justice (3 B. L. R., F. B., 37) says :—"It is unnecessary for us to decide whether, under a decree against Bhagwan in his [207] lifetime, his share of the property might have been seized, for that case has not arisen. According to a decision in Stokes' Reports, it might have been seized, but the case as against Bhagwan and that against the survivors are very different. So long as Bhagwan lived, he had an interest in this property which entitled him, if he had pleased, to demand a partition, and to have his share of the joint estate converted into a separate estate."

The decision in *Sadabari's* case has been followed by, amongst others, that of *Mahabeer Persad v. Ramyad Singh* (12 B. L. R., 90), being the case referred to in the judgment under appeal as No. 209 of 1872.

That was a decision by the two learned Judges who passed the decree now under appeal, and the circumstances of the one case are nearly the same as those of the other. In that of 1872, the father had borrowed the money ostensibly on his sole credit, and given a Bengali mortgage bond to secure it. The bondholder had sued on his bond, obtained a decree, taken out execution against joint property, and became the purchaser of it at the execution-sale. The distinction between that case and the present is that the property seized and sold was that which was specially hypothecated by the bond. The sons sued to recover the property. There was a clear finding against the alleged "necessity" for the loan. The Court laid down in the strongest terms (12 B. L. R., p. 94) the law as established by the Full Bench ruling in *Sadabari's* case and other decisions, and appears to have assumed that a title acquired by means of an execution sale stood on no higher ground than one founded on a voluntary alienation.

It asserted, however, the power of imposing equitable terms upon the son, whom they held entitled to recover ; and these terms were, in effect, that the property, when recovered, should be held and enjoyed by the family in defined shares ; and that the share of the father, the judgment-debtor, should be subject

to the lien of the judgment-creditor for the money advanced, with interest. In the present case, the same Judges have refused to recognize any such equity, proceeding on the ground [208] that the execution was taken out not against the property especially hypothecated, but against the general estate.

It is difficult to see upon what principle the hypothecation of the property in question can be taken to improve the position of the creditor; since the very act of hypothecation implies a violation of the rule laid down in *Sadabari's* case. It is further to be observed that in one respect the equity of the creditor is stronger in the present case than it was in that of 1872; since here it has been found by the lower Appellate Court that "legal necessity to borrow the money existed"; whereas, in the case of 1872, there was a clear finding the other way. Their Lordships, therefore, are of opinion that the reasons which the learned Judges have given do not justify their refusal to give to the defendant in this case the benefit of the equity which they enforced in the other.

But what is the effect of the decision in the case No. 209 of 1872? It is a clear authority for the proposition that, although by the law as settled in that part of the Presidency of Fort William which is governed by the *Mitakshara*, a member of a joint family cannot incumber his share in joint property without the consent, express or implied, of his co-partners, the purchaser of it at an execution-sale nevertheless acquires a lien upon it to the extent of his debtor's share and interest.

There appears to be little substantial distinction between the law thus enunciated and that which has been established at Madras and Bombay, except that the application of the former may depend upon the view the Judges may take of the equities of the particular case; whereas the latter establishes a broad and general rule defining the right of the creditor.

Their Lordships, finding that the question of the rights of an execution creditor, and of a purchaser at an execution sale, was expressly left open by the decision in *Sadabari's* case, and has not since been concluded by any subsequent decision which is satisfactory to their minds, have come to the conclusion that the law, in respect at least of those rights, should be declared to be the same in Bengal as that which exists in Madras. They do not think it necessary or right in this case to express any dissent from the ruling of the High Court in *Sadabari's* case [209] as to voluntary alienations. But however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution-sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution-sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value.

It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the peculiar status and rights of the co-partners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place.

In the present case their Lordships are of opinion that they ought not to interfere with the decree under appeal so far as it directs the possession of the

property, all of which appears to have been finally and properly found to be joint family property, to be restored to the respondent. But they think that the decree should be varied by adding a declaration that the appellant as purchaser at the execution-sale has acquired the share and interest of Toofani Singh in that property, and is entitled to take such proceedings as he shall be advised to have that share and interest ascertained by partition. And they will humbly advise Her Majesty accordingly. They desire to add that they cannot make any more precise declaration as to Toofani Singh's share, since, if a partition takes place, his wife may be entitled to a share; and, further, that there will be no order as to the costs of this appeal.

Decree varied.

Agents for the Appellant: Messrs. *Watkins and Lattey*.

NOTES.

[A.—THE SCOPE AND AUTHORITY OF THIS CASE: ERRONEOUS VIEWS HELD AS TO THIS.

I. MISTAKEN VIEWS WERE HELD—

The headnote is extremely defective and leaves out altogether the very important rulings given in this case.

This decision of the Privy Council is one of a series of cases decided by that tribunal respecting the liability to seizure and sale of the interest of a Mitakshara coparcener (father or any other) in execution of a decree against him, and the quantum of interest that passes to the execution-purchaser. Several expressions in the judgment were supposed to lay down rules of a general character, and gave rise to a "plentiful crop of litigation"; very eminent Judges like WEST (9 Bom., 305), MUTTUSAMI AYYAR and TURNER (see 4 Mad., 1, 9 Mad., 343, 9 Mad., 424—all of which dealt with the same case—12 Mad., 142) were misled as to the scope of this decision. The case of *Hardi Narain* (1883) 10 Cal., 626, only confirmed the mistake. Until the Privy Council's exposition of the law in (1885) 13 Cal., 21, the mistake prevailed.

II. WHAT THIS CASE DECIDED—

What this case decided (expressly or by necessary implication) may be stated as follows :—

- (1) That the interest of a Mitakshara coparcener (not necessarily the father, 4 Cal., 809), as well in Bengal as in Bombay and Madras, may be attached and sold in execution of a decree against him, whatever be the rule as to the inalienability by act of parties (as to which see *Sadabart Prasad v. Foolbakh Koer*, 3 B. L. R., F. B., 31).
- (2) That though in execution of a decree against the father of a Mitakshara joint Hindu family on a debt not immoral, the entire interest in the property as well of the 'sons' as of the father, can be attached and sold (as laid down in *Muddun Thakoor's* case, 14 B. L. R., 187), yet it is a question of fact in each case whether the entirety or the smaller interest only passed to the purchaser at the sale.
- (3) Where the purchaser has bargained and paid for the entirety, he may defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings. (This is explained not here but in *Nanoms Babuasin's* case, (1885) 13 Cal., 21).
- (4) Where such purchaser bargained for and purchased only the smaller interest, that interest alone passes to him and no more, and an inquiry into whether the debt is for a necessary purpose or otherwise is immaterial (3 Cal., 198, at 204).

- (5) In cases of ambiguity as to what interest passed at the sale—"in cases where the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone, and in *Deendyal's* case there certainly was an ambiguity of that kind,"—the frame of the suit and the absence of the sons from the proceedings may be material considerations. This was what was done in *Deendyal's* case and this was the purpose of their Lordships' observations in the judgment as regards the frame of suit, etc., 3 Cal., 198, at 204.
- (6) The right of the purchaser at the execution-sale is limited to that of compelling the partition which his debtor might have compelled, had he been so minded, before the alienation of his share took place:—3 Cal., 198, at 209.
- (7) Where such partition as in the last preceding clause is mentioned takes place, the wife and other female sharers may be entitled to their several shares:—(Last para. of the judgment at 3 Cal., 209).
- (8) As to the rule with respect to *onus* laid down in this case, see *infra* under 'D.'

III. THIS CASE DID NOT DECIDE—

- (1) That where the father alone is sued and the sons are not brought on the record, their interests remain unaffected, and nothing but the father's coparcenary interest passes by the sale. This view was long maintained, but it was declared in *Nanomi Babuasin v. Modhuni Mohun*. (1885) 13 Cal. 21 P. C. (at 36) to be incorrect:—

"Their Lordships do not think that the authority of *Deendyal's* case bound the Court to hold that nothing but (Girdhari's (i.e., the father's) coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold without a suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right it will avail them nothing unless they can prove that the debt was not such as to justify the sale."

- (2) When the decree against the father is a simple money decree, a sale in execution thereof conveys only the father's interest.

This is also incorrect. The larger interest may pass—see *Nanomi Babuasin's* case, (1885) 13 Cal., 21.

N.B.—Though not positive *rules of law*, these are *rules of construction*, for ascertaining in a case of ambiguity what was intended to be sold and was sold—as *explained* by the Privy Council in (1885) 13 Cal., 21; (1887) 14 Cal., 572.

B.—WHAT INTEREST PASSES TO THE PURCHASER IN EXECUTION OF A DECREE AGAINST THE FATHER.

THE GENERAL PRINCIPLES.

- (a) "Each case must depend on its own circumstances":—(1887) 14 I. A., 77; 14 Cal., 572.
- (b) "It appears to their Lordships that in all the cases, at least the recent cases, the inquiry has been what the parties contracted about if there was a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance, but only a sale in execution of a money-decree."—*Simbhunath Panday's* case, (1887) 14 I. A., 77; 14 Cal., 572.
- (c) "When a man conveys his right and interest, and nothing more, he does not *prima facie* intend to convey away also rights and interests presently vested in others, even though the law may give him the power to do so. Nor do they think that a purchaser who is bargaining for the entire family estate would be satisfied with a document purporting to convey only the right and interest of the father":—(1877) 14 I. A., 77; 14 Cal., 572.

- (d) "In the absence of special circumstances, showing a larger intention, only the interest of the judgment-debtor passes by the sale"—(1890) 15 Bom., 87; see 15 Bom., 18; (1899) 18 Bom., 147.*
- (e) "The questions are **what did the Court intend to sell and what did the purchaser understand that he bought**"—*per* Lord WATSON in *Pettachi's case* in argument, (1887) 14 I. A., 84, at 85; 10 Mad. 241, at 245.
- (f) The question is *not*, what had the Court the right and duty to sell, and is the purchaser to be prejudiced by any mistake in the mind of the Court as to what was being sold? This was put by Messrs. MAYNE and SHEPHERD in the argument (14 I. A. at 85) and in the judgment it was observed, "It is not a question of *what the Court could have done or ought to have done but what they did*," at 88. (1887) 14 I. A., 84; 10 Mad., at 250.
- (g) "If the whole estate could have been put up for sale, it was not put up. It is not a question of what the Court could have done, or what they ought to have done, but what they did, what was put up for sale, and what was purchased. If what was put up for sale was merely the estate which the father had in his lifetime, then what the purchaser purchased was only that interest"—(1887) 14 I. A., 84, at 88; 10 Mad., 241.
- (h) Thus, where the Court ordered only the judgment-debtor's interest being sold, larger interest was not conveyed:—(1887) 14 I. A., 81; 10 Mad., 241.
- (i) Similarly, where the Court did not intend to sell more than the judgment-debtor's interest under an erroneous view of the law as to the saleability of the estate:—(1903) 8 C. W. N., 186.

C. - CIRCUMSTANCES FROM WHICH WHAT WAS INTENDED TO BE SOLD AND WAS SOLD MAY BE ASCERTAINED.

I. PROCEEDINGS IN EXECUTION--

"The whole of the proceedings in the execution and sale must always be important evidence, often the best, as to the nature of the thing sold":—(1889) 17 I. A., 11, at 14; 17 Cal., 584.

The Court will "look to the substance of the case," and will not be guided by formal or technical defects.—(1879) 6 I. A., 233.

II. WHETHER THE CREDITOR TOOK "STEPS TO BIND THE OTHER MEMBERS OF THE FAMILY"—(1887) 14 I. A., 77, at 83.—

(a) *The joinder makes the matter clear*—

If he (the appellant) had sought to go further and to enforce his debt against the whole property and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it.—(1877) 3 Cal., 198 at 204; 4 I. A., 247, at 251; *Hurday Narain's case*, (1883) 10 Cal., 626.

"The purchase being as it was here by the person who had obtained the decree, only that passed which the father against whom the decree was obtained, had":—(1883) 10 Cal., 626, affirming (1879) 5 Cal., 425.

Moreover, if Bichuk relied on assent by the sons he should have taken care to make them parties to the execution proceedings. In *Deendayal's case*, where the expressions used by the mortgagor were much more favourable to the conveyance of the entirety than they are here, the creditor's omission of the sons from the proceedings was made a material circumstance against him. And in *Nanomi Babuasin's case*, where the decree was in favour of the purchaser, the same circumstance was recognised as being material when the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the coparcenary interest alone":—14 I. A., 77; 14 Cal., 572.

(b) *The non-joinder, however, does not necessarily import only the smaller interest passing—*

This omission, however, of the sons is available only "if the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone (and in *Deendyal's* case there certainly was an ambiguity of that kind) the absence of the sons from the proceedings may be one material consideration"—*Nanomi Babuasin's* case, (1885) 13 Cal., 21, at 36.

(1) This absence of sons is not of itself conclusive :—

Nanomi Babuasin's case, (1885) 13 Cal., 21.

(1883) 13 C. L. R., 96

(1880) 3 All., 72.

(1882) 12 C. L. R., 104.

(1880) 3 All., 118.

(1882) 9 Cal., 389.

(1880) 3 All., 191.

(1882) 9 Cal., 452.

Mortgage (1881) 11 C. L. R., 263, reversing

(1889) 12 Mad., 309.

7 C. L. R., 465.

(2) Whether at the time of the transaction, the sons were adults or minors :—(1883) 13 C. L. R., 96; (1882) 9 Cal., 452; (1882) 9 Cal., 495. But *quere* adult son may have the right to say, "I shall pay it out of my private funds."

(3) Too much importance was attached to this circumstance in the following cases :—

(i) (1880) 7 C. L. R., 465, where stress was also laid on only the right, title and interest being sold, (adult).

(ii) (1881) 8 Cal., 517 (minor sons).

(iii) (1878) 1 Mad., 354.

(iv) (1884) 9 Bom., 305, *per* WEST, J.

(v) (1882) 5 Mad., 125, F.B. (case of brother; it was erroneously observed in this, that unless the suit is so framed as to enable those interested to contest the allegation that the debt is one binding upon the family, the decree can only be a personal decree binding the interest of the defendants in the suit).

(4) It is immaterial whether the father was or was not the managing member :—(1887) 11 Mad., 64, at 67.

(5) As to the necessity of sons being parties when subsequently to the mortgage but prior to the suit the father and sons divided :—See (1884) 8 Bom., 481 at 488 and 489.

(6) As to sons being necessary parties in mortgage proceedings under the Transfer of Property Act, 1882, sec. 85, there is a conflict of decisions :—See (1901) 28 Cal., 517, reversing (1900) 27 Cal., 724.

See also the C. P. C. (1908) Order, Sch. I, Or. XXXIV, rule 1.

(c) *This principle has been applied to co-sharers other than sons* :—(1887) 15 Cal., 70; 14 I. A., 187; (1890) 14 Bom., 597, overruling 11 Bom., 700; (1882) 7 Bom., 91; (1882) 6 Bom., 564; (1896) 21 Bom., 616, even where other parties to the debt are omitted; (1886) 11 Bom., 361; (1895) 20 Bom., 338, extended to Mahomedan heirs; (1882) 5 Mad., 201.

(d) *Existence of debt sufficient as against son but as against other minor coparcener, other things to be considered* :—(1881) 4 Mad., 73; see also (1879) 5 Cal., 144.

III. OBJECTION PROCEEDINGS :—

The proceedings taken in execution by way of objection to the attachment and sale elucidate the question of fact whether the thing meant to be sold and bought was the entirety of the estate or only a share in it.

The son's petition, and its being rejected not on the ground that the thing to be sold was only the share of the father :—(1889) 17 I. A., 11; 17 Cal., 584; 14 I. A., 85; 10 Mad., 241.

IV. THE USE OF THE WORDS, THE "RIGHT, TITLE AND INTEREST" OF THE JUDGMENT-DEBTOR IS NOT CONCLUSIVE—

- (a) The Procedure Code at that time required, that property sold in execution should be described as the right, title and interest of the judgment-debtor, and it has been held in many cases, that the presence of these words in the sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold, and does not necessarily import that when the father of a joint family is the judgment-debtor, nothing is sold but his interest as a co-sharer. It is a question of fact in each case :—(1889) 17 I. A., 11 at 16 17 Cal., at 589.
 - (b) Description in the sale certificate :—(1889) 17 I.A., 11.
 - (i) "Whatever interest the judgment-debtor had in the property" *Hurday Narain's case* (1883) 10 Cal., 626 affirming (1879) 5 Cal., 425 5 C.L.R., 112.
 - (ii) "Right, interest and connection which the judgment-debtor had in the property"—(1889) 17 I. A., 11.
 - (iii) "My proprietary share"—6 Cal., 749.
- See also (1887) 9 All., 672 : (1880) 2 All., 800.
- (c) Too much importance was attributed to this in the following cases :—(1880) 7 C.L.R., 465 ; (1880) 7 C.L.R., 218 (see last para.) ; (1884) 8 Bom., 489 ; (1881) 9 Bom., 305—*Per WEST, J.*

Y. EFFECT OF PRESENCE OF THE SONS, ETC., AT THE TRANSACTION —

"Their Lordships cannot agree with the Subordinate Judge ; whatever part any of the sons may have taken in negotiating between Luchman and Bichuk, there is no evidence whatever of their proposing to mortgage their own interests. The sons may have assented to what is done. That must be answered by the documents. Moreover, if Bichuk relied on assent by the sons, he should have taken care to make them parties to the execution proceedings"—14 Cal., 572 P. C.

The authority of the following cases as to estoppel is shaken by the foregoing observations of the Privy Council :—(1881) 8 Cal., 517, (1883) 13 C. L. R., 96 ; 8 Cal., 898 (time when brought).

VI. THE FACT OF THE DECREE BEING A SIMPLE MONEY-DECREE --

Deendyal's case (1877) 3 Cal., 198 P.C.

Hurdai Narain's case (1885) 10 Cal., 626 P. C.

(a) But this is not conclusive—*Nanami Babuasin's case* (1885) 13 Cal., 21 P.C. ; (1888) 12 Bom., 691.

(b) The following cases proceeded on an erroneous view :—(1885) 9 Mad., 343 F.B. ; (1884) 8 Bom., 489 ; (1880) 7 C.L.R., 218 (see last para.), (1878) 1 Mad. 358 F.B.

VII. THE PRICE PAID MAY BE TAKEN INTO CONSIDERATION --

In *Simbhunath Panday's case*, it was observed—"for . . . the Rs. 625 which he (the creditor) got for his purchase appears to be nearer the value of one-sixth than of the entirety"—(1887) 14 I. A., 77 at 83 14 Cal., 572.

See also (1896) 23 Cal., 262.

VIII. LAW UNDERSTOOD AT THE TIME --

Recourse may be had to what was, at the time of sale, believed to be the law, though erroneously :—(1903) 8 C. W. N., 186.

D.—ONUS ON SON DISPUTING THE PURCHASER'S INTEREST AND ITS CONSEQUENCES.

This subject is dealt with *in extenso* in the Notes to 5 Cal., 148, in our LAW REPORTS REPRINTS. The rule in *Deendyal's case* as to *onus* is, that *where it is ascertained from the execution proceedings, etc., that what was intended to be sold and bought at the sale in execution of the decree against the father, was only the father's interest and not the entirety, the son is not called upon to prove the immorality of the debt as his interest remains unaffected. Nor can the purchaser show the purpose of the loan, etc., within the meaning of 6 M.I.A.,*

399 to show that he took the entirety when, as a matter of fact, what he bought was only the smaller interest. 'This is the meaning of their Lordships' observation at 204, that the issue as to the nature of the judgment debt is "immaterial in the present suit, because whatever may have been the nature of the debt, the appellant cannot be taken to have acquired by the execution sale more than the right, title and interest of the judgment-debtor."

E. ALIENATION OF THE INTEREST OF A MITAKSHARA COPARCENER IN BENGAL.

I. MAY BE THE SUBJECT OF ATTACHMENT AND SALE —

This case declared that in Bengal also the interest may be attached and sold in execution of a decree —

- i. This case was that of the father-coparcener :—(1877) 3 Cal., 198.
- ii. Others also are within the rule :—(1879) 4 Cal., 809.

II. BUT THEY MUST BE TAKEN BEFORE DEATH—

But the proceedings cannot be taken after death :—Then survivorship intervenes ; and the survivors take in their own right by survivorship free from the liability for the personal debts and obligations of the deceased coparcener —(1890) 18 Cal., 157.

III. SUFFICIENCY OF PROCEEDINGS SHORT OF SALE—

It is sufficient if proceedings in execution had sufficiently advanced by attachment, etc. :—(1879) 5 Cal., 148 ; (1892) 20 Cal., 895, though execution proceedings might have been struck off the file :—(1906) 11 C. W. N., 163 5 C. L. J., 80.

This rule enures to the benefit only of those creditors that attached and not others :—(1900) 23 All., 106.

IV. WHEN FATHER'S ALIENATION IS JUDGED BY THESE RULES—

Alienations of the share of the father alone whether by reason of being tainted with immorality (1879) 2 All., 267 F. B., (1879) 5 Cal., 148 or by reason of only the smaller interest having been bought (1877) 3 Cal., 198 will be judged like those of any other coparcener.

F.—THE QUANTUM OF INTEREST PASSING TO THE PURCHASER.

I. RIGHT OF COMPELLING PARTITION —

The interest which is purchased is not, as Mr. Doyne argued, the share at that time in the property, but it is the right which the father, the debtor, would have to a partition, and what would come to him upon a partition being made. . . That is the answer to Mr. Doyne's argument that the father was entitled to a half. What the father was entitled to, and what the purchaser became entitled to, was what the father would get if a partition had been made which was only a third of the 8-anna share. According therefore to the authority of *Deendyal v. Jugdeep*, the present appellant became entitled only to the one-third treating it as if the sale was to operate as a partition at that time :—(1883) 10 Cal., 626 (686).

II. SHARE AT THE DATE OF PURCHASE, not that at the date of the suit :—See (1895) 23 Cal., 262 ; (1911) 35 Mad., 47 ; see also (1896) 21 Bom., 797.

III. THE TITLE THAT PASSES —

- (a) The execution purchaser might set up as *defendant* the right of partition against a member of the joint family who seeks to reclaim the property which has come into his possession, even as he might claim partition as *plaintiff* :—(1879) 5 C. L. R. 26 ; (1878) 3 C. L. R., 282.
- (b) A sale in execution gives a good title to the purchaser (even if it were another coparcener) who bought *bonâ fide* and without notice of prior alienation by the judgment-debtor when, by the Mitakshara rule prevalent in Bengal, that alienation is invalid :—*Balgovind v. Narain* (1893) 15 All., 339 P. C.

(c) But otherwise when there had been knowledge, and by partition the previous invalid mortgage attached to the share allotted :—(1907) 7 C.L.J., 644.

IV. FORM OF DECREE —

For this, see (1878) 3 Cal., 198 ; (1883) 10 Cal., 626 at 636.

G.—SHARES ON PARTITION.

I. WIFE (AND OTHER FEMALE SHARERS) —

Entitled to share on partition as against execution-purchaser :—(1877) 3 Cal., 198 ; (1880) 3 All., 88 ; 10 Cal., 626 ; (1904) 32 Cal., 234 9 C. W. N., 270.

The mother's right not defeated by son's alienation pending partition suit :—(1880) 3 All., 88.

II. AN INSANE MEMBER IS NOT ENTITLED —

The coparcener that might sue for partition against the auction-purchaser should be such as is entitled to demand partition at the time ; an insane member cannot :—(1881) 8 Cal., 149.

H.—GENERAL.

I. PARTNER'S INTEREST may be seized and sold without injury to the continuance of partnership :—(1878) 3 Cal., 198 at 200; (1890) 13 Mad., 447; (1893) 20 Cal., 693.

II. EFFECT OF ALIENATION OF A COPARCENER'S INTEREST —

It does not cause a severance of the joint character. —(1878) 3 Cal., 198.

But partition has this effect, —*Balabai's case* (1903) 30 Cal., 725 30 I. A., 130. See, however, (1883) 9 Cal., 817.]

[210] PRIVY COUNCIL.

The 6th July, 1877.

PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND
SIR R. P. COLLIER.

Lekhraj Roy and others.Plaintiffs

versus

Kunhya Singh and others.....Defendants

[4 I. A. 159.]

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Construction, Rules of—Grant for an indefinite period.

The rule of construction that a grant made to a man for an indefinite term enures only for the life of the grantee and passes no interest to his heirs, does not apply in cases where the term can be definitely ascertained by reference to the interest which the grantor himself has in the property, and which the grant purports to convey.

THIS was an appeal against a judgment and decree of the Calcutta High Court, dated the 4th April 1872 (18 W. R., 494), by which an application made by the appellants for admission of a review of a judgment of the said Court passed on the 23rd June 1871 (14 W. R., 262), was dismissed.

The only question arising on this appeal was as to whether, under a lease of certain lands granted to the father of the respondent, Kunhya Singh, by one Choonee Lal, through whom the appellants claim, there passed to the lessee

merely an interest for his own life, as contended by the appellants, or one which was to continue as long as the tenure of the lessor, as contended for by the respondents.

Mr. *Leith*, Q. C., and Mr. *Doyne*, appeared for the Appellants.

Mr. *Cowie*, Q. C., and Mr. *John Cutler*, for the Respondents.

The material circumstances of the case will appear from their Lordships' Judgment, which was delivered by

Sir M. E. Smith.—This suit was brought by the present appellants to obtain possession of an eight-anna share of Mouza Toee, and the plaint also prays for the annulment of the mokurari tenure which the respondents claimed to have in the mouza under a potta granted by one Choonnee [211] Lall. The appellants are the purchasers under a decree obtained against some persons who had become possessed of part of the interest of Choonnee Lall in the eight-anna share of the mouza. The respondents are the heirs of Nirput Singh, who was the grantee under the potta. The single question in this appeal is, whether, upon the true construction of this potta, and upon the evidence in the case, the grant was one to enure for the life of Nirput Singh only, or whether it was to enure so long as the interest of Choonnee Lall existed. That involves also an inquiry into what the interest of Choonnee Lall was.

The lease or potta in question is dated in April 1808, and the material parts of it are in these terms: "The engagements and agreements of the potta "on the kabulyat of Nirput Singh, lessee of Mouza Toee, Pergunna Malda, "Zilla Bahar, are as follows: Whereas I have let the entire rents of "the mouza aforesaid," - describing what he had let,—"at an annual uniform "jumma of sicca Rs. 606, without any condition as to calamities, from the "beginning of 1215 fusli to the period of the continuance of my mokurari." That is the term fixed in the potta. It is a term "from the beginning of 1215 "fusli to the period of the continuance of my mokurari." Then it is required that the lessee should cultivate, "and pay into my treasury the sum of sicca "Rs. 606, the rent of the mouza aforesaid, for the period aforementioned, "according to the instalments, year after year." Then there is this provision, "if, hereafter the authorities desire to make a settlement of the property at "that time, he shall pay the jumma thereof separately according to the Govern- "ment settlement." It concludes, "hence these few words are written and "given as a potta, to continue during the term of the mokurari, that it may "be of use when required. The annual jumma malguzari, including the "malikana, Rs. 606."

To ascertain what is the term granted by this potta, we must see, in the first place, what is the interest which the grantor Choonnee Lall had. He calls it a mokurari interest; but whether it be a true mokurari interest or not, it was [212] evidently the intention of the parties that the grant should enure during term of his interest. If it can be ascertained definitely what that term is, the rule of construction that a grant of an indefinite nature enures only for the life of the grantee would not apply. If a grant be made to a man for an indefinite period, it enures, generally speaking, for his lifetime, and passes no interest to his heirs, unless there are some words showing an intention to grant an hereditary interest. That rule of construction does not apply if the term for which the grant is made is fixed or can be definitely ascertained.

Now it appears that as early as 1788 the Government granted what has been called a mokurari lease to Mahomed Buksh, and that lease, after various intermediate assignments, was ultimately purchased by Choonee Lall, the grantor of the potta in question. Choonee Lall is said to have purchased it in 1807 or 1808. It is also said that he had purchased the proprietary interest in two annas of the mouza. From the document which has been produced from the Collector's office, other persons appear to have been proprietors of the remaining annas, but nothing is heard of them in this suit. However that may be, it does not really affect the present question, because the interest pointed at in the potta in question is a mokurari interest. The kabulyat of the lease of 1788, signed by Mahomed Buksh, is as follows :—“Whereas I have obtained a lease of Mouza Toe, Zilla Kosra, Pergunna Malda, the area whereof, by estimation, is 709 bigas 10 cottas, from 1196 (one thousand one hundred and ninety-six) Fusli, at a jumma of sicca Rs. 400”—with certain exceptions—“I do acknowledge and give in writing that I shall continue to pay the rent of the mouza aforesaid at the said jumma, year after year, according to the kabulyat and the kisthundi. If any one establish his zamindari (proprietary) right in respect of the said mouza in his own name before the authorities, I shall continue to pay, year after year, to him or his heirs, the ‘malikana’ (proprietary allowance) thereof at the rate of Rs. 10 per cent. on the jumma aforesaid, in addition to the Government revenue.” The lessee is to pay a jumma of Rs. 400 and a malikana of 10 per cent. on the jumma. Of [213] course, if Mr. *Leth* is right that Choonee Lall became the owner of the proprietary interest, the malikana would go into his own pocket. Then at the end there is this clause, which has given occasion to considerable discussion : “If the present officers of the British Government, or any authority who may come hereafter, do not accept my mokurari lease to be hereditary, I acknowledge that this kabulyat is only for one year, thereafter it shall be cancelled.” That, undoubtedly, acknowledged a power in the Government to put an end to this lease, which is called a mokurari lease, at the end of one year. But it appears that the Government have not done so. It may be that it was contemplated that the Government would settle in the ordinary way with proprietors for the revenue, and in that case would put an end to this mokurari. But it appears that no settlement has been made, and that this lease has been allowed to go on without being put an end to ; and although it is not perhaps properly a mokurari, inasmuch as practically the Government could enhance the rent, it must be regarded, as long as it goes on, as an hereditary lease, a mourasi potta. This being the interest of Choonee Lall (he having become the purchaser of this potta), he grants this lease to Nirput Singh to endure during the continuance of it. That interest, which continues, and has not been determined by the British Government, being an hereditary interest, there seems to be no reason why, upon the construction of the potta in question, it should be held to be limited to the life of Nirput Singh. As already observed, the duration of the term is capable of being definitely ascertained by reference to the interest which the grantor himself has in the property.

Their Lordships think that this case may be decided upon the construction of the document, and that it is not necessary to have recourse to the exposition of it to be derived from the conduct of the parties. It is satisfactory, however, to find that the view which has been taken by their Lordships of the construction of this document is that which the parties themselves evidently entertained, because for twelve years after Nirput Singh's death his heirs were allowed to remain in [214] possession of the property precisely in the same way in which he had held it, paying the same rent.

Their Lordships agree with the judgment of the High Court given upon review, and they will humbly advise Her Majesty to affirm that judgment, and to dismiss this appeal with costs.

Appeal dismissed.

Agent for the Appellants : Mr. S. L. Wilson.

Agents for the Respondents . Messrs. Barrow and Barton.

NOTES.

[Life interest presumed, where the grant was an allowance by a Maharaja to a member of his family :—(1878) 3 C. L. R., 417.

See the case of *Churaman v. Balli* (1887) 9 All., 591.

See also our Notes to 11 M. I. A., 439, in the *Indian Reports* (1910) Vol. III.]

[3 Cal. 214]

PRIVY COUNCIL.

The 9th and 12th June, 1877.

PRESENT :

SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH,
AND SIR R. P. COLLIER.

Parichat.....Defendant

versus

Zalim Singh.....Plaintiff.

[- 4 I. A. 159.]

[On Appeal from the Court of the Judicial Commissioner, Central Provinces.]

Mitakshara—Alienation of ancestral property—Illegitimate son—Maintenance.

Since by the Hindu law the illegitimate son of a person belonging to one of the "twice-born" classes is entitled to maintenance, an assignment to him by his father, having no legitimate son then born, of a part of his ancestral estate, being in performance of a legal obligation, is on a different footing from a voluntary alienation to a stranger, and is valid under the law of the Mitakshara.

Quere.—Whether under the Mitakshara law a father who has no child born to him is competent, without legal necessity, to alienate the whole or any part of the ancestral estate ; or whether the rights of unborn children are so preserved as to render such an alienation unlawful ?

IN the suit in which this appeal was brought, Zalim Singh claimed to recover from Rajah Parichat, possession of a village which he alleged had been granted to him under a sannad by way of maintenance by Bahadoor Singh, the late Rajah of Belhera, whose illegitimate son he was, and from which he had been dispossessed by the defendant, the present Rajah. The defendant denied the *factum* of the sannad. He also denied its validity. The Deputy Commissioner of Saugor, in whose Court the suit was brought, held that the village had been assigned to the plaintiff by his father for his maintenance, and [215] that the assignment was valid. But, on it appearing that the plaintiff had mortgaged the village to a stranger, he was of opinion that he ought not

to be restored to possession. He, accordingly, made an order that the defendant should pay the plaintiff a yearly maintenance of Rs. 680, being the estimated value of the village.

This decision was affirmed on appeal by the Commissioner; but on special appeal by the defendant, the Judicial Commissioner of the Central Provinces, on the 24th March 1874, reversed the decree of the Deputy Commissioner, and gave Zalim Singh a decree for possession of the village. Zalim Singh was not present, and took no part in the proceedings under the special appeal to the Judicial Commissioner. The present appeal was brought by Rajah Parichat against the Judicial Commissioner's order.

Mr. Cowie, Q.C., and Mr. Joseph Graham for the Appellant. —The Deputy Commissioner decreed not what the plaintiff had asked for in his plaint, namely, the possession of land, but an annuity, for which he had not asked. On our special appeal for a reversal of this order the plaintiff did not appear. The Judicial Commissioner set aside the order of the Deputy Commissioner, and in the absence of the plaintiff gave him a decree for the land to which the Deputy Commissioner had held he was not entitled. In the absence of a cross-appeal on the part of the plaintiff, or objections taken by him to the decisions of the lower Courts, the Judicial Commissioner had no jurisdiction to make a decree in favour of the plaintiff at variance with the decree of the Deputy Commissioner. He ought to have dismissed the suit. Section 348, Act VIII of 1859, did not apply to such a case. It might be admitted that the plaintiff, an illegitimate son was, under the Hindu law, entitled to maintenance out of his father's estate—*Chuoturya Kun Murdun Syn v. Saheb Purhulad Syn* (7 Moore's I. A., 18). There was evidence, however, that the plaintiff's father had separate self-acquired property, out of which provision for the plaintiff's maintenance might [216] have been made. Under such circumstances the grant out of the ancestral estate could not be justified on the ground of necessity, since the separate estate of the father was primarily liable—*Muttusawmy Jagavera' Yetappa Naicker v. Venkataswara Yetaya* (12 Moore's I. A., 203). The case was governed by the law of the Mitakshara, under which it was not competent for one of several co-sharers to alienate even his own interest in the joint ancestral property without the consent of the co-sharers. Under that law a father could not make a voluntary alienation without the concurrence of his sons, and a son born after an alienation would not be bound by it—*Rajah Ram Tewary v. Luchmun Persad* (B. L. R., Sup. Vol., 731; s. c. 8 W.R., 15), and the passages of the Mitakshara there cited; see also *Modhoo Dyal Singh v. Golbur Singh* (B. L. R., Sup. Vol., 1018; s. c. 9 W.R., 511). Assuming the right of Rajah Bahadoor Singh to charge the zamindary to a reasonable amount 'with the plaintiff's maintenance, it was not necessary, nor competent for him, to alienate for that purpose a specific part of the zamindary in perpetuity.

The Respondent did not appear

Their Lordships' Judgment was delivered by

Sir J. W. Colville.—This is an appeal from an order made by the Judicial Commissioner of the Central Provinces whereby he has decreed to the respondent, the plaintiff in the suit, who does not appear upon this appeal, the possession of a certain village called Simeeria. The facts, so far as it is necessary to mention them, may be very shortly stated. The father of the appellant, the late Rajah Bahadoor Singh, was the owner of an estate consisting of five villages, one of which was this village of Simeeria. They had been held by his

ancestors for a long time, but there seems to have been some doubt to what extent they were rent-free, though enjoyed by him as such. Ultimately, however, the Government of the North-West Provinces determined to recognise the right of the Rajah and his heirs to hold them in perpetuity as rent-free. Before [217] that question (which is not material to the decision of the present appeal) was settled, the Rajah having then no legitimate son, but having an illegitimate son, the plaintiff, Zalim Singh, executed a sannad which with the omission of certain names and titles of the parties is in these words:—"This sannad is granted by Rajah Bahadoor in favour of you Zalim Singh, pledging to you the possession of Mouzah Simeeria, which you will hold and enjoy in perpetuity for your personal expenses, food, clothing, pan, masala. You are to receive as written herein, and to be regular in rendering your service." Delivery of possession of the village seems to have followed upon the grant, and Zalim Singh was in possession of it when his father died, and continued to be in possession during the period while the estate was administered for the appellant, the legitimate son and heir of the Rajah, by the Court of Wards. The appellant, however, on coming of age appears to have ejected Zalim Singh from the possession of the village. The latter then brought this suit, in which he claimed the possession of the village "as granted to him for his maintenance by the sannad"; and the statement of his pleaders, who were examined in the cause, contains the following passage:—"It is true that the proprietary rights of this village with others belonging to the jaghir were given at the settlement to Parichat (the appellant) as head of the family; this Zalim Singh does not dispute, nor does he claim proprietary rights, but as he belongs to the family, and as his father considered this village sufficient for his support, he claims possession of the same, or a payment in money equal to the profits of the village." And in answer to a direct question by the Court why at the settlement Zalim Singh did not claim proprietary rights, they said, "Zalim Singh only wished for support, and it would have interfered with the position of the head of the family to have broken up the estate by having the proprietary right bestowed on any other than the head of the family." In these circumstances their Lordships do not deem it necessary on this appeal to consider whether upon the true construction of the sannad it was such a grant in favour of Zalim Singh as would enure for the benefit of his children, if [218] he had any, or enable him, upon an alienation of the village, to give a good title to the purchaser. It seems to them that all that is raised on the present record is the right of Zalim Singh to the present possession of the village.

The course the litigation took was as follows:—The right of Rajah Bahadoor Singh to make such a grant was contested. That issue was found in favour of the plaintiff and against the defendant. The *factum* of the grant was also contested. That issue must be taken to have been conclusively found by the judgment of the Deputy Commissioner confirmed by that of the Commissioner in favour of the plaintiff. It came out, however, before the Deputy Commissioner, that after Zalim Singh had been ejected from the possession of the village, he had executed a mortgage of it in favour of some money-lender; and thereupon the Deputy Commissioner came to the conclusion that the plaintiff was no longer entitled to hold the village in khas possession and to receive the collections; but that having a distinct right to maintenance, and having had this village assigned to him by way of maintenance, he was at all events entitled to receive what may be called the net proceeds of it after the expenses of management, collection, and the like were provided for, such proceeds being estimated at the annual sum of 680 rupees. And he made a decree accordingly, which on the appeal of the defendant was confirmed by the Commissioner. Zalim Singh

did not appear in the Commissioner's Court, or join in that appeal. It further appears that after the decision of the Commissioner he proceeded to take out execution, and recovered the amount which had been awarded to him by the Deputy Commissioner. In that state of things the defendant, the present appellant, saw fit to carry the case before the Judicial Commissioner by a special appeal, and the two material grounds of that appeal are the first and the fifth. In the first he says:—"The lower Courts are wrong in law in holding that Raja Bahadoor Singh had power to alienate ancestral immoveable property in the way he is alleged to have done by the sannad put forward by the plaintiff." In the fifth he says:—"The lower Courts are wrong in law in decreeing maintenance in plaintiff's favour, notwithstanding that his [219] plaint was simply for possession of the village of Simeoria, and was never amended so as to enable the Courts to give a decree for maintenance." The Judicial Commissioner in dealing with this special appeal yielded to the last ground of appeal, and held that the lower Courts had gone beyond their proper functions in making a decree for maintenance in money instead of awarding possession of the village; but he assumed that he had a right to make the decree which he thought ought to have been made on the merits of the case, and he accordingly varied the decree of the Courts below by giving a decree for possession. His decree, which is that now appealed from, is: "That the decrees of both the lower Courts be reversed, and a decree granted for possession of Mouzah Simeeria to plaintiff, special respondent," with costs.

It has been argued, that to make this decree upon a special appeal was *ultra vires* of the Judicial Commissioner, the Courts below having decided against the plaintiff's claim to possession, and he having acquiesced in their decisions. It seems, however, to their Lordships, that the appellant himself re-opened that question. He took the cause before the Judicial Commissioner. By his fifth ground of appeal he contended that the particular decree which had been made was improperly made; by his first ground of appeal he contended that the suit ought to have been dismissed: If he were right on the former point, but wrong upon the latter, it became necessary for the Judicial Commissioner to make some decree, and therefore the question what decree was proper to be made upon the pleadings and evidence in the cause was necessarily open and raised before him.

A more substantial question is that raised by the first ground of appeal. Their Lordships do not think it necessary in this case to determine the question, whether, under the Mitakshara law, a father who has no child born to him is or is not competent to alienate the whole or part of the ancestral estate; whether the rights of unborn children are so preserved by the Mitakshara as to render such an alienation unlawful. When that question does come distinctly before them, it will of course be their duty to decide it; but upon the present appeal they abstain from laying down any positive rule one way or the [220] other. It seems to them that the objection in this case goes only to the particular alienation by the sannad, which stands upon a different footing. It appears to be unquestionably the law, that the illegitimate son of a person belonging to one of the twice-born classes, and the Rajah may be assumed to fall within that category, has a right of maintenance. Therefore, in assigning maintenance to Zalim Singh his father was acting in the performance of a legal obligation. He could not consult his legitimate son, because at that time there was no legitimate son born, and therefore looking to the purpose for which the grant made by the sannad, whatever may be its extent, was made, their Lordships think that it would not fall within the prohibition, supposing, which they

are far from deciding, that a father, having no legitimate son, is by the Mitakshara law incompetent to alienate ancestral estate to a stranger. Their Lordships, therefore, without, as has been said before, determining anything as to the extent of the grant, are of opinion that upon the question whether the Rajah Bahadoor had power to make it, the concurrent decisions of the three Courts in India were correct; and on the whole case they are of opinion that the decree of the Judicial Commissioner is right, and ought to be affirmed; and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal. There will be no costs, as the respondent has not appeared.

Appeal dismissed.

Agents for the Appellant: Messrs. *Watkins and Lattey*.

NOTES.

[I. MAINTENANCE OF ILLEGITIMATE SONS—

1. See (1884) 6 All., 329, where the period of maintenance is also defined.

2. As for maintenance when the son is by a woman not a Hindu, see *per* BHASHYAM AYYANGAR, J., in (1903) 27 Mad., 13. There is no text of Hindu Law under which an illegitimate son of a Hindu by a woman who is not a Hindu can claim maintenance, and in none of the reported cases has maintenance been ever awarded to an illegitimate son who was not a Hindu by birth; and in the only reported case on the point, (1879) 4 C. L. R., 154, in which maintenance was claimed for the illegitimate son of a Hindu by a Muhammadan woman, the claim was disallowed on the ground that such issue was not the offspring of a female servant by the head male member of a family, as also because the illegitimate son was of a "different race from the putative father."

3. For the obligation to maintain after the death of the putative father, see (1899) 22 All., 191.

4. See also (1878) 1 Cal., 91.

II. DECREE—

On the point as to decree, see (1905) 2 C. L. J., 288.]

[3 Cal. 220]

ORIGINAL CIVIL.

The 13th and 18th June, 1877.

PRESENT:

MR. JUSTICE KENNEDY.

Edo

versus

Kanto Nath Shaw.

• *Contract, Alteration of, after signature—Contract Act (IX of 1872), s. 37.*

To a contract between the plaintiffs and the defendant, for the purchase by the defendant of a cargo of salt, the plaintiffs, after the contract had been signed by the defendant, added in the margin: "Ten days' demurrage will be allowed at Rs. 250 per diem." *Held*, that the addition of the words in the margin did not amount to an alteration within the rule of English law: [221] the alteration must be either something which appears to be attested by the signature or something which alters the character of the instrument.

THIS was a suit for Rs. 5,463-14 as damages for breach of contract.

On the 23rd June 1876, the following contract, which was a printed form filled in, was entered into between the plaintiffs and defendant :—

Contract between Fide and Hobson, merchants, Calcutta, and the undersigned

Ten days' demurrage to be allowed at the rate of Rs. 250 (Company's rupees) per diem.

"The merchants agree to sell, and the undersigned to buy, the goods under-mentioned at the price specified below, and on the following terms :—The salt to be taken delivery of at the rate of 60 tons per custom house working day, commencing from the time that notice is given to the buyers that the ship is ready to begin to discharge. Price to be paid by the buyers against delivery of the salt at the rate of Rs. 58 per 100 maunds. Buyers to pay cash of weighing, amounting to Re. 1 per 100 maunds. Rupees 501 to be deposited by the buyers as security for the fulfilment of this agreement, which deposit will be forfeited in event of non-fulfilment thereof, and the seller will have the right to re-sell the salt and sue the buyers in a Court of law to recover any deficiency thereby arising, but any surplus shall belong to the sellers. About 1,750 tons salt ex *British Envoy*, or whatever quantity the ship may bring, June, sailing from Liverpool."

(Signature of defendant.)

The defendant failing to take delivery of the salt, the present suit was brought for breach of contract. The only defence material to this report was that contained in the following paragraph of the defendant's written statement :—

"Some time after the defendant had signed the said printed form, the plaintiffs requested him to sign or initial some conditions which the plaintiff had inserted on the said printed form ; but the defendant declined to do so, on the ground, as he the defendant then expressly reminded the plaintiffs, that the said alleged contract was a merely nominal one, and that he the defendant had nothing whatsoever to do with it ; and the [232] defendant submits that even if the said printed form had been originally valid and binding on the defendant, the alteration thereof by the plaintiffs after signature by the defendant and without his consent, would render the same void." The alleged alteration was the addition by the plaintiff, after the defendant signed the contract, of the words in the margin—"Ten days' demurrage to be allowed at the rate of Rs. 250 per diem."

Mr. Trevelyan for the plaintiffs contended that the rule laid down in *Master v. Miller* (4 T. R., 320) does not apply where the alteration is satisfactorily explained : Smith's L. C., 7th ed., 913, Vol. 1. Here the evidence gives a satisfactory account of the alteration. The reason of the rule is to prevent a person from benefiting by his own fraud, and where there is no want of *bona fides*, the rule does not apply ; see *per* BULLER, J., 335. Here, moreover, the alteration is not to take effect until after the time for the performance of the contract has expired ; it is merely adding to the contract what the law would itself add, as the addition of the words "on demand" to a promissory note : *Aldous v. Cornwell* (L. R., 3 Q. B., 573). This is an alteration the law would imply, and therefore immaterial. [KENNEDY, J.—It may be a question whether it is not a mere rule of evidence and provided for by the Evidence Act.]

Mr. Bonnerjee for the defendant contended that the alteration was a material one, and vitiated the contract ; and referred to *Davidson v. Cooper* (11 M. & W., 795 ; s.c., on appeal, 13 M. & W., 343) and *Patterson v. Luckley* (L. R., 10 Exch., 330). The Evidence Act does not assist the plaintiffs. The alteration here is a part of the document itself. [KENNEDY, J., referred to *Chandrakant Mookerjee v. Kartick Charan Chaile* (5 B. L. R., 103).] The

alteration being a portion of the document, and being a material alteration, avoids the whole contract.

Mr. Trevelyan in reply.—I have been unable to find any authority that this is a rule of evidence. Where a deed has [223] been varied, the variation does not divest the estate, but only alters the evidence of title: *West v. Steward* (14 M. & W., 47). There is nothing in the contract to allow the defendant to unload salt after the contract time, so that the alteration is a new contract: it is quite outside the original contract: the original contract still stands, and the plaintiff can recover on it.

Kennedy, J. (after finding on the evidence in favour of the plaintiff) continued:—The next question is with respect to the alleged alteration. As to that I fully believe the plaintiffs' account of what occurred, and discredit the defendant's. However that may be, I do not think that the words amounted to an alteration or addition within the rule of English law. I think the alteration must be either something which appears to be attested by the signature or something which, as in *Davidson v. Cooper* (13 M. & W., 343), alters the character of the instrument. I was not referred to authorities on what constitutes an alteration, but on the principles upon which *Pigot's case* has been extended to contracts not under seal, I think it must be so. Endorsements, marginal observations, &c., &c., clearly do not come within that principle, and I think that this does not. Possibly, this would not be said to be a forgery within s. 464 of the Penal Code, cl. 2; and on comparison with *Master v. Miller* (4 T. R., 320) I think that nothing which would not come within that section would be sufficient, at least if the element of fraud was proved. It is *prima facie* a mere statement of a fact which does not appear to be a part of the contract, or covered by the signature. *Chunder Kant Mookerji v. Kartick Charan Chatterjee* (5 B. L. R., 103), so far is the only authority I remember having any bearing on this point of the case, and showing what would be taken to be included.

Even, however, if it were so, I think that the "swift and simple" provisions of the Indian Legislature has swept away *Pigot's case* by s. 37 of the Contract Act (*reads*).

[224] So far as I could discover, and on *Davidson v. Cooper* (11 M. & W., 778), there is little doubt left, as there was there a verdict, on the plea of non-assumpsit, that the doctrine is not part of the law of evidence, but of substantive law; if it were, however, matter of evidence, the Evidence Act would have equally destroyed it.

Attorneys for the Plaintiffs: Messrs. Sen and Farr.

Attorneys for the Defendant: Messrs. Remfry and Rogers.

NOTES.

[UNAUTHORISED ALTERATION OF DOCUMENTS--]

Notwithstanding this case, "Indian practice follows the authorities of the Common Law." As regards the present value of this case, the remarks of Messrs. Pollock and Mulla, Indian Contract Act (1909), 2nd Edn. at pp. 265-271 may be studied.]

* [Sec. 37:—The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.]

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.]

[3-Cal. 225]
APPELLATE CIVIL.*The 3rd December, 1877.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE BIRCH.

Gossain Dass Chunder.....Defendant

versus

Issur Chunder Nath.....Plaintiff.

Title—Adverse possession—Limitation.

Twelve years' continuous possession of land by a wrong-doer not only bars the remedy and extinguishes the title of the rightful owner, but confers a good title upon the wrong-doer.

Semble.—Such title may be transferred to a third person whilst it is in course of acquisition and before it has been perfected by possession.

Suits for possession distinguished from suits for declaration of a particular title.

Where a plaintiff seeks to recover possession of property of which he has been dispossessed, and bases his claim on the ground of purchase, and also upon the ground of a twelve years' possessory title, he is entitled to succeed if he proves his possession, even if he fails to prove his purchase.

IN this case the plaintiff sued to recover possession of a room and the use of a staircase in an undivided dwelling. He alleged that the house in question was the property of the defendant's maternal grandfather; that the defendant possessed half of the house, and that the other half was in the possession of Bhugobutty Dassia, the defendant's aunt; that the defendant sold his half share to the plaintiff's brother in the year 1850; that [225] this half of the house fell to the share of the plaintiff at the time of partition with his brothers, and that the defendant, on the allegation of a purchase of Bhugobutty Dassia's half share, dispossessed the plaintiff of the room and staircase, the subject of this suit.

Bahoo *Kassikant Sein* for the Appellant.

Baboo *Sreenath Dass* for the Respondent.

Garth, C.J.—We think there is no ground for this appeal. The plaintiff sued to recover possession of certain rooms in a house, the whole of which he admits to have once belonged to the defendant, but which he says were sold by the defendant to his (the plaintiff's) brother in the year 1857 or 1858, and afterwards fell to the share of the plaintiff in a partition which took place between him and his brother many years ago.

The evidence of the purchase of the property from the defendant was so weak, that it was rejected altogether by the Munsif (who found in the defendant's favour) and not relied upon by the District Judge (who reversed the Munsif's judgment, and found in favour of the plaintiff). This judgment of the District

* Appeal under cl. 15 of the Letters Patent, against the decree of R. C. MITTER, J., dated the 6th February 1877, made in Special Appeal, No. 2030 of 1876, from the order of A. J. R. Bainbridge, Esq., Judge of East Burdwan, dated 29th July 1876, reversing the order of Baboo Promothonath Banerjee, Munsif of Kutwah, dated the 30th November 1875.

Judge is based upon the ground that, although the plaintiff may not have legally established the purchase from the defendant in 1857, he has proved that he has been in possession of the property in question for upwards of twelve years, and this is in fact admitted by the defendant, whose case is, that during that time the plaintiff paid rent to the defendant's mother's sister.

The District Judge, under these circumstances, considered, that the plaintiff had made out a *prima facie* case, by showing that he had been in possession for upwards of twelve years, and that the onus of proving that the plaintiff paid rent during that time, as alleged by the defendant, was upon the defendant. He has further found that, notwithstanding the purchase of the property by the plaintiff was not established, the plaintiff was entitled to a decree for possession upon the strength of his twelve years' possession.

The learned Judge in this Court was of opinion, that the District Judge was right in so holding, and we quite agree with him.

[226] The plaintiff's case in the first instance was founded not only upon the fact of purchase from the defendant by the plaintiff's brother, but also upon his long possession of the property for upwards of twelve years. The purchase he failed to prove, but the twelve years' possession was established, not only by the plaintiff's evidence, but by the defendant's own admission. It is true that this admission was accompanied by the counter-statement by the defendant, that during the twelve years the plaintiff had paid rent to the defendant's aunt, but the onus of proving this statement was upon the defendant, and he entirely failed to prove it.

We have, therefore, a possession by the plaintiff established for upwards of twelve years before the defendant's dispossession, and there is ample authority that such continuous possession for upwards of twelve years not only [in the language of the Privy Council in the case of *Gunga Gobind Mundul v. Collector of the 24-Pergunnahs* (11 Moore's L. A., 345)] bars the remedy, but practically extinguishes the title of the true owner in favour of the possessor.

The construction which this Court has given to the law thus laid down by the Privy Council, is not only that a twelve years' possession by a wrong doer extinguishes the title of the rightful owner, but confers a good title upon the wrong-doer—see *Amirunnissa Begum v. Umar Khan* (8 B. L. R., 540 ; s. c., 17 W. R., 119) and *Ram Lochun Chuckerbutty v. Ram Soonder Chuckerbutty* (20 W. R., 104) ; and this Court has gone still further, because it has held, that the title of the wrong-doer can be transferred to a third person whilst it is in course of acquisition, and before it has been perfected by a twelve years' possession—see *Brindaban Chunder Roy v. Tarachand Bandopadhyaya* (11 B. L. R., 237 ; 20 W. R., 114). Whether the law as laid down by the Privy Council was meant to have this extended operation, may perhaps be doubted, but such a construction of it tends to convenience in this country, and we are certainly not disposed to question its correctness as applied to the present case.

It was strongly contended by the appellant that the plaintiff's suit ought not to have been decreed, because, he did not establish his right in the precise way in which it was claimed, and the cases of *Bijoya Debia v. Bydonath Deb* (24 W. R., 444) and *Ramcomar Shome v. Gunga Pershad Sein* (14 W. R., 109) were relied upon in support of that contention. But these cases were very different from the present. They were cases in which the plaintiffs prayed for a declaration by the Court that they held their land upon a particular title,

and as they had failed to establish that particular title, it was impossible of course that the Court could say that they were entitled to it.

Here the plaintiff asks for no declaration of title. He seeks to recover possession of property of which he has been dispossessed by the defendant, upon the strength, no doubt, of a purchase made by him, which he has not proved, but also upon the strength of a twelve years' possessory title, which he has proved, and upon which, for the reasons that we have already given, he is entitled to succeed.

The appeal is dismissed with costs.

• Appeal dismissed. •

NOTES.

- [1. Adverse possession alone may be made the basis of title :—(1878) 1 Cal., 699.
2. This is inapplicable to one of several co-owners dealing with the mortgagee :—(1883) 7 Mad. 26.
3. Whether trespasser can transfer any title :—(1892) 16 Bom., 722.]

[228] APPELLATE CIVIL.

The 21st November, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRCH.

Kali Kishore Roy.....Defendant
versus

Dhununjoy Roy.....Plaintiff.

Practice—Right of appellant (respondent in lower Appellate Court) to prefer appeal—Act VIII of 1859, s. 119—Suit by Hindu excluded from joint family property—Limitation—Act IX of 1871, sched. II, arts. 127, 143.

An appellant, who was respondent in a lower Court of appeal, is not precluded, by reason of his non-appearance in such Court, from preferring an appeal to the High Court.

In a suit by a Hindu excluded from joint family property, to enforce a right to a share therein brought before the 1st of October 1877, the period of limitation must be computed under, art. 127, † and not under art. 143, of sched. II of Act IX of 1871.

THE facts are sufficiently stated in the judgment.

Baboo Nilmadhub Bose for the Appellant.

Baboo Porankristo Biswas for the Respondent.

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice AINSLIE dated the 30th of May 1877, in Special Appeal No. 39 of 1877, from the decree of C. B. Garrett, Esq., Judge of Dacca, dated 23rd October 1876, reversing the decree of Baboo Chundee Churn Sen, Second Munsif of Manikgunge, dated the 2nd December 1875.

† [Art. 127 :—

Description of suit.	Period of limitation.	Time when period begins to run.
By a Hindu excluded from joint family property to enforce a right to share therein.	Twelve years.	When the plaintiff claims and is refused his share.]

The Judgment of the Court was delivered by

Garth, C.J., (**BIRCH, J.**, *concurring*).—A preliminary objection has been taken to the hearing of this appeal, that as the present appellant, who was the respondent in the Court below, did not then appear, he is not entitled to be heard in this Court; and s. 119 of the Code of Civil Procedure has been relied upon as an authority for that position. No case showing that s. 119 applies to such a case as the present has been cited; and looking at the language of the section, it appears to us to apply only to the case of a defendant who does not appear in the Court of First Instance, and not to that of a respondent who does not appear in a lower Court of appeal. Moreover, we find, that a [229] Full Bench of the Bombay High Court, in the case of *Ramshet v. Balakrishna* (6 Bom. H. C. Rep., A.C., 161), has decided, that a special appeal lies where the respondent did not appear in the first appellate Court, and that s. 119 does not apply to such a case; and we also find, that in two cases before this Court,—one the case of *Omda Bibee v. Acourie Sing* (7 W. R., 425), decided by Mr. Justice JACKSON, and the other the case of *Tara Chand Ghose v. Anund Chunder Chowdhry* (10 W. R., 450), decided by Mr. Justice MACPHERSON,—the same point has been ruled in the same way.

These authorities being quite in accordance with our own view, we consider that this preliminary point is untenable, and we proceed to decide the appeal upon the merits.

If we had only to consider the grounds upon which Mr. Justice AINSLIE'S judgment appears to have proceeded, we should have felt some doubt as to whether we could altogether agree with him. But there is a very important point which Mr. Justice AINSLIE did not find it necessary to enter upon, which appears to us to disclose a very serious error of law which has pervaded this case from its commencement.

The plaintiff, who is a Hindu, claimed a four-anna share in a joint family property, of which he admitted that the defendant was one of the co-sharers; and he alleged that he had been excluded from his share by the defendant. The defendant, on the other hand, claimed the whole talook as his own, denying that the plaintiff had any share in it.

It seems to have escaped the attention of the Courts below that if the plaintiff were right upon the merits,—that is, if he were entitled to the four-anna share which he claimed, and had in fact been excluded from it by the defendant,—the clause in the Limitation Act of 1871, which would be applicable to the case, would not be the ordinary one of twelve years under art. 143 of the second schedule, but the 127th article of that schedule, which provides for the case of a Hindu, excluded from joint family property, seeking to enforce a right to his share. That article provides, that the period of limitation shall be twelve years, not from the time of the plaintiff's exclusion, but twelve years from the time when the plaintiff claims and is refused [230] his share. Consequently, if a plaintiff has been excluded for fifty years, and he then claims his share and is refused, he would have twelve years from the time of such refusal to bring his suit; or, in other words, he would have sixty-two years from the time of his exclusion; and if he never claims or is refused, the period within which he may bring his suit appears to be indefinite. This apparent inadvertence has been rectified in the present Limitation Act.

Now in this case the Munsif, instead of dealing with the question of limitation under art. 127, has raised an issue, "whether or not the plaintiff

had been in possession of the disputed share of talook Mahadeb Rai at any time within twelve years next immediately before the institution of the suit." This evidently was an error of law. The Munsif then found upon the merits in favour of the plaintiff, and decreed his claim. The District Judge upon appeal says that he is disposed to agree with the Munsif as regards the merits of the case, at least, that is what we understand him to mean. His words are: "The Munsif seems to have thought the plaintiff's case very plain, and decreed it. Now I agree so far, that it does appear that there is a just claim; but at the same time I do not think that the evidence on which the Munsif has relied is nearly as strong as he thinks." He goes on to comment upon the evidence, and finds that there is not sufficient proof that the plaintiff had been in possession of his share within twelve years before suit. He then, at the instance of the plaintiff, adjourns the case, in order that the defendant himself might be examined, and having heard his evidence, he says: "I see no reason to change the view I formerly took of the case—namely, that the plaintiff has failed to prove that he was in possession within twelve years before the date of suit"; and then he concludes his judgment in this way:—"It lies upon the plaintiff to prove that he was in possession within twelve years of the date of suit, and I am of opinion that, as he has entirely failed to show this, his suit must be dismissed." It is clear, therefore, from the way in which the issue as to limitation has been dealt with by both the lower Courts, that neither the Munsif nor the Judge was aware that art. 127 of the second schedule applied to a case of this kind, [231] and as this error has pervaded the whole of the proceedings from the first, the proper course will be, to send the case back for re-trial to the Court of First Instance.

The attention of the Munsif must be drawn to the fact, that if the plaintiff is entitled upon the merits to any share in this joint property, and has at any time been excluded from it (which appears to have been the Munsif's finding on the trial), the plaintiff would have twelve years to bring his suit, not from the time of his exclusion, but from the time when he claimed and was refused his share, and if he has never claimed or been refused his share, then he might bring his suit at any time. The Munsif will frame a fresh issue or issues on the point of limitation, having regard to the judgment of this Court; and will re-try the case upon such issue or issues, both parties being at liberty to adduce further evidence upon the points so raised. In case of an appeal from the Munsif, the District Judge will, of course, be at liberty to rehear the whole case upon the merits. The costs will abide the event.

Case remanded.

NOTES.

[STATUTORY CHANGES—

Art. 127, sch. II of Act IX of 1877—same under Act IX of 1908, Art. 127:—

Description of suit.	Period of limitation.	Time when period begins to run.
By a person excluded from joint family property to enforce a right to share therein.	Twelve years	When the exclusion becomes known to the plaintiff.]

[3 Cal. 231]

APPELLATE CIVIL.

The 20th August, 1877.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Monohur Doss.....Plaintiff

versus

McNaghten.....One of the Defendants.*

*Indigo Factories—Mortgage—Liability of creditor of Factory—
Lien by custom.*

A sold to B, the proprietor of an indigo concern, of which C was a mortgagee, certain bags of indigo seed. The agreement of sale contained no provision pledging the crop of indigo, the product of the seed, as a security for its price. Subsequent to the sale and after the seed had been planted, C, under a decree on his mortgage, obtained possession of B's factory. In a suit by A against B and C for the price of the indigo seed, *Held* that, in the absence of any agreement by C to pay the debts of B C could not be held liable.

There is no lien by custom upon an indigo factory, or upon the produce of an indigo factory, in respect of any debt of the factory.

[232] THIS was a suit for the recovery of Rs. 2,563-12, the value of certain bags of indigo seed. The plaint also asked for the realization of the money due by the sale of the prepared indigo cakes, the product of the seeds, or for a declaration of the plaintiff's right to a charge on the cakes in accordance, as it alleged, with the practice of indigo business. The seed was sold by the plaintiff to the defendant Fitzpatrick, the proprietor of the Paigampore Factory. The evidence of such sale was a "sata," or written agreement, which however, contained no provision pledging the crop of indigo, the product of the seed, as a security for its price. While the crop was still on the ground, the defendant McNaghten took possession of the factory under a mortgage decree obtained against the defendant Fitzpatrick. The Court of First Instance dismissed the plaintiff's claim as against the defendant McNaghten, on the ground that there was no agreement, express or implied, that he should be liable for the debts of his mortgagor. The lower Appellate Court upheld this decision, and the plaintiff preferred a special appeal to the High Court.

Mr. J. D. Bell (with him Baboo Jodu Nath Roy) for the Appellant.—The assignee of the indigo concern can be made liable for the price of the indigo seed. A mortgagee in possession is like an assignee in bankruptcy. Here the mortgagee has realized the advantage from the crop, the outturn of seeds sold to his mortgagor, and is, therefore, liable for the price—*Kearnes v. Bhawani Charan Mitter* (B. L. R., Sup. Vol., Part I, 54). The indigo crop being clearly, for the benefit of both mortgagee and mortgagor, the cost of production is a charge on the factory, not a personal debt. The mortgagee takes subject to encumbrances: Macpherson on Mortgages, 109; see also an unreported case, No. 51 of 1874, *KEMP and BIRCH, JJ.*, and *Jowadunessa Satudai Khandan v. Jhaman Lall Misser* (23 W. R., 158).

Mr. Fergusson for the Respondents.—Unless the assignee has notice of the debt, he is not bound. The assignee must be found with some knowledge.

* Special Appeal No. 1853 of 1876, against the decree of F. S. Mosley, Esq., Officiating Judge of Zillah Bhagulpore, dated the 6th of June 1876, affirming the decree of Baboo Mothura Nath Gupta, First Subordinate Judge of that district, dated the 25th of November 1875.

Mr. Bell in reply.

[233] The Judgment of the Court was delivered by .

Markby, J.—In this case the plaintiff is a person who supplied seed to an indigo factory. While that seed was in the ground, the mortgagee of the owner of the factory took possession of it, and I assume that he also took the crop which was produced by the seed. The person who sold the seed is plaintiff in this suit, and he sues the mortgagee, Mr. McNaghten, and also the mortgagor, Mr. Fitzpatrick, to recover the value of the seed. Both the Courts below have held that the mortgagor is liable, but that the mortgagee is not. The plaintiff appeals.

Now it is not necessary to advert to the exact terms of the plaint, as Mr. Bell, in arguing for the plaintiff, says that he is not bound by the precise terms of the plaint, and has argued the general question whether, under these circumstances, the mortgagee in possession can be made liable for the price of the seed. I think he has failed to show that he can be made so liable.

Before considering the Full Bench decision that has been referred to, I will clear the case of one preliminary point, —namely, that there is not in this case any pledge of the crop of indigo which was grown out of this seed by the owner of the factory to the plaintiff. Mr. Bell read the "*sata*" to us, and it does not seem to us to constitute any such pledge. Therefore, that distinguishes the case from two manuscript judgments which were read to us in Regular Appeal No. 51 of 1874, and the case of *Jowadunessa Satudai Khandan v. Jhaman Lall Misser* (23 W. R., 158).

But then it is said that, quite independently of any arrangement of that kind between the seller of the seed and the owner of the factory, there is in the case of an indigo factory a right to recover the price of the seed from the mortgagee in possession.

Now I think the Full Bench ruling which has been quoted lays down two things. I think we must now take it to be the law of this country that there is no lien by custom or otherwise upon the factory or upon the produce in respect of any debt of the factory. And I think that that decision further lays down that the purchaser of an indigo factory is liable only for those debts which, as between himself and the vendor, he has agreed to pay. At page 59, Bengal Law Reports, Full Bench Rulings, Part I, [234] it is said :—"Looking to general principle, as well as to the authorities in the late Sudder Court, and particularly *E. D. De Sarun v. Wooma Churn Seth* (S. D. A., 1858, p. 1814), there seems no ground whatever for saying that the back rents of a firm, the lease of which had expired before the sale of the factory, can be considered as a lien on the factory and other property belonging thereto in the hands of a purchaser." No doubt, that particular subject of remark is back rent, but I think the same principle applies to any other debts of the factory. And further on it is said : "We have already seen that if, as in the present case, the purchaser, by the contract of sale, takes over the assets of the factory, and agrees to pay the debts, the creditors may adopt and avail themselves of the contract in their favour. It is hardly suggested that there is any local or special custom which carries the liability of the purchaser further than this. Indeed, any such custom would be certainly at variance with the general law applying to the case of in-coming and out-going partners. The rule applying to such cases is stated in *Lindley on Partnership*, Vol I, page 314, ed. 1860. A person, who is admitted as a partner into an existing firm, does not, by his entry, become liable to the creditors of the firm for anything done before he became a partner."

Now there is, undoubtedly, one decision of the Sudder Court which goes so far as to say that there is a lien on the factory. And one of the learned Judges who gave his opinion in the Full Bench case seemed still to think that there was a lien on the factory. But I think that only brings out the decision of the majority of the Court all the more strongly. It appears to me clear that the majority lay down that, according to law of this country, there is no such lien. Then how does the case stand? It is simply a question—did the mortgagee, by any contract between himself and the mortgagor, make himself liable for this debt? There is no evidence, as far as I can see, nor has any been suggested, that the mortgagee ever undertook to pay this debt. It would be exceedingly unlikely that the mortgagee should agree to pay the debts of the factory. His position is quite different from that of a purchaser. He does not mean to retain the factory in his own [235] hands as the purchaser does; what he intends to do is merely to work out the debt due to himself. Mr. Bell argued that the position of a mortgagee is stronger than that of a purchaser. I do not see any principle under which a mortgagee can be made liable for such a claim as this unless upon the principle laid down by the Full Bench that he has undertaken to do so.

Therefore, on these grounds, I think the decision of the Court below was right, and this special appeal ought to be dismissed with costs.

Prinsep, J.—I am of the same opinion.

Appeal dismissed.

[3 Cal. 235]

FULL BENCH.

The 11th September, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE JACKSON,
MR. JUSTICE MACPHERSON, MR. JUSTICE MARKBY AND
MR. JUSTICE AINSLIE.

Chunder Coomar Roy and others.....Decree-holders

versus

Rhogobutty Prosonno Roy and another.....Judgment-debtors.*

[---1 C. L. R. 23.]

Limitation Act (IX of 1871), sched. II, art. 167 -- "Applying to enforce the decree"—Application "to keep the decree in force"

— Act VIII of 1859, s. 212.

The words "applying to enforce the decree," in Act IX of 1871, sched. II, art. 167, †

* Miscellaneous Regular Appeal No. 386 of 1876, against the order of H. T. Prinsep, Esq., Judge of Zillah Hooghly, dated the 28th of August 1876.

† [Sched. II, Art. 167, Act IX of 1871

Description of application.	Period of limitation.	Time when period begins to run.
For the execution of a decree or order of any Civil Court not provided for by No. 169.	Three years	The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the Appellate Court,
		or (where there has been a review of judgment) the date of decision passed on the review,
		or (where the application next hereinafter mentioned has been made) the date of applying to the Court to enforce or keep in force the decree or order,
		or (where the notice next hereinafter made has been issued) the date of issuing a notice under the Code of Civil Procedure, section 216,
		or (where the application is to enforce payment of an instalment which the decree directs to be paid at a specified date) the date so specified.]

mean^{*} the application (under s. 212, Act VIII of 1859, or otherwise) by which proceedings in execution are commenced, and not applications of an incidental kind made during the pendency of such proceedings.

In cases governed by Act IX of 1871, a decree-holder who has applied to the Court *simpliciter* "to keep the decree in force," may, within three years from the date of such last named application, obtain execution of his decree.

THE facts of this case and the authorities cited appear in the JUDGMENT of AINSLIE, J., referring the case to a Full Bench.

. AINSLIE, J.—On the 22nd February 1875, the decree-holder applied, under s. 212, Act VIII of 1859, to put his decree [236] into force. The Judge below holds that the application must be dismissed under the Limitation Act, sched. II, art. 167, cl. 5, because the last application for execution under s. 212 having been filed on the 21st December 1871, notice under s. 216 was issued on the 17th January 1872, and the time limited for renewing the application is three years, commencing from that date.

This appeal is brought to have it determined whether applications subsequent to the 21st December 1871, and in furtherance of the proceedings then set on foot, are not applications to enforce, or keep in force, the decree. There was an application for attachment of property made, after issue of notice under s. 216, on 1st February 1872. A writ of attachment was issued on 16th, and returned with certificate of execution on the 28th idem, and on the 29th an order was recorded requiring the judgment-creditor to deposit the costs of proclamation of sale within seven days. Up to this time there was nothing that can, on any construction, come within the meaning of the words "application to enforce or keep the decree in force" done within three years next before 22nd February 1875. The further proceedings were: payment into Court of the costs of proclamation of sale by *challan* on the 4th March 1872; order for sale on 20th April, and proclamation accordingly; sale on that date; and application on the following day by the decree-holder to take the sale proceeds out of Court. This last I cannot hold to be an application to enforce or keep the decree in force. As far as the debtor was concerned, the proceedings had terminated—*Maharajah of Burdwan v. Luckee Monee Debee* (8 W. R., 359), *Juggut Mohinee Dibee v. Ram Chand Ghose* (9 W. R., 100); and the money was held in deposit on account of the decree-holder, who could leave it lying in the treasury or take it out at his own convenience. If this is to be deemed an application within the meaning of the clause, it is in the power of the creditor to extend his time by not drawing money which has completely passed from the control of the debtor, and is in fact his own.

There remains the payment of money into Court for the purpose of causing issue of proclamation of sale under the [237] order of 29th February. The first question is, whether this was an application at all; the next, whether

* [Sec. 212:—The application for execution of a decree shall be in writing, and shall contain in a tabular form the following particulars, namely the

Form of application for execution of a decree.

number of the suit, the names of the parties, the date of the decree, whether any appeal has been preferred from the decree and whether any and what adjustment of the matter in dispute has been made between the parties subsequently to the decree: the amount of the debt or damages due upon it, or other relief granted by the decree; the amount of costs, if any were awarded: the name of the person against whom the enforcement of the decree is sought and the mode in which the assistance of the Court is required, whether by the delivery of property specifically decreed, the arrest and imprisonment of the person named, or attachment of his property, or otherwise, as the case may be. (Amended in Act XXIII of 1861, sec. 15.)

it was one to enforce or keep the decree in force. I think it must be taken that the *challan* by which money was tendered for the costs of issue of proclamation of sale, when taken in connection with the original application to execute the decree by attachment and sale, and the attachment effected and order thereupon, was an application to the Court to proceed with the execution of the decree; it is therefore necessary to go on and try the second question.

The learned Legal Remembrancer, who appeared for the appellant, pointed out the difference of the words used in the first and third columns of the schedule under art. 167. As to the entry in the first column, headed "description of application," it is beyond doubt that the words "for the execution, &c." apply to applications under s. 212. It was contended that if the words "applying to the Court to enforce" are meant to be restricted to such applications, the language in the third column would have followed the form used in the first column, and have run as follows—or to the same effect—"or (when the application next hereinafter mentioned has been made) the date of applying to the Court under s. 212, Code of Civil Procedure, to enforce the decree, or otherwise applying to keep it in force."

In the parenthesis in the schedule, the word "application" is used in the singular, but it is manifest that more than one kind of application is contemplated. The words "to keep in force" do not apply to an application under s. 212. They may be intended to apply to such applications as those suggested by Mr. Justice MARKBY in the case of *Rajah Nilmoney Singh Deo v. Nilcomul Tupparadar* (25 W. R., 546), but with that I am not now concerned. The use of the singular is, therefore, in no way inconsistent with a construction of the words "applying to enforce," which shall include more than one form of application. Moreover, the absence of such reference to the section of the Code as occurs in the next following clause of the same article, and the change of expression from "application for execution" to "applying to enforce" may reasonably be presumed to be [238] intentional and to have a purpose, and the construction contended for by Mr. Bell certainly gives effect to the varied form of expression. It cannot be said that the position of the clauses indicates a restricted construction of the earlier clause, inasmuch as the later clause provides for an extension of time by reference to a proceeding of later date than an application for execution, for this is to ignore the application to keep in force which, apparently, may be many months, possibly three years, later than either the application to execute under s. 212, or the notice under s. 216.

The law of limitation being a Statute in restraint of right, must, in case of doubt, be construed favourably to the rights restrained, and it seems to me that any application in furtherance of an application to put a decree into execution may be held to be an application to enforce the decree. If it becomes necessary to apply to the Court to take some further step in execution proceedings already started, that is really an application to enforce.

The reported cases on this article of the schedule brought to my notice are not numerous; and of these only two directly bear upon the present question. These are the cases of *Faez Buksh Chowdhry v. Sudut Ali Khan* (23 W. R., 282), decided by JACKSON and McDONELL, JJ., and *Rajah Nilmoney Singh Deo v. Nilcomul Tupparadar* (25 W. R., 546), by MARKBY and McDONELL, JJ.

The other cases brought before me were:—*Gouree Sunkur Tribedee v. Arman Ali Chowdhry* (21 W. R., 309), *Eshan Chunder Bose v. Prannath Nag* (14 B. L. R., 143; s. c., 22 W. R., 512), *Baboo Pyaroo Tuhobildarinee v.*

Syud Nazir Hossein (23 W. R., 183), *Shaikh Subhan Ali v. Shaikh Sufdar Ali* (24 W. R., 227), *Abdool Hekim v. Shaikh Assentoollah* (25 W. R., 94), *Jibhai Mahipati v. Parbhu Bapu* (I. L. R., 1 Bom., 59). I will examine these first :—

Gouree Sunkur Tribodee v. Arman Ali Chowdhry (21 W. R., 309) was decided by COUCH, C. J., and JACKSON, J. This case only decided that as the application relied on was not an application under s. 212, it did not serve to keep the decree in force. [239] It was said that the provision in art. No. 167 must be held to require an application to be in accordance with s. 212. That is the least that must be done, supposing that the decisions about *bonafides* should be held to be not applicable now. All that can be gathered from the report is, that the decree-holder was probably relying on some informal application for execution, and not on an application following and subsidiary to a regular application under s. 212. The report does not state the facts. But this is the view of the case taken in the Bombay case to be referred to hereafter.

The next case, *Fshan Chunder Bose v. Prannath Nag* (14 B. L. R., 143 ; s. C., 22 W. R., 512), was decided by a Full Bench. The case was referred to a Full Bench by JACKSON and McDONELL, JJ. In the referring order, Mr. JACKSON said that it had been pressed on them that because every application made after the period of limitation prescribed for it must fail, therefore, conversely, every application made within that period is a good application to stop limitation running ; and that another Bench (MARKBY and MITTER, JJ.) had held that this is now the law, and that all questions of *bonafides* are excluded. Pointing out the resulting unlimited delays that might be brought about, he asked for a decision on the question of *bonafides*. The Full Bench unanimously held that the provisions of the present law are absolute and irrespective of any question of *bonafides*. I may observe (though it refers more properly to an earlier part of this order) that Mr. Justice JACKSON expressly rests his judgment on the ground that the silence of the Legislature on the question of *bonafides* must be taken to have been intentional.

The next case cited, *Baboo Pyaroo Tuhobildar v. Syud Nazir Hossein* (23 W. R., 183), is scarcely connected with the present question in any way, and I shall pass it by as immaterial.

Shaikh Subhan Ali v. Shaikh Sufdar Ali (24 W. R., 227). This case also is unimportant. Apparently there was nothing which could be called an application after the issue of notice under s. 216 on the 15th April 1871, up to 20th July 1874, when the fresh application for execution was put in, though the former case was not struck off the file till 24th August 1871.

[240] *Abdool Hekim v. Shaikh Assentoollah* (25 W. R., 94). The former application was on 31st October 1868 ; notice was issued on the 20th November 1868, and the new application was on the 28th November 1871. A petition of 12th December 1868 was relied upon as sufficient to save the case from the operation of the statute, but this was rejected on the ground that the decree-holder did not thereby apply to enforce execution ; he simply prayed that the matter of the execution applied for on 31st October 1868 should be disposed of, along with an application for an execution he had made in another suit.

Jibhai Mahipati v. Parbhu Bapu (I. L. R., 1 Bom., 59). The last application for execution was in February 1868. The proceedings thereon lasted till 10th September 1871, when they were brought to a close by an order setting out that all the money due had been received, except Rs. 20-13-3, which there was

then no prospect of realizing. On the 30th September 1871, a petition was put in, which was afterwards relied on as bringing the next application for execution made on 19th October 1872 within time. *The Court citing the Calcutta case—*Houree Sunker Tribedee v. Arman Ali Chowdhry* (21 W. R., 309)—held that it was not an application to execute at all, and was itself out of time.

I now come to the two cases directly on the question before me. The second merely follows the first, and it will be convenient to notice it first. In *Rajah Nilmoney Singh Deo v. Nilconul Tuppadar* (25 W. R., 546), the application to execute was made on 29th December 1873, the last previous application was on 10th September 1870. A notice under s. 216 issued on this; the date is not given, but it seems to have been admitted that it was not within three years. It was suggested that further proceedings might have been taken, but this was not enquired into. Mr. Justice MARKBY, in delivering judgment, said:—"The case of *Faez Buksh Chowdhry v. Sadut Ali Khan* (23 W. R., 282) decides that, under the new law of limitation, when proceedings have been had subsequent to the application to execute the decree and to the issue of notice, limitation does not [241] run from the date of any such subsequent proceedings, but only from the date of the first application to execute the decree, or from the notice, as the case may be." That is a decision of a Division Bench of this Court in which Mr. Justice McDONELL was a party, and I should not feel justified in departing from it.

This brings me to the last case to be noted, *Faez Buksh Chowdhry v. Sadut Ali Khan* (23 W. R., 282), decided by JACKSON and McDONELL, JJ., which governed the case just cited. The application before the Court was in September 1873, the last preceding one in August 1870. It was urged that, under that application, proceedings had been taken, property sold, and money recovered: but it was held that "the Act does not allow limitation to run from the date of such proceedings, but only from the date of the application." Why the Court held the applications to enforce a decree mentioned in art. 167, cl. 4, to be limited to applications under s. 212, is not stated.

That the decisions as far as they go, run one way, must be admitted, but the principle of construction has been discussed in none of them, and with the greatest respect for the example of my learned brother MARKBY, I think I shall not be uselessly wasting the time of the Court by placing the question, which it is of immense importance to get finally settled, before a Full Bench.

The applications I refer to as subsidiary and in furtherance of the enforcement of a decree, and which appear to me to be applications to enforce within the meaning of cl. 4, art. 167, are such applications as for attachment after issue of notice; for proclamation of sale after attachment; for further proclamation after temporary stay of proceedings; in short, all applications the expressed purport of which is to procure something to be done by the Court which is necessary to carry into effect, give force to, or enforce the primary application for execution under s. 212. I use the words *expressed purport* designedly to avoid any doubt whether I am not coming into conflict with the Full Bench decision in the case of *Eshan Chunder Bose v. Prannath Nag* (14 B. L. R., 143; s.c., 22 W. R., 512). * I do not mean to raise any question of the *bona fides* of the petitioning decree-holders, if the terms of any application sub-[242]sidiary to and in furtherance of an application under s. 212 set out and ask for something which is material to the progress of the execution. As at present advised, I believe it to be a sufficient application under the Limitation Law.

The question, then, may be stated in the following terms :—Under the terms of cl. 4, art. 167, sched. II of the Limitation Law, is not an application to the Court to have something done for the purpose of carrying on and giving effect to a pending application for execution of a decree made under s. 212 of the Code of Civil Procedure an application from the date of which a fresh period of limitation runs ?

It is scarcely necessary to say, as the order of reference implies it, that, in my opinion, the question of limitation was open for consideration by the Judge, and that an admission by one of two co-debtors could not operate to prevent his giving effect to cl. 4, art. 167, sched. II of the Limitation Law.

MORRIS, J.—I think that the question raised by my learned colleague as to the effect of cl. 4, art. 167, sched. II of the Limitation Act, should very properly be referred for the decision of a Full Bench of this Court.

The Senior Government Pleader (*Bahoo Annoda Persad Bannerjee*) and *Bahoo Srinath Dass* for the Appellants.

Bahoo Mohini Mohun Roy and *Bahoo Juggut Chunder Bannerjee* for the Respondents.

The following **Judgments** were delivered by the Full Bench :—

Garth, C.J.—We are of opinion that "applying to enforce the decree" in art. 167 means the application (under s. 212, Code of Civil Procedure, or otherwise) by which proceedings in execution are commenced, and not applications of an incidental kind made during the pendency of such proceedings.

But we also think that some meaning must be given to the alternative expression "keep in force" occurring in the same article, and that consequently in cases governed by Act IX of 1871, a decree-holder who has applied to the Court *simpliciter* [243] "to keep the decree in force" may, within three years from the date of such last-named application, obtain execution of his decree.

Ainslie, J.—I accept the decision of my learned colleagues as the proper answer to the question put.

NOTES.

[See *infra* for Notes under I. L. R. 3 Cal., 716.]

[3 Cal. 243]
APPELLATE CIVIL.

The 24th November, 1877.

PRESENT :-

MR. JUSTICE MARKBY AND MR. JUSTICE MITTER.

Madhub Chunder Giree.....Defendant

versus

Sham Chand Giree.....Plaintiff.

[In the Matter of the Petition of Madhub Chunder Giree.]

Superintendence of High Court—24 and 25 Viet., c. 104, s. 15—Act XXIII of 1861, ss. 26 and 35.

The High Court will not, under s. 15 of 24 and 25 Viet., c. 104, interfere with judgments, decrees, or orders of a lower Court on the bare ground that they are erroneous at law, or are based upon a wrong conclusion of facts; there must be some special ground justifying the High Court to exercise such powers.

Where the appellant has a remedy by regular suit, the Court is reluctant to interfere.

THIS was a suit under s. 15 of Act XIV of 1859, for recovery of possession of certain immoveable property. The defendant was formerly Mohunt of the Tarokessur, and as such was in possession of the temple and its appurtenances, including the official residence of the Mohunt, and of large landed estates, the property of the endowment, as also of some other landed property, the private and individual property of the Mohunt. On the 24th November 1873 the defendant was convicted by the Court of Sessions of the offence of adultery, and was sentenced to three years' imprisonment. On the defendant's conviction and imprisonment, the plaintiff, who was at the time the defendant's senior disciple, took possession of the office of Mohunt, and remained in possession not only throughout the three years' imprisonment of the defendant [244] (which expired in the latter part of November 1876), but until the 22nd December following, on which date the defendant re-entered the temple premises, and resumed possession of them and of the landed properties. The re-entry was complained of by the plaintiff as an illegal act, and he then brought a suit, to reinstate himself under Act XIV of 1859, in the Court of the District Judge of Hooghly. The plaintiff's contention was, that he was without his consent unlawfully dispossessed during a temporary absence, and that the defendant re-entered by force; and a number of cases were cited in his favour including the case of *Protab Chunder Burrooah v. Ranee*

* Rule No. 1023 of 1877, against the decree of J. P. Grant, Esq., District Judge of Hooghly, dated 28th August 1877.

No appeal from order or decision under section 15, Act XIV of 1859.

† [Sec. 26.—No appeal shall lie from any order or decision passed in any suit instituted under sec. 15, Act XIV of 1859 (to provide for the limitation of suits), nor shall any review of any such order or decision be allowed.]

Sudder Court may call for record of lower Appellate Court, and set aside its decision, though no appeal shall lie to the Sudder Court.

Sec. 35 :— The Sudder Court may call for the record of any case decided on appeal by any Subordinate Court in which no further appeal shall lie to the Sudder Court, if such Subordinate Court shall appear in hearing the appeal to have exercised a jurisdiction not vested in it by law, and the Sudder Court may set aside the decision passed on appeal in such case by the Subordinate Court, or may pass such other order in the case as to such Sudder Court may seem right.]

Kyanteswarree Dabee (2 W. R., 250), which laid down that the remedy afforded by s. 15* of Act XIV of 1859 was a special one contrived to discourage lawless acts of ouster by depriving the dispossessor of the privilege of proving a better title.

The defendant denied the forcible entry, stating that he returned peaceably and at the invitation of the plaintiff; and further pleaded that, by certain arrangements made between him and the plaintiff when defendant's conviction seemed probable, the plaintiff was constituted the defendant's agent, and held possession throughout only as such; and, therefore, that his possession was that of his principal, who, it was contended, was entitled to eject the plaintiff—*Hansev v. Brydges* (M. and W., 442). As to the particular terms of s. 15, it was argued that, as the words "notwithstanding any other title" are used, the issue was not limited to bare possession, but to the possessory title, and that therefore a person sued under that section might prove such title; and as to the words "otherwise than by due course of law," it was maintained that they only meant "illegally," and that there was nothing illegal in a man entering upon his own property. It was further contended that the intention of the Legislature that title to possession was maintainable under this section was manifest, by comparing it and the possessory section of the Criminal Procedure Code with Act IV of 1840, the two-fold provisions of which are reproduced one in each of the subsequent laws, the criminal law providing for maintenance of *de facto* possession, [246] while the limitation law allowed the title to possession to be proved lastly. In support of these arguments the following cases were quoted by the defendant:—*Protab Chunder Burrooah v. Ranev Kyanteswarree Dabee* (2 W. R., 250); *Bagram v. The Collector of Bulloah* (W. R. Gap No. 1864, 245); and *In the matter of the Petition of Sutherland* (9 B. L. R., 229; s.c., 18 W. R., 11).

The District Judge, Mr. J. P. Grant, decided, that all the questions put in issue, except those relating to the anterior possession of the plaintiff, his dispossession by the defendant, and the manner thereof, were irrelevant; and ordered that the plaintiff should recover possession.

On the 3rd September 1877, the defendant applied to the High Court by petition, praying that the judgment of the Judge of Hooghly should be set aside, and that he should be directed to try the proper issues involved; and that, in the meantime, all proceedings should be stayed, and the *Advocate-General* obtained a rule calling upon Sham Chand Giree to show cause why the judgment of the District Judge of Hooghly should not be set aside on the ground that the petitioner (the defendant) was entitled to have a decision upon the question raised in the said suit, as to whether or not the possession of the plaintiff was in law the possession of the said petitioner (defendant), and whether that being so, the plaintiff was estopped from setting up an adverse title.

Person unlawfully dispossessed of immoveable property may recover possession, notwithstanding any title that may be set up.

Suits for dispossession to be brought within six months.

Suit to establish title not to be affected.

* [Sec. 15:—If any person shall without his consent have been dispossessed of any immoveable property otherwise than by due course of law, such person or any person claiming through him shall in a suit brought to recover possession of such property be entitled to recover possession thereof, notwithstanding any other title that may be set up in such suit, provided that the suit be commenced within six months from the time of such dispossession. But nothing in this section shall bar the person from whom such possession shall have been so recovered or any other person instituting a suit to establish his title to such property, and to recover possession thereof within the period limited by this Act. (Modified by Act XXIII, 1861, s. 26).]

The Standing Counsel (Officiating), Mr. J. D. Bell (with him Baboo *Girish Chunder Ghose*) appeared to show cause against the rule. He drew attention to s. 26 of Act XXIII of 1861, which absolutely forbade appeals from orders or decisions under Act XIV of 1859, s. 15; and cited *In the matter of Lakhi Kant Bose* (I. L. R., 1 Cal., 180), in which the High Court decided that, "under s. 15 of 24 and 25 Vict., c. 104, the High Court will not interfere with the decisions of the Courts below in cases in which a special appeal is forbidden by s. 27 of Act XXIII of 1861." He also contended that the High Court will not interfere in the exercise of its extraordinary jurisdiction when the petitioner [246] applying has his remedy by regular suit: *Malashankar Hari-shankar v. Valibhai Umanji* (6 Bom. II C. Rep., 174), *In the matter of A. B. Miller* (12 W. R., 103) and *Hurrehur Mookerjee v. Nobin Chunder Doss* (20 W. R., 202).

The learned Counsel then questioned whether s. 15 of the Charter gave power to the High Court to call for the record of a suit already decided, citing *Karim Sheikh v. Mukhoda Soondery Dossee* (15 B. L. R., 111; s. C., 23 W. R., 268), *In the matter of Munoo Singh* (19 W. R., 306), *In the matter of the Petition of Durga Churn Sirkar* (2 B. L. R., A. C., 165), and distinguishing the case of *Oman Chund Mahater v. The Nawab Nazim of Bengal* (11 W. R., 229). He further argued that although a tenant or person claiming under him cannot dispute his lessor's title to demise, yet he may show that, since the demise, the lessor's title has expired, or been duly determined or defeated, or that he had since assigned it by way of sale or otherwise; and that, therefore, he was not estopped from setting up an adverse title: *Cole on Ejectment*, p. 164.

The Advocate-General (Officiating), Mr. Paul, in support of the rule, contended that the case had not been tried as to the points in issue, and that the Judge was bound to try them, and by not doing so had refused his duty, and thus called for the exercise of the extraordinary jurisdiction of the High Court, and that the Supreme Court had, on several occasions, issued a mandamus compelling a Judge to do his duty when there was no other means of compelling him to do so. The learned Advocate-General further contended that the meaning of the section did not apply to the position of the master and servant, and cited in support of the powers of superintendence of the High Court *In the matter of Juggut Chunder Chuckerbitty* (I. L. R., 2 Cal., 110), *Girdhari Singh v. Hurdeo Narain Singh* (3 L. R., I. A., 230), *In the matter of the Petition of Syed Abdool Ali* (15 B. L. R., 206), *Mussamat Mitya v. Syed Fuzl Rub* (15 W. R., P. C., 15).

The following Judgments were delivered:—

[247] Markby, J.—In this case the plaintiff sued to recover possession of certain property under s. 15, Act XIV of 1859.* The District Judge gave the plaintiff a decree. The defendant then applied to this Court to set aside that decree under the powers of general superintendence conferred upon it by s. 15 of 24 and 25 Vict., c. 104. Upon that application a rule was issued, calling upon the plaintiff to show cause why the decision of the District Judge should not be set aside, upon the ground that the defendant was entitled to have a decision upon the question whether or no possession of the plaintiff was in law the possession of the defendant, and whether that being so, the plaintiff was estopped from setting up an adverse title.

I am certainly not prepared to say that I agree altogether with the view of the law taken by the District Judge. It would seem to go to

* [q. v. *supra* 3 Cal., p. 245].

the length of laying down that a mere agent, who was put into possession of property by his employer upon his employer's behalf, might, if he chose to deny his employer's right to possession, not only hold the property against his employer, but turn his employer out, even although his employer had committed no breach of the peace or committed any act of which the agent could complain other than that of returning upon his own property. I do not say that is what has actually occurred in this case; but the refusal of the District Judge to consider the terms under which the plaintiff obtained and held possession seems to be based upon considerations which go to that length.

But I do not think it follows, because I do not agree with the view of the law taken by the Court below, that we ought, in such a case as this, to interfere under the special powers of superintendence conferred upon us by s. 15 of 24 and 25 Vict., c. 104. Whatever difficulties there may be in the construction of this section, I think it is quite clear that every erroneous decision is not to be set right under the powers conferred by it. For if every erroneous decision can be set right under it, then every decision may be questioned under it upon grounds both of fact and law. The result would be that no Court subordinate to the High Court would be capable of giving an unappealable decision upon any question whatsoever. No one could seriously [248] maintain such a proposition as that; and it is, therefore, necessary to consider further, whether, admitting the decision of the Court below to be questionable, this Court ought to interfere in order to nullify that decision.

There being no limitation expressed in the language of the section itself which confers these extraordinary powers, the only limitation upon the exercise of these powers is the discretion of the Court to which the application is made, and such principles as the Judges have themselves laid down for their own guidance in the exercise of that discretion.

There is some difficulty in extracting any very clear rules from the decisions and it is not surprising that the decisions upon such a subject are not wholly uniform. There would always naturally be a strong inclination to interfere where an erroneous decision has been brought to the notice of the Court, and the choice lies between two evils—between leaving an erroneous decision to have its effects, and between weakening to an extent which would be most injurious to the powers of the subordinate Courts. One consideration, however, has always, as a matter of course it ought, weighed strongly with this Court—namely, whether the party aggrieved will be remediless if the superintending Court refuses to interfere. If he has another remedy provided him by the law, his claim to the extraordinary interference of the Court is much weakened, even though the remedy may not be quite complete. I am not prepared to say that in this case the remedy which the defendant has, by way of regular suit, is complete, but he can bring such a suit, and, if successful, it will go a long way towards preventing any wrong which may have [been?] done him by the decision of the District Judge.

Another matter which this Court will always consider is any charge of judicial misconduct in the Court below; and by this I do not mean misconduct of a moral kind only, but an entire misconception by the Court below of the duty which it had to perform. I consider this to be the ground upon which this Court interfered in the case *Girdhari Singh v. Hurdeo Narain Singh* (3 L. R. 1. A., 230). The Subordinate Judge in that case had revoked a previous [249] order made by himself upon grounds which he had himself previously overruled, and without any notice to one of the parties interested. But this is a very different case. There was no misconduct here. The District Judge did,

no doubt, refuse in this case to consider a question which he was asked to consider, and I think he was wrong in doing so. But he did so upon a careful and deliberate examination of what, according to his view, was his duty in this respect, and after the parties had been fully and patiently heard. There is nothing in this which can be called judicial misconduct in any sense whatever.

On the other hand, it is admitted that the District Judge neither exceeded his jurisdiction, nor declined jurisdiction in this case, unless his refusal to consider the question of how the plaintiff came into possession can be so called. But, in my opinion, no determination of the Judge as to the materials upon which he thinks he ought to base his judgment can be called a question of jurisdiction. To refuse to look at a document or to consider an issue tendered arbitrarily, and without assigning any reason, might, under some circumstances, be misconduct, but could not be a refusal of jurisdiction.

Under these circumstances, I think that a case has not been made out for the exercise of the extraordinary powers of the Court, and that the rule ought to be discharged with costs.

Mitter, J.— I am also of the opinion that this rule ought to be discharged with costs. I also concur with my learned colleague that the District Judge is in error in refusing to consider the effect of the alleged *urponnumah*, on the ground that it is not relevant in this enquiry. This document, if established as genuine, might show that the possession of the plaintiff was the possession of a servant on behalf of his master, viz., the defendant. The District Judge is, therefore, wrong in excluding this document wholly from his consideration. The question, therefore, that we have to determine in this rule is, whether, for this error of law, this Court under the provisions of s. 15 of 24 and 25 Vict., c. 104, ought to interfere with the decision of the District Judge.

[250] It is not disputed that, by s. 26 of Act XXIII of 1861,¹ the decision of the District Judge in this case is final, and cannot be interfered with by way of appeal; and I think it has been now settled by a uniform current of decisions in this Court, that, under s. 15 of 24 and 25 Vict., c. 104, it will not interfere with the judgments, decrees, or orders of the lower Court on the bare ground that they are erroneous in law, or are based upon a wrong conclusion of facts. These cases are all collected in a foot-note in page 104 of Volume I of the Indian Law Reports (Allahabad Series). An applicant moving the Court to interfere under the extraordinary powers given by this section must establish something more than a mere error of law, or a wrong conclusion on evidence.

In this case, I do not think that the petitioner has succeeded in establishing any special ground upon which this Court would be justified in interfering with the judgment of the lower Court, which is admittedly final by the provisions of the Indian Legislature. He has a remedy by a regular suit; and he will have an ample opportunity in that regular suit of establishing the particular fact which the lower Court, in this proceeding he complains, has erroneously declined to enter into. It has been said that if the decision of the lower Court in this case be allowed to stand, he would be compelled to occupy the disadvantageous position of a plaintiff. But it seems to me that, in the investigation of the particular question which he asks the Court to investigate, it makes no difference to him whether he occupies the position of a plaintiff or defendant. The apparent previous possession of the plaintiff being admitted, the applicant must, whether in this proceeding or in a regular suit, show that it was really possession on his behalf.

* [*q. v. supra* I. L. R., 3 Cal., p. 244.]

I think, therefore, that, beyond establishing a bare error of law in the decision of the lower Court, the petitioner in this case has failed to make out any special ground upon which this Court would be inclined to interfere under the provisions of s. 15 of 24 and 25 Vict., c. 104.

Application refused.

NOTES.

[See 1 C. W. N., 617.]

[251] The 12th September, 1877.

PRESENT :

**SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE McDONELL.**

Leelanund Singh Bahadoor.....Plaintiff

versus

Thakoor Munrunjun Singh and another.....Defendants."

Ghatwali Tenure--Grants prior to Permanent Settlement--Reg. VIII of 1793, s. 51, cl. 1--Enhancement of rent.

Where grants of land had been made prior to the Permanent Settlement on ghatwali tenure at a fixed rent, and the Government subsequently dispensed with the services on the part of a zamindar—*Held*, in a suit by the zamindar to enhance the rents, that as long as the ghatwals were able and willing to perform the services, the zamindar had no right to enforce payment of an enhanced rent on the ground that the services were no longer required.

The ghatwals are dependent talookdars within the meaning of Reg. VIII of 1793, and are protected from enhancement by cl. 1 of s. 51 of that Regulation.

THE original suits which gave raise to these appeals were brought by Rajah Leelanund Singh to recover arrears of rent in respect of certain ghatwali taluks situate within his zamindari of Khurukpur, and to have his right declared to enhance the rents of the same, at a rate which the Court might think fit as an equivalent for the ghatwali services which had been rendered unnecessary through the agency of the Government.

The three cases were analogous, and at the instance of the parties were tried together. In the judgment will be found a full account and explanation of the origin and nature of ghatwali tenure, as also a resume of the circumstances which led up to those suits being brought.

In the first suit the plaintiff sought to recover the sum of Rs. 6,965-9-2, principal and interest, being arrears of rent payable in respect of the taluk Kukwara, from the 22nd Falgun 1267 F. S., to the close of 1281 F. S., and to have his right declared to receive rent from 1282 F. S. at the rate of Rs. 11,240 per annum in lieu of the salary of officers, burkundazes and archers, and other expenses which the ghatwals were bound to pay, and which actually they did not pay.

*Regular Appeals Nos. 250 and 251 of 1885 and 59 of 1886 against the decree of Baboo Mothura Nath Gupto, First Subordinate Judge of Zillah Bhagulpore, dated 15th July 1875.

On behalf of the plaintiff it was contended that the ghatwali [252] grants in question had been made on condition of the performance of certain Police services by the grantees; that these services having been undertaken by the Government in consideration of the plaintiff paying an additional sum of Rs. 10,000 annually, the latter, by reason of such arrangement and in virtue of his right as zamindar, was entitled to an enhanced rent.

The defendants in all three suits denied their liability to pay more than they were bound to pay by the terms of the sanads under which they held their lands.

In the first suit two sanads were filed, the first dated 7th Pous 1183 Fasli, purported to have been granted to the defendant's ancestors, Ranku and Bhyro Singh, by one Captain James Browne. It declared that "from the commencement of the year 1184 Fasli, the jama of Taluk Kukwara has been fixed as a mukurari istemrari at Rs. 245-12-5 of the local current coin in the name of Ranku Singh and Bhyro Singh, ghatwals of the aforesaid Taluk," stipulated for due payment of the Government rent, and directed the authorities, ministerial officers, and zamindars to "uphold the mukurari and istemrari jama of the said pergunnah, and receive the jama year by year, and not to demand a fraction more." The second sanads, dated 1194 Hijri, and granted to Ranku and Bhyro Singh by Raja Kadir Ali, the then zamindar, confirm the ghatwals in their office. Similar sanads, dated respectively 2nd of Safar 1194 H. S., and 15th Safar 1209 Hijri, were filed by the defendants in the second and third suits.

On the 15th of July 1875, the Subordinate Judge dismissed all three suits.

The present appeals were from this decree.

The Advocate-General (with him Mr. R. E. Twidale, Bahoo Unoda Pershad Banerji, Bahoo Mohesh Chunder Chowdry and Moonshes Mahomed Yusoff) for the Appellant.—In reviewing the cases bearing upon the subject of ghatwali tenure, referred to *Rajah Leelanund Singh v The Bengal Government* (6 Moore's L. A., 101), *Forbes v. Meer Mahomed Tuquee* (13 Moore's L. A. 438), *Kooldeep Narain Singh v. The [253] Government* (11 B. L. R., P. C., 71; 14 Moor's L. A., 247) and *Farquharson v. Dwarkanath Singh* (14 Moore's L.A., 259). He contended that, although the tenants were described as ghatwals, the sanads were not really ghatwali in their nature; that the terms as to watching, &c., were the ordinary terms in Government land agreements. The ghatwals were in the position of mere leaseholders or talukdars, and such being the case, the zamindar had the right of every zamindar to assess his taluks. There has been abatement from the jama payable by the defendants. They are, therefore, not protected under s. 51 of Reg. VIII of 1793: *Meertinjay Shah v. Baboo Gopal Lal Thakoor* (7 Sol. Rep., new ed., 257; old ed., 217). There is no fixed rent within the meaning of Act X of 1859, s. 15.* A fixed rent within the meaning of this section is a

Dependent talookdar, &c., holding land at fixed rent without change since permanent settlement not liable to enhancement of rent.

* [Sec. 15:—No dependent talookdar or other person possessing a permanent transferable interest in land intermediate between the proprietor of an estate and the ryots, who in the Provinces of Bengal, Behar, Orissa and Benares, holds his talook or tenure (otherwise than under a terminable lease) at a fixed rent, which has not been changed from the time of the permanent settlement, shall be liable to any enhancement of such rent, anything in section 51, Regulation VIII, 1793, or in any other law to the contrary notwithstanding.]

fixed money-rent with no other incident attached thereto ; see *Mahomed Yacoob Hossein v. Sheikh Chowdhry Wahid Ali* (4 W. R. Act X Rul., 123) and *Thakoor Pershad v. Nawab Syed Mahomed Baker* (8 W. R., 170). The word 'jama' means, according to the Regulations, a rent wholly in money : *Meertinjay Shaw v. Baboo Gopal Lal Thakoor* (7 Sel. Rep., new Ed., at p. 261; old ed. 217). By s. 56* of the Contract Act the engagement between the plaintiff and defendants has become void. The plaintiff was entitled in equity to an enhanced rent.

Mr. Montriou (with him Baboo Chunder Madhub Ghose, Baboo Taruck Nath Sen, and Baboo Rajendro Nath Bose) for the Respondents.—The only persons really interested in the ghatwali services were the Government, it being the duty of the zamindar to see to the due performance of the services. Over the ghatwals themselves we had little more than a sovereignty. The Rs. 10,600 to be paid annually by the zamindar was in consideration of his being relieved from his duty of supervision. It gave him no equity. The position of a ghatwal is distinct from that of an ordinary tenant ; his privileges and status are recognised by the Settlement : see *Roopnaram Deo v. Raja Qudir Alee* (1 Sel. Rep., 28). The jama was that part of the rent which was to be paid in [254] money, there being other conditions forming part of the consideration for the grant. A variation in the number of men to be maintained in accordance with the conditions is not an abatement of the jama within the meaning of s. 51 of Reg. VIII of 1793, for abatement under the section is a mere temporary measure. Here there is a perpetual dispensation from service. The defendants never applied for an abatement. There was no agreement between the parties that the services should be withdrawn. The ghatwali tenures having existed long before the Permanent Settlement—see, 1 Hamilton's *Hindustan*, p. 249, and *Raja Leelanund Singh v. The Bengal Government* (6 Moore's I. A., 112-113) -- are protected by s. 37, exception first, of Act XI of 1859 ; see the remarks of Sir BARNES PEACOCK in *Kooldeep Naram Singh v. Mohadeo Singh* (B. L. R., Sup. Vol., 559, at p. 566, s.c., 6 W. R., 199 at p. 204) affirmed in Privy Council (11 B. L. R., 71 ; s.c., 14 Moore's I. A., 250).

It was contended on the other side that the defendants are talukdars. If they are independent talukdars, the plaintiff cannot affect them ; if dependent talukdars, they are protected by s. 51 of Reg. VIII of 1793. As to whether s. 2, Act VIII of 1859, applied, *Woonu Tara Dabee v. Unnopoorna Dasse* (11 B. L. R. 158 s. c., in the Court below, 2 B. L. R., A. C., 102) and *Mohima Chunder Mozumdar v. Asradha Dossia* (15 B. L. R., 251, s. c., 21 W. R., 207) were quoted, and it was contended that the section did apply.

The Advocate-General in reply.

Cur ad. vult.

Agreement to do impossible act.

*[Sec. 56.—An agreement to do an act impossible in itself is void.]

Contract to do act afterwards becoming impossible or unlawful.

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.]

Garth, C.J.—This suit is brought by the plaintiff, the zamindar of the mehals of Khurukpore, to recover from the defendants certain arrears of rent in respect of Taluk Kukwara, appertaining to the Khurukpore mehals; and also to have his right declared to an enhanced rent at the annual rate of Rs. 11,240 from the beginning of 1282 F.S., or any other rate which the Court may think just as an equivalent for the ghatwali services which the defendants and their predecessors [255] in title have been used to render, but which now, through the agency of Government, have been discontinued.

This is probably the last scene in a long series of litigation which has been going on between these parties for upwards of thirty years past. The defendants and their ancestors have, from the year 1785, and probably from a still earlier period, been in possession of Taluk Kukwara under a ghatwali tenure. The origin and nature of these tenures are explained very clearly in the judgment delivered by Lord KINGSDOWN in the case of *Raja Leelanund Singh v. The Bengal Government* (6 Moore's L. A., 109), which was a suit brought by the Government of Bengal, in the year 1838, to resume possession of, and to assess to revenue, certain ghatwali lands within the present plaintiff's zamindari of Khurukpore; and which suit, after having been litigated for many years in this country, was finally dismissed by their Lordships in the Privy Council in the year 1855. And it is very necessary for our present purpose to bear in mind what was the true origin and nature of these tenures. They were created by the Mahomedan Government in early times, as a means of providing a Police and military force to watch and guard the mountain passes from the invasions of the lawless tribes who inhabited the hill districts. Large grants of land were made in those days by the Government, often to persons of high rank, at a low rent, or at no rent at all, upon condition that they should provide and maintain a sufficient military force, to protect the inhabitants of the plains from these lawless incursions; and the grantees on their part subdivided and regranted the lands to other tenants (much in the same way as military tenures were created in England in the feudal age), each of whom, besides paying generally a small rent, held their lands in consideration of these military services, and provided (each according to the extent of his holding) a specified number of armed men to fulfil the requirements of the Government.

This was the state of things at the time when the East India Company by Reg. LXXII of 1791 effected the decennial settlement of Bengal, Behar and Orissa. By this settlement [256] the amount of land revenue payable by the superior grantees to the Government, which has therefore been more or less uncertain, was fixed at a certain rate or jama for a period of ten years. This jama was to be ascertained by the Collector upon equitable principles, to be approved by the Board of Revenue; certain allowances, called *malikana* and *kurchay*, were made to the zamindars for their maintenance and disbursement, and one of the conditions of this new holding was, that the zamindars should be responsible, as theretofore, for the peace and protection of the district.

At this time the zamindari of Khurukpore was in the hands of Raja Kadir Ali. A large proportion of the lands of this zamindari was held upon ghatwali tenure; and, amongst others, Taluk Kukwara was held upon that tenure by the predecessor in title of the present defendant.

The earliest grant which we find of this taluk is dated the 24th of Jeit 1795, and will be found in page 243 of the paper book. It purports to have been made by Captain James Browne (who appears to have held at that time an office under Government) to Ranku Singh and Bhyro Singh, from the commencement of the year 1184 Fasli, at a rent of Rs. 245-12-15, upon certain conditions

mentioned in the grant; and, amongst others, that the jagirdars or grantees should cause the roads within their village to be closely watched, and when summoned to the presence (of the superior zamindar) should attend the presence with their body of men; and there is a special provision, that if any murders, dacoities, affrays, &c., should be discovered, or if the jagirdars should give bad advice, or cause injury to the interests of Government, they should forfeit their office and be dispossessed of their lands.

Then follows a list of twenty-two mouzas contained in the taluk.

The next document relating to the same tenure is a grant dated the 27th of January 1780 by Kaja Kadir Ali (the then zamindar of Khurukpore) to the same jagirdars, Bhyro Singh and Ranku Singh, confirming them in the tenure, requiring them by good treatment to keep the tenants of the land contented, and to watch and look after the ghat and ohowkies, so [237] that no thieves or murderers should remain in the neighbourhood. They are enjoined to seize therein and prosecute cattle-stealers under penalty of being themselves responsible, and that they should attend the presence when summoned. At the foot of this document we find a detailed statement, showing the number of armed men to be provided by the grantees of the tenure, and the share of rent payable by each. They were to provide 172 burkundazes and archers with sirdars, and of the rent

Bhyro Singh was to contribute ...	...	...	178	3	5
and Ranku Singh ...	...	...	67	9	10
Total ... 245 12 15					

These being the grants or sanads under which the defendants and their predecessors in title held the lands in question, there can be no doubt that, at the time of the Permanent Settlement the Taluk Kukwara formed a part of the Khurukpore zamindari, and we consider that the holders of that taluk were "dependent talookdars" of that zamindari within the meaning of Reg. VIII of 1793.

Many years after this, attempts were made by the Bengal Government to resume possession of these ghatwali lands, and to re-assess them to revenue as against the zamindar; but the Privy Council, in the above-mentioned case of *Rajgh Leelanund Singh v. The Government of Bengal* (6 Moore's I. A., 169) decided that the Government had no right to do so.

It then appears that, in the year 1863, a proposal was made by the Government to compound with the zamindars for the discontinuance of the ghatwali services on payment by the zamindars to Government of an annual sum in lieu of those services; and as an inducement to the zamindars to entertain this proposal, it was held out to them that, upon their making such a composition, they might either resume possession of the ghatwali lands or enhance the rents of the ghatwal talookdars.

In the letter, dated the 12th of January 1863, from Mr. Lushington, the Secretary to the Government of Bengal, to the Commissioner of the Bhagulpore Division, after directing the [238] Commissioner to see that the services of the Ghatwals should be strictly enforced, it is said in paragraph 6:—"But it must be admitted that the ghatwals, like the pykes of Midnapore, are of little value as Police or auxiliaries to the police; and if therefore the zamindar is willing to compound for their service by a fixed annual payment, the Lieutenant-Governor would be prepared to release the ghatwals from the obligation they are under

to the State, and to replace them by a more reliable agency, and one more immediately and directly under the control of the Government. The zamindar would then be at liberty to proceed against the ghatwals, either for the resumption of their lands or the enhancement of their rents, without any hindrance on the part of the Government. But unless he undertakes to furnish the Government with the means of providing an adequate Police force in lieu of the ghatwals, he cannot be allowed to appropriate their lands or to take from them in the shape of increased rent, the funds which are needed for the preservation of the peace and for the prevention of crime."

It is probable that the Government did not sufficiently consider how far this inducement held out to the zamindar could legally be carried out; but upon the faith of this letter, negotiations were entered into between the Rajah Leelanund Singh, the zamindar of Khurukpore, and the Government, by which the Government, by a document, dated the 9th of November 1863, waived their claim to Police services through the Pergannas Saheri within the Khurukpore estates, on condition of the zamindar paying to Government a fixed annual permanent rent of Rs. 10,000, and the arrangement is stated to have been made upon the basis of paragraph 6 of the above letter from Mr. Lushington.

Upon the strength of this arrangement with the Government, several suits were instituted by the Rajah Leelanund Singh against the respective holders of ghatwali tenures within his zamindari, to recover possession of those tenures, on the ground that the services, in consideration of which they were held, were no longer required; and one of these suits was brought against the present defendants to resume possession of the Taluk Kukwara. In many of these suits, the persons against whom [259] they were brought did not attempt to dispute the Rajah's claims; but all the suits which were disputed, including that brought against the present defendant, were decided against the Rajah by the Courts of this country; and upon appeal to the Privy Council, that decision was affirmed in the year 1873. In the case brought against the present defendants their Lordships say:—"It is contended that the sanads (the ghatwali grants) in effect merely gave certain lands as wages to hired servants, and that the ticcadar, whenever he chose, provided the Government dispensed with the ghatwali services, might put an end to the tenure, and take back the lands which were allotted in lieu of wages. It appears to their Lordships that this contention is not a correct one; that these sanads were grants of the lands subject to certain services, viz., the payment of the small rent of Rs. 245-12, and also of performing the ghatwali duties. They were not, therefore, the hiring of a servant giving him certain land in lieu of wages, but grants of land upon condition of certain services."

It may, therefore, be assumed upon the principle of those decisions, that the zamindar had no right to turn the tenants out of possession by dispensing with their services, unless the Government had dispensed with those services as between the Government and the zamindar. The only question then is, "whether the fact of the Government having consented to dispense with those services as regards the zamindar, and the zamindar having agreed with the Government to pay an additional revenue of Rs. 10,000 in consideration of the Government having absolved him from the services, make such a distinction in this case, that the zamindar, as between him and the ghatwals, is entitled to treat them as trespassers and turn them out of possession. In the cases which have been cited, it was stated, that even if the Government had not dispensed with the services, it appeared to their Lordships that the zamindar would have had no right to treat the ghatwali holders as trespassers, and their

Lordships see no distinction between those cases and the present. The lands were held upon a grant subject to certain services, and as long as the holders of those grants were willing and able to perform the services, the zamindar had no right to [231] put an end to the tenure whether the services were required or not."

Their Lordships then go on to say in the next case, which was decided upon similar grounds: " Their Lordships express no opinion as to whether the plaintiff would be entitled to enhance the rent, whether the circumstances of the case would enable him to enhance the rent, or whether a suit to enhance would be barred by the Statutes of Limitation, are questions which are not at present before their Lordships, and as to which they wish to express no opinion."

This suit (with others) was then brought by the plaintiff to recover arrears of rent due from the 22nd Falgun 1267 F. S., to the close of 1281 F. S., at the former rate of rent; and also to have his right declared to an enhanced rent from the beginning of 1282 F. S.

The Subordinate Judge framed issues as to valuation, as to whether any portion of the claim was barred, as to whether the case was barred by s. 2 and s. 7 of the Civil Procedure Code, and, lastly, as to whether the defendants were liable to further assessment, and, if so, to what amount.

The Subordinate Judge, for the reasons given in his judgment, dismissed the suit.

We consider that the Subordinate Judge was right in finding that the suit had been properly valued, and in holding that the plaintiff's claim to arrears of the rent claimed was barred by limitation, except so much of it as related to the rent of the three years previous to the institution of the suit. But he was in error in supposing that the provisions of ss. 2 and 7 of the Civil Procedure Code applied to the present claim, and also in not giving the plaintiff a decree for so much of the rent in arrear as was not barred by limitation.

With regard to s. 2 of the Civil Procedure Code, there was no ground whatever for holding, that the subject-matter of the present suit was the same as in the former one. The claims in the two suits were wholly different, and their Lordships in the Privy Council, in the former case, distinctly say in their judgment, that they express no opinion as to whether the plaintiff would be entitled to enhance the rent, or whether a suit to [261] enhance would be barred by the Statute of Limitation. The claim, therefore, in the present suit was clearly not determined in the former one. Nor is there the slightest reason for saying that (under s. 7) this suit will not lie, because the plaintiff ought to have included his present claim in the former suit. The claims in the two suits are altogether diverse and inconsistent. It is hardly necessary, however, to notice this point, because it was very properly not argued by the respondents' Counsel.

As regards the omission to give the plaintiff a decree for the arrears of rent at the old rate for the last three years before suit, this appears to have been a mere oversight of the Subordinate Judge, for he distinctly states that the plaintiff's claim to this rent is not barred by limitation; and the defendants in their written statement (paragraph 1) admit that the plaintiff is legally entitled to this rent, only pleading that the rent for one year, namely 1281 F. S., has been deposited in the Court of the Munsif of Bhagulpore.

Upon the main point in the case, viz., whether the plaintiff was entitled to enhance the defendants' rent, we quite agree with the Judge of the lower Court. The defendants, as far as we can see, are still perfectly ready and willing, as they always have been, to fulfil the obligations of their sanads as between them and the plaintiff, and it is not because the plaintiff has thought fit to compound the ghatwali services with the Government, without the defendants' consent, that the plaintiff has any right to change the terms of the defendants' tenure.

We find nothing in the sanads themselves, nor any law or custom applicable to those sanads, which would justify the plaintiff's claim for enhanced rent.

The first sanad granted by Captain Browne expressly provided that the ministerial officers and zamindars of Taluk Kukwara should uphold the mukurari and istemrari jama of the said pergannas, and receive the jama year by year, *and should not demand a fraction more.*

And even if the rent reserved by the sanads were of such a nature as would be liable to enhancement, we consider that the first clause of s. 51 of Reg. VIII of 1793 expressly prohibits any enhancement under the circumstances of this case. [262] One of the plaintiff's contentions is, that by s. 56 of the Contract Act, the engagement between the plaintiff and the defendants has become void; but it is clear that this section cannot apply, because the contract was not broken in any way by the ghatwals; and any change in the extent of their obligations under it was owing to circumstances over which they had no control.

It was also argued that these ghatwals are neither independent nor dependent talukdars, but more ordinary lease-holders, liable to have their rents enhanced under the Rent Law. They certainly are not independent talukdars, because the zamindar had a beneficial interest in the tenure, and these tenures were never registered as independent taluks. Moreover, they are not of the class of dependent talukdars referred to in s. 16 of Beng. Act VIII of 1869, because they do not possess a permanent transferable interest in the land, but it by no means follows that their status is that of ordinary lease-holders. The High Court (in their decision of the 17th June 1865, in the former suit) considered "that the defendants held a perpetual hereditary tenure at a fixed jama in money and service, and that except for misconduct on their part they could not be evicted." The Privy Council on appeal said, "that though it may be doubtful whether the words mukurari istemrari used in the sanad mean permanent during the life of the person to whom they are granted, or permanent as regards hereditary descent, yet their Lordships were of opinion that, coupling those words with the admitted usage for a long series of years, the tenures were hereditary."

The defendants are thus found to be holders of an old hereditary tenure which was established long before the Government took possession of the country; and we are of opinion that they do come under the denomination of dependent talukdars as defined in Reg. VIII of 1793, and further that they are protected by the first clause of s. 51 of that Regulation, which is very comprehensive, and includes all talukdars not included in s. 5.

It is argued that s. 51 does not protect the defendants' tenure from enhancement, because there has been an abatement from the defendants' jama. But we hold that there has been [263] no such abatement. The jama was that part of the rent which was to be paid in money, and in that jama there

representations, he took the said jewellery from the plaintiff's shop for the alleged purpose of permitting the same to be inspected by his master. The defendant Gopalkisto deposited the sum of Rs. 2,000 as security or earnest-money for the payment of the said sum of Rs. 7,800 in case his master should approve of the said goods on inspection, and gave the plaintiff a receipt in writing for the jewellery, acknowledging that he had received the same on inspection for ten days. The defendant subsequently obtained other jewellery from the plaintiff in the same way to the extent of Rs. 3,820. The plaintiff afterwards learnt that the allegations of the defendant Gopalkisto that he was taking the goods for inspection, and that they were to be purchased by his master, were wholly untrue; and that, on the 18th day of July, he had, without the knowledge or assent of the plaintiff, pledged all the jewellery entrusted to him by the plaintiff to the defendant Cowar Kally Kissen Roy, at his residence in Chitpore in the suburbs of Calcutta. The plaintiff, on discovering the fact of the said pledge, applied before the Deputy Magistrate of Sealdah, and obtained the issue of a warrant against the said Gopalkisto Paulit on a charge of breach of trust and criminal misappropriation of the said jewellery; but the case was, on the 13th of September instant, dismissed by the Sealdah Magistrate, on the ground that he had no jurisdiction. The jewellery so pledged as aforesaid was, at the time of suit, in the Sealdah Magistrate's Court.

The plaintiff submitted that the jewellery was delivered to the defendant in Calcutta on inspection, and the bailment [266] thereof was determined by the aforesaid pledge of goods at Chitpore, and hence part, at all events, of the cause of action arose in the town of Calcutta.

The defendant Gopalkisto did not appear to the suit.

The defendant Kally Kissen put in a written statement, in which he submitted that he was not subject to the jurisdiction of the Court, and that the suit ought to be dismissed as against him. He stated that he had no knowledge of the facts alleged in the plaint as to the manner in which Gopalkisto became possessed of the jewellery; but he alleged that, on the 18th July, on the security of certain jewellery pledged to him by Gopalkisto, whom he had reasonable grounds for believing to be a respectable man, he made over to him Government securities to the amount of Rs. 6,000, on the promise of Gopalkisto to redeem the jewellery within two months, on payment to Kally Kissen of the value of the Government securities with interest at 9 per cent. per month with option to Gopalkisto to extend the period of the loan for another two months on payment of interest then due, and with power to Kally Kissen to sell the jewellery in the event of its not being redeemed within the stipulated time. He further stated that, according to the custom of trusts amongst the native dealers in jewellery, no bill or other document is given by the seller of jewellery to the purchaser as evidence of the sale, but the ownership passes by delivery of possession; and that the defendant Gopalkisto had not paid the principal or interest of the loan or any portion thereof. He submitted that, assuming the allegations in the plaint were true, the conduct of the plaintiff in his transactions with Gopalkisto were extremely imprudent and unbusiness-like, and calculated to be injurious to innocent parties, and therefore the plaintiff was not entitled to any redress.

Leave to sue had been obtained under s. 12 of the Charter.

Mr Erans and *Mr. J. G. Apar* for the Plaintiff.

Mr. J. D. Bell and *Mr. Hill* for the Defendant Kally Kissen.

Mr. *Evans* for the plaintiff contended that, as the obtaining the jewellery took place in Calcutta, a part of the cause of [267] action arose within the jurisdiction so as to entitle the plaintiff, with the leave of the Court, to sue in Calcutta. The plaintiff's case depends on this: that the goods were obtained from him by an offence or fraud in Calcutta, all circumstances necessary to establish the plaintiff's right are parts of the cause of action, and the offence by which the jewellery was obtained is a circumstance necessary to establish his right. The question, what was Gopalkisto's right, is one which must arise in this suit. If this were a suit against Kally Kissen for conversion, the question of Gopal's title would not arise; but this is an equity suit in which the plaintiff must show his right to recover from Gopal. At the time of the pledge to Kally Kissen the right to possession of the jewellery was in Gopal, to whom a bailment had been made for a particular purpose. It may be that Gopal's breach of the contract of bailment was out of Calcutta, but surely the existence of the bailment is part of the cause of action. Here also we allege a joint action or conspiracy by the two defendants, in which case, if part of the cause of action arose in Calcutta, this Court would have jurisdiction.

Mr. *Bell* for the defendant Kally Kissen.—The cause of action against this defendant is the detention of the jewellery: it is a tort. There cannot be a joint action against this defendant and Gopal, a bailee of the plaintiff. There is no charge of want of good faith against Kally Kissen—See s. 178 of Contract Act; nor is there any evidence of *malafides* on Kally Kissen's part. There is no evidence of fraud or offence in obtaining the goods. It is submitted that the cause of action arose out of the jurisdiction, and the suit as against Kally Kissen must be dismissed.

Mr. *Evans* in reply.—The latest case on the jurisdiction is that of *Mulchand Joharimul v. Sugunchand Shivdas* (I. L.R., 1 Bom., 23), where the Court points out that the cases decided as to the County Courts' jurisdiction in England are the true guides on the construction of the Charter; see *De Souza v. Coles* (3 Mad. H. C., 384) and *Cameron v. Gray* (6 T. R., 363). Fraud has been shown, inasmuch as it is proved that Gopal [268] fraudulently alleged he wanted the goods for inspection when he wanted them to raise money upon.

Macpherson, J.—In this case the facts, which I find to be proved, are, that the defendant Gopalkisto Paulit came to the plaintiff's place of business in Calcutta, and there got from him the jewellery, which is the subject of this suit, taking it away and giving for it a receipt in which the prices of the articles were mentioned, and it was stated that they were taken on ten days' inspection. He said, he was taking the jewels on inspection, and would purchase if he did not return within the ten days. But I do not consider it proved that he ever said he would send them up to Moorsheadabad or to Bahoo Poolinbehari Sen.

I believe that the plaintiff allowed him to take away the jewellery, because he said he wished to take it with a view to purchase on ten days' inspection, and would buy if he did not return within that time, because he deposited two thousand rupees, and because Koylash Chunder Sircar, a cashier in the employment of Moharaja Jotindro Mohun Tagore, said, that he was a respectable man, and good for twelve thousand rupees. Gopalkisto Paulit, having thus obtained the jewellery, immediately took the articles to the defendant Kally Kissen Roy at his house, which is just outside the limits of the town of Calcutta, and there and then pledged them for 6,000 rupees.

The present suit is brought to recover the jewellery or its value either from Gopalkisto Paulit or from Kally Kissen Roy. Gopalkisto not being now

forthcoming, the suit is in truth chiefly brought in order to establish the liability of the defendant Kally Kissen Roy, with whom all the articles were pledged, with the exception of one ring, which in the receipt is stated to be worth Rs. 250.

The plaintiff's suit is based upon the 178th section of the Contract Act, which declares that the person in possession of goods may make a valid pledge of them, provided the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly; but adds a proviso, the effect of which is, that no such [469] pledge is valid if the goods have been obtained from their lawful owner by means of an offence or fraud.

The plaintiff's case is, that the pledge of these articles to the defendant Kally Kissen Roy was not a valid pledge, even if he acted in good faith, because Gopalkisto Paulit had obtained them from the plaintiff by means of an offence or fraud.

The defendant Kally Kissen Roy's principal defence is, that the transaction in which alone he is concerned having taken place at his house, which is beyond the limits of the ordinary jurisdiction of this Court, the suit will not lie, this Court not having jurisdiction in the matter so far as he is concerned.

I was at first much inclined to think that the defence was good. But, on further consideration, I think that this Court has jurisdiction. The plaintiff's cause of action is really this, that although the defendant Gopalkisto Paulit was in possession of these articles at the time he pledged them with the defendant Kally Kissen Roy, still Gopalkisto Paulit had obtained them from their lawful owner by means of an offence or fraud; and therefore the plaintiff, as such lawful owner, is entitled to recover them or their value from the pawnee. There is no doubt the plaintiff could not prove his case against Kally Kissen Roy without showing the circumstances under which Gopalkisto Paulit got possession of the goods; and as all these circumstances occurred within the town of Calcutta, I think that a part of the plaintiff's cause of action did arise in Calcutta. The offence or fraud by means of which Gopalkisto obtained possession took place in Calcutta, and that offence or fraud is certainly part of the plaintiff's cause of action.

On the issue as to whether the goods were obtained from the plaintiff by fraud, I think (my opinion on this point also being somewhat contrary to my first impression) that the plaintiff made out a *prima facie* case when he proved that he was induced to give the articles to Gopalkisto Paulit by his representation that he took them merely on inspection for ten days with a view to purchasing,—and proved that a few hours afterwards these articles were pledged by Gopalkisto for 6,000 rupees. There is certainly some evidence of an offence, [270] to wit, the offence of cheating,—and at any rate there is evidence of what would fall under the more general term "fraud," which is used in s. 178.

The case thus proved by the plaintiff is much strengthened by the evidence of the defendant Kally Kissen Roy. For he says distinctly that Gopalkisto Paulit represented to him that the jewels were his own, which was absolutely false. The acts of Gopalkisto Paulit might possibly have been capable of explanation. But these matters occurred twelve months ago, and no explanation of them has been offered up to this time. That being so, it is impossible to come to any other conclusion than that Gopalkisto, the pawnor of these

jewels, had obtained them from their lawful owner by means of an offence or fraud.

The plaintiff is entitled to a decree as against the defendant Kally Kissen Roy, as well as against the other defendant, for the jewels or for their value, to wit, Rs. 8,000. But then the plaintiff admits 2,000 rupees were deposited by Gopalkisto Paulit as security : and that money must be taken *pro tanto* in satisfaction of the Rs. 8,000. The jewels pledged with the defendant Kally Kissen Roy, and which are produced in Court and valued at Rs. 8,000, do not include the ring which is in the receipt signed by Gopal as valued at Rs. 250.

Therefore, the plaintiff is entitled to deduct those Rs. 250 from the Rs. 2,000 in deposit, unless the ring is returned to him. The decree against Kally Kissen Roy will be for the jewels produced in Court or Rs 6,250. As regards Gopalkisto, the decree will be for all the jewels (i.e., all those produced in Court, *plus* the missing ring) or Rs. 6,250.

In any event the plaintiff is entitled to costs on scale 2.

Judgment for plaintiff.

Attorney for the Plaintiff : Mr. Remfry.

Attorney for the Defendant Kally Kissen : Mr. Gillanders.

NOTES.

[See the remarks and opinion of Pollock and Mulla in their Contract Act under sec. 178, as to whether a valid pledge can be made under a contract which is voidable either on the ground of coercion, undue influence, misrepresentation or even of fraud.]

[271] APPELLATE CIVIL.

The 9th January, 1878.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRCH.

Ekram Mundul and others.....Defendants

versus

Holodhur Pal.....Plaintiff.

Enhancement of Rent—Notice—Beng. Act VIII of 1869, s. 14—Res judicata.

A lease from generation to generation gave the boundaries of the land leased, estimated the area thereof, and fixed a certain rent per biga. It contained a condition that, if on measurement the actual quantity of land should turn out to be either more or less than the estimated area, the rent should be increased or decreased in proportion at the same rate per biga. In a suit for enhancement of rent, on the ground that the land leased contained more than

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice AINSLIE, dated the 29th of May 1877, in Special Appeal, No. 2697 of 1876, from the decree of Baboo Kristomohun Mookerjee, the Second Subordinate Judge of Nuddea, dated the 31st of August 1876, modifying the decree of Baboo Kristo Behary Mookerjee, the Munsif of Kooshtea, dated the 16th of August 1875.

the estimated number of bigas, the lease being one which did not specify the period of the engagement,—*Held*, that notice of enhancement was necessary under Beng. Act VIII of 1869, s. 14.

In a previous suit the present plaintiff had sued the defendant for the amount of rent originally fixed in the lease, and the defendant claimed in that suit to have the rent reduced in accordance with the terms of the lease, and a measurement was thereupon made, which showed that the quantity of land held by the defendant was in excess of that named in the lease: that suit was decided in favour of the plaintiff for the rent claimed. *Held*, that the measurement adopted by the Court in the former suit was not, as regards the amount of the excess, binding upon the defendant, and that, even if it were, the fact of such measurement would be no sufficient notice of enhancement to the defendant.

THE facts are sufficiently stated in the **Judgment** appealed from, which was as follows:—

Ainslie, J.—The defendant holds certain lands for the plaintiff under a lease from generation to generation. The lease gives the boundaries of the lands. It estimates the area to be 47 bigas 5 cottas, and fixes the rent at Rs. 59 odd annas at [272] the rate of Re. 1 annas 4 a biga. It contains a condition that if on measurement the actual quantity of land should turn out to be either more or less than 47 bigas 5 cottas, the rent will be increased or decreased in proportion at the same rate per biga.

The lower Appellate Court has held that in a case of this kind no notice of enhancement is required.

It appears to me that although the case does not fall strictly within the terms of s. 14 of Beng. Act VIII of 1869, a notice would, nevertheless, be necessary. The tenant is entitled to know the amount of rent demanded from him for each year at its commencement: and until measurement has been made and notice of the result of it given to him, he would be entitled under this lease to hold on from year to year at the old rent of Rs. 59 odd annas; but although it seems to me that he was entitled to a notice, I do not think that the present suit can be entirely defeated for want of notice, because it appears that in 1870 the plaintiff sued the defendant for rent at the rate originally fixed, namely, Rs. 47 annas 5. The defendant then put forward his right to have the rent reduced under the terms of the lease; and, in consequence of this plea, a measurement was made by the Court for the purposes of that suit. This in fact was a measurement which the defendant himself caused to be made after notice to the plaintiff under the conditions of the lease: and therefore, by the terms of the lease, he must be bound by the result of that measurement, and cannot claim to have a separate notice from the plaintiff after he has himself elected to put in force that condition of the lease which reserved to either party a right of measurement.

With reference to the finding of the Court in the former suit, it has been contended that it is not binding in the present case; but it seems to me that it cannot be otherwise. A question having arisen between the parties as to what would for the future be the proper rate of rent under the condition of the lease, and it having been determined, according to the terms of the lease, that a certain quantity of land was in the occupation of the defendant, and therefore that a certain rent was payable by him, it appears to me that that question was necessarily tried and determined once for all, and that neither party is at liberty to [273] re-open it. The case cited by the lower Appellate Court—*Nobo Doorga Dossee v. Foyzbux Chowdhry* (I. L. R., 1 Cal., 202; s. c., 24 W. R., 403)—appears to me to govern this case precisely.

Then there remains the question whether the plaintiff in this case is entitled to recover the excess rent for 1277 (1870). As regards four annas in respect of that year, it is perfectly clear that he cannot recover it on the ground that when he brought his former suit for the four-anna kist of 1277 he was bound to sue for the whole of arrears then due to him; but I think that effect must be given to the first objection in respect of the other 12 annas,—that is, that there was no notice of any change of the rent until after the end of the year 1277. It appears to me that the measurement which was made in the former suit must be taken as a measurement effected on the day on which that suit was decided in the first Court, and the measurement of the ameen accepted and confirmed, which was on the 6th of Bysack 1278 (18th April 1871). Therefore, as regards the excess rents claimed for 1277 with any interest thereon, the decision of the Court below must be set aside. In respect of the remainder of the claim, the judgment of that Court is affirmed.

From this decision the defendant appealed.

Baboo *Kishori Mohun Roy* for the Appellant.

Baboo *Shosha Bhooosun Dutt* for the Respondent.

The **Judgment** of the Court was delivered by

Garth, C. J.—We think that this appeal should be decreed. The facts of the case are correctly stated in the decision of Mr. Justice AINSLIE; and we quite agree with that learned Judge, that before the plaintiff in this case (the landlord) could sue the tenant for increased rent, upon the ground that the land demised consisted of more than 47 bigas and 5 cottas, he was bound to give the defendant a previous notice that the increased rent would be required of him.

It seems to us that this notice was rendered necessary by s. 14 of Beng Act VIII of 1869; because we have had the lease [274] in question read, and it appears to be one "not specifying the period of the engagement;" so that, until he had received such a notice as the section requires, the defendant could not be called upon to pay a higher rent than he did in the year preceding the suit. Mr. Justice AINSLIE considers that the defendant was entitled in this case to some notice, though he thinks that s. 14 does not apply. But the learned Judge proceeds to say that the defendant did in fact have sufficient notice that the increased rent was payable, because in the former suit, which the plaintiff brought against the defendant for rent in the year 1870, a measurement of the demised lands was made at the instance of the defendant, the result of which was that the land was found to contain an excess of 11 bigas 16 cottas beyond the quantity mentioned in the lease.

Now, in order to see how far the defendant was bound by this measurement, and how far the fact that he knew of its being made was a sufficient notice to him to enable the plaintiff to bring this suit, we must first see what was the nature of the former suit. It was a suit by the plaintiff to recover from the defendant the rent originally fixed by the lease. The defendant pleaded that the actual quantity of land was less than that estimated in the lease, and consequently that he was entitled to an abatement. In order to ascertain the correctness of this plea, an ameen was appointed by the Court to measure the land; and the land upon measurement was found to contain more, instead of less, than the estimated quantity; the excess being 11 bigas 16 cottas. Upon this the plaintiff obtained a decree, not for any excess rent, but for the original rent for which he had brought his suit, the

Judge holding very properly that he could not decree him a larger rent than he had claimed in his plaint. But it follows from this that the judgment in that suit, whatever the evidence of the afeen or the observations of the Judge may have been, was only conclusive between the parties upon the question whether the land demised was or was not less than, or equal to, the estimated quantity. Whether it was more than the estimated quantity, was a question immaterial to the suit, and one which from the very nature of the issue the Judge could not, and did not, decide. Perhaps the best of this is. [275] that if the defendant had desired to call evidence at the trial to disprove the excess, or to appeal from the judgment, upon the ground that in fact the land did not exceed the estimated quantity, he could not have done so; that point being immaterial to the purposes of the suit.

In the case referred to by Mr. Justice AINSLIE—*Nobo Doorga Dossee v. Foyzbux Chowdhry* (I. L. R., 1 Cal., 202; s. c., 24 W. R., 403)—the point decided in the first suit was necessary to the due determination of the issues in both suits, and therefore the judgment in the one case was held to be binding in the other. But here it is not so. We consider, therefore, that the measurement found by the ameen, and adopted by the Court in the suit of 1870, was not, as regards the excess, binding upon the defendant. But even supposing it were, we think it clear that the judgment in the former case, although known to the defendant, would not be a sufficient notice to him by the landlord under s. 14 of Beng. Act VIII of 1869. That notice is required to be in a particular form, and served a certain time before any suit can be brought for the excess rent; and the obvious intention of the Legislature, as it seems to us, was, that the tenant, before he could be sued for any higher rent than he had previously paid, should have notice, not only that such rent might be demandable, but that his landlord intended to demand it.

The fact of the land having been measured and found to contain more than the estimated quantity would be no sufficient notice, in our opinion, that the landlord intended to insist upon the higher rent.

We are of opinion, therefore, that the original judgment of the Court of First Instance, giving the plaintiff a decree for the original rent and rejecting the claim for the excess rent, was correct; and that all subsequent judgments should be reversed, the defendant being entitled to his costs in all the Appellate Courts, and also of the second trial before the Munsil in the Court of First Instance.

Appeal allowed.

NOTES.

[RES JUDICATA -- IMMATERIAL FACT -- TEST --

This case was followed by GARTH, C. J., in *Raja Luchmun v. Lukkan* (1878) 3 C.L.R., 74.

There the plaintiff and defendant had entered into an agreement by which rent at a certain rate was to be paid if there were an excess of area over 7,000 bigas, the estimated measurement. The first suit was for a refund of an excess amount of rent on the allegation that the tenant, the plaintiff, had been dispossessed of some 692 bigas in a suit against him by a third party. A measurement was made for finding whether the allegation was correct, and not finding whether the land exceeded 7,000 bigas and if so by how much. The area was found to contain upwards of 9,000 bigas. The second suit was for enhanced rent on the basis of this finding. A fresh finding was not held to be precluded by *res judicata*:—*Ibid*.

“There the measurement was made in the former suit with an entirely different object than to ascertain whether there was any excess quantity of land beyond the 7,000 bigas.

It was to determine whether the case which the then plaintiff (the present defendant) set up was correct ; and although the measurement may have shown that the quantity was upwards of 9,000 bigas, that was not a matter material to the suit, nor one against which the plaintiff in the suit could have appealed if he had wished to :—*Ibid*.*

In *Bussun Lall v. Chunder Dass* (1879) 4 Cal., 686, in the first suit which was for rent, the question was tried whether the amount claimed (which was admitted) was payable in respect of a larger or a smaller area. A subsequent suit for declaration that that sum was all that was payable in respect of all the lands held by the tenant was held barred. Though the issue might have been unnecessary (JACKSON, J.) it was raised, it was the only question between them and could have been appealed from (GARTH, C.J.).]

[276] APPELLATE CIVIL.

The 9th January, 1878.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRCH.

Parbatty Nath Roy Chowdhry and others... Plaintiffs

versus

Mudho Paroe and others.....Defendants.

[- 1 C. L. R. 592.]

Jalkar—Easement—Dispossession—Limitation Act IX of 1871, s. 27, sched. II, art. 145.

A jalkar is not an easement within the meaning of s. 27† of Act IX of 1871, but is an interest in immoveable property within the meaning of sched. II, art. 145‡ of that Act. Where the defendant had been exercising a right of fishing in certain water adversely to the plaintiff

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice AINSLIE, dated the 7th of June 1877, in Special Appeal No. 2219 of 1876, against the decree of J. O'Kinealy, Esq., Officiating Additional Judge of the 24-Pergannas, dated the 17th of June 1876, reversing the decree of Baboo Ram Doyal (Ghose, Second Munsif of Bassirhaut, dated the 20th January 1876. .

† [Sec. 27 :—*Acquisition of ownership by possession.*—Where the access and use of light or air to and for any building has been peaceably enjoyed therewith, as an easement, and as of right without interruption, and for twenty years, and where any way or watercourse or the use of water or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement, and as of right without interruption and for twenty years, the right to such access and use of light or air, way, watercourse, use of water or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested, etc.]

‡ [Art. 145, sch. II, Act IX of 1871 :

Description of suit.	Period of limitation.	Time from which period begins to run.
For possession of immoveable property or any interest therein not hereby otherwise specially provided for.	Twelve years	... [When the possession of the defendant or of some person through whom he claims became adverse to the plaintiff.]

for more than twelve years, *Held*, that a suit by the plaintiff for a declaration that he was entitled to the exclusive right of fishing in such water was barred by limitation.

THE Judgment appealed from, in which the facts are fully stated, was as follows :—

Ainslie, J.—The plaintiffs in this suit seek to recover the rents of a certain jalkar from the defendants, who in answer allege that the jalkar is the property of Government, and if this is not so, that they have never paid rents to, and do not hold from, the plaintiffs. The Judge of the lower Appellate Court has found that, with the knowledge, but without the permission, of the plaintiffs, the defendants have been fishing in this water for at least eighteen years adversely to plaintiffs, and that the law of limitation bars this suit.

It has been urged in special appeal that the plaintiffs having enjoyed possession through other tenants cannot be barred. I think, however, that where property is of such a nature that there may be equal enjoyment thereof by several persons at one and the same time without necessary interference one with another, it is not necessary for respondent to establish the total exclusion of the plaintiffs in order to succeed on the plea of limitation. If, as in this case, the defendants can show that while plaintiffs may have been enjoying profits out of this fishery through others, they themselves have within the knowledge of the plaintiffs [277] been appropriating the entire produce of their own fishing in the same waters without in any way acknowledging the plaintiffs' title, they do in effect prove an adverse possession *pro tanto*.

It was, however, further argued that possession for twenty years is necessary to establish a prescription. But, as the law now stands, the case does not fall within the provisions of s. 27 of the Limitation Act, and must therefore be governed by art. 145. The Judge correctly observes that the right claimed is not an easement, and although in the draft of an amended Law of Limitation recently published the meaning of the word 'easement' is intended to include such claims, it has, as the law now stands, a more restricted meaning.

As the Judge has found that the enjoyment of the fishery has not been by license or consent of plaintiffs, but, on the contrary, accompanied with a denial by plaintiffs of the defendants' right to fish, and a denial by defendants of plaintiffs' right to interfere with or tax their fishing, and that this state of things has been going on for eighteen years, the suit was rightly dismissed. The appeal is dismissed with costs.

Baboo Chunder Madhub Ghose for the Appellants.

No one appeared for the Respondents.

The Judgment of the Court was delivered by

Garth, C. J.—We have felt some difficulty in coming to a conclusion upon this case, partly from the peculiar nature of the rights claimed by the plaintiffs, and partly from there being no provision in the Limitation Act of 1871 which applies to, or contemplates, a suit of this nature.

The plaintiffs claim to be entitled to an 8-anna share of a certain jalkar, and they pray for a declaration as against the defendants,—*first*, that they are entitled to receive rent from them for fishing in their jalkar; or, *secondly*, that the defendants have no right to fish there without paying them (the plaintiffs) rent; or, in other words, that the plaintiffs are entitled to enjoy their jalkar rights without the defendants' interference.

The Munsif very properly dismissed the first portion of the plaintiffs' claim, upon the ground that the defendants were not, [278] and had never claimed to be, the plaintiffs' tenants. But he decreed their claim in the other alternative, declaring in substance that the plaintiffs had a right to the share which they claimed in the jalkar, and that the defendants could not fish there without the plaintiffs' permission. He holds that the right of fishing claimed by the defendants in the jalkar was at most an easement; that the defendants, therefore, could not become entitled to it by prescription, till they had enjoyed it as of right for twenty years (see Limitation Act of 1871, s. 27), and that their use and enjoyment of it had not been proved for more than eighteen years.

The Additional Judge, on appeal, reversed this decision of the Munsif. He held that neither the right of fishing claimed by the defendants, nor the jalkar rights claimed by the plaintiffs, were "easement." He apparently considered that the enjoyment of the right of fishing by the defendants was an interference by them with the exclusive right claimed by the plaintiffs, and ultimately decided that as the plaintiffs had not brought their suit to establish such exclusive right within twelve years of the defendants' first interference, their suit was barred by limitation, and ought to be dismissed.

The learned Judge of this Court has approved the finding of the lower Court, and substantially upon the same grounds.

It has now been urged before us on appeal from his decision: *1st*, that the jalkar which the plaintiffs claim is not in its nature "immoveable property, or an interest in such property," within the meaning of the Limitation Act, and that consequently art. 145 of the 2nd schedule to the Act does not apply; *2nd*, that a jalkar is an easement, to which the defendants could only become entitled by twenty years' use (s. 27 of the Limitation Act); and *3rd*, that the acts of the defendants when fishing in the jalkar were only a series of trespasses or infringements of the plaintiffs' right, each of which was a successive cause of suit; and that therefore the plaintiffs are not barred by limitation.

We think, however, that the lower Appellate Courts are right in the view which they have taken. Whatever may be the [279] law under the present Limitation Act, a jalkar is clearly not an easement within the meaning of s. 27 of the Act of 1871. An easement is defined by Mr. Gale in his *Law of Easements* (p. 5) to be "a privilege without profit" which the owner of one tenement may enjoy (as a right of way or of light over the land of another); but "conferring no right to a participation in the profits arising from it."

Now a jalkar, on the other hand, is the right to take the profits of a river, lake, or other water on a particular estate or tract of country; and although, as was decided by Justices JACKSON and McDONELL in the case of *Radha Mohun Mundul v. Neel Madhub Mundul* (24 W. R., 200), the right to a jalkar may not involve any actual property in the soil over which the water flows, it is still, we think, an interest in immoveable property within the meaning of art. 145 of the Limitation Act.

We also agree with the lower Appellate Courts that the acts of the defendants in taking fish from this jalkar for so many years cannot properly be considered as successive acts of trespass. They appear to have been exercised continuously under a claim of right, and in the only way in which that right could be effectually asserted. Assuming that the plaintiffs' possession of the jalkar consisted of the participation of the profits derivable from it, the enjoyment by the defendants of a partial participation of those profits for a long

course of years must be considered (as Mr. Justice AINSLIE describes it) as a dispossession by the defendants of the plaintiffs' right *pro tanto* during that period. The plaintiffs ought, therefore, to have brought their suit within twelve years from the commencement of such dispossession.

The appeal is dismissed without costs, no one appearing for Respondents.

Appeal dismissed.

NOTES.

I. THE RULE IN THIS CASE AFFECTED BY SUBSEQUENT LEGISLATION —

The Indian Limitation Act, 1877, introduced a definition of *easement* which would include the right of *jalkar*, and this definition is retained in the Indian Limitation Act, 1908, sec. 2 (5) :—

'Easement' includes a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, or attached to, or subsisting upon, the land of another.

Accordingly, the right of *jalkar* would come within sec. 26 of the Limitation Act, 1908, and twenty years will be the prescriptive period :—(1880) 5 Cal., 945 : 6 C. L., R., 269 ; (1882) 9 Cal., 698.

II. WHERE THE INDIAN EASEMENTS ACT V OF 1882 APPLIES—

Sec. 3 (read with sec. 8 of the General Clauses Act, 1897) repealing the above definition for the territories within which this Act extends, it is possible that the rule in this case might be followed in those territories.

III. WHAT CONSTITUTES DISPOSSESSION—

The mere fact of trespass and misappropriation of fish from certain *bhills* in a *zamindari* by all the inhabitants of the villages did not amount to it :—

"In 3 Cal., 276, some ascertained persons were proved to have been in adverse possession for more than 12 years of an interest in an immoveable property; in the present case, it has been already shown that no defined and ascertained persons have been in continuous possession of the fishery right in these *bhills*":—(1882) 9 Cal., 698.

IV. RIGHT OF JALKAR AN INTEREST IN IMMOVEABLE PROPERTY--

Not immoveable property within the Specific Relief Act (1 of 1877), sec. 9 :—(1892) 19 Cal., 544 F. R. See (1899) 23 Bom., 673 ; also (1887) 12 Bom., 221 ; (1894) 13 Mad., 54 ; 14 C. L. J., 572.]

[280], PRIVY COUNCIL.

The 6th, 7th, and 8th February and 10th March, 1877.

PRESENT :

LORD BLACKBURN, SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH
AND SIR R. P. COLLIER.

Irvine.....Defendant

versus

The Union Bank of Australia.....Plaintiffs.

[4 I. A. 86 — L. R. 2 A. C. 366 — 46 L. J. P. C. 87 — 37 L. T. 176 — 25 (Eng.) W. R. 682.]

[On Appeal from the Court of the Recorder of Rangoon.]

Ratification—Company—Acts done by Directors in excess of authority.

The ratification by a Company of particular acts done by its Directors in excess of the authority given them by the articles of the Company, does not extend the powers of the Directors so as to give validity to acts of a similar character done subsequently.

[*This head-note gives no idea at all of the point decided in the case. See our notes at the end of this case for the propositions laid down here.*]

THIS was a suit brought by the Union Bank of Australia, in the Court of the Recorder of Rangoon, to recover money advanced by the Bank to the Oriental Rice Company, and to enforce an equitable mortgage on certain premises situated in Rangoon as a security for the advance, against the said Company and against the defendant William Irvine, who had purchased the Company's rights and interest in the mortgaged property at a sale in execution of a decree obtained against the Company by other creditors.

By one of the articles of association of the Oriental Rice Company, which was formed at Melbourne under an Act of the Legislature of Victoria, corresponding in its provisions with the English Companies' Act, 1862, the powers of the Directors to borrow money on the credit of the Company, and to mortgage its property, were limited to a sum not exceeding in the aggregate as an existing debt at the same time one-half of the actually paid up capital of the Company. By another article these powers might be extended by a vote of one-half the shareholders given at a general meeting; and no limit or restriction was fixed by any of the articles upon the power of the Company to borrow or mortgage.

The facts of the case are set forth in their Lordships' judgment.

The main question raised for determination was as to the amount for which the plaintiff held a valid charge on the property mortgaged.

[281] The Recorder of Rangoon, in a judgment dated the 8th October 1875, held, that the Directors of the Rice Company had exceeded their powers in charging the Company's property with a debt greater than one-half of the Company's actually paid-up capital. But he was of opinion that the acts of the Directors in borrowing in excess of their powers had been ratified by the shareholders. He, accordingly, gave a decree against the Rice Company for the amount of the debt, and ordered that, in the event of the Company failing to pay, the mortgaged premises should be sold, and the proceeds applied in satisfaction of the plaintiffs' claim.

The Oriental Rice Company did not appear or answer in the suit. The present appeal to Her Majesty in Council was brought by the defendant Irvine, who sought to have the decree of the Recorder varied by a declaration that the charge on the Company's property in favour of the Bank was valid only to the amount of one-half of the actually paid-up capital of the Company.

Mr. *Cowie*, Q. C., and Mr. *H. Macnaghten*, for the Appellant, submitted that there was no evidence of the shareholders of the Rice Company having ratified the acts of their Directors in borrowing and in charging the property of the Company in excess of the limit prescribed by the Company's articles. The Directors could only pledge the property of the Company to the extent of one-half of its paid-up capital. The mortgage was valid only to that extent. The following cases and authorities were cited: *Lindley on Partnership* (last edn.), pp. 780, 782; *Hutton v. The Scarborough Hotel Company* (2 Drew and Sm., 521; and 4 De G. S. & J., 672); *The Electric Telegraph Company of Ireland, Troup's case* (29 Beav., 353), and *Hoare's case* (30 Beav., 225); *Re Pooley Hall Colliery Company* [21 L. T. (N. S.), 690; W. N., 1869, p. 255].

Mr. *Benjamin*, Q. C., and Mr. *W. Murray* for the Respondents.—The limitation of the powers of the Directors to borrow on the credit of the Company was not a limitation on the general powers of the Company itself. It merely restricted the agency [282] of the Directors. Acts done by the Directors in excess of that limitation might, under the articles of association, be validated by the sanction of the shareholders. Whether the Directors had exceeded their authority was a matter between them and the shareholders, and did not affect third parties. The Bank had notice that the Directors of the Company had power to borrow and to mortgage under certain conditions. It was not necessary for it to enquire further; it might assume that these conditions had been observed. They referred to *The Phosphate of Lime Company v. Green* (L. R., 7 C. P., 43), *Royal British Bank v. Tarquand* (5 E. & B., 248; 6 E. & B., 327), *Story on Agency*, § 250.

Mr. *Macnaghten* replied.

Their Lordships took time to consider their **Judgment**, which was delivered by

Sir B. Peacock.—This is an appeal from a decree of the Recorder of Rangoon in a suit in which the respondents, suing in the name of their Inspector, were plaintiffs, and the appellant was one of the defendants.

The suit was brought to recover the sum of 15,296*l.* 17*s.* 6*d.*, for money advanced by the Bank to the Oriental Rice Company, Limited, and to enforce an equitable mortgage as a security for the advances.

The plaintiffs prayed, amongst other things, that it might be declared that, by virtue of the deposit by the Company of certain title-deeds and the agreements accompanying the same, they were entitled to an equitable lien or mortgage upon certain messuages and premises situate in the town of Rangoon for securing the repayment of the said sum of 15,296*l.* 17*s.* 6*d.*, and that upon non-payment of that amount the defendants might be foreclosed from their equity of redemption in the said premises, or that the said premises might be sold, and the proceeds applied in payment of the said sum or such other sum as the Court might find to be due to the plaintiffs, with interest and costs.

The Company were made co-defendants in the suit, but they did not appear or defend.

[263] The defendant (appellant) claimed the property under a purchase at a sale in execution of a decree against the Company, by which he acquired the right, title, and interest of the Company, and nothing more. That purchase was made on the 31st May 1872.

The principal question to be decided is, what is the sum for which the Union Bank is entitled to a charge upon the property. On the part of the Bank it was contended that they are entitled to a charge for the full amount claimed; and on the part of the defendant (appellant), that the charge is limited to the amount of one-half of the actually paid-up capital of the Company, which paid-up capital the appellant in his written statement alleged was never more than 17,100*l*.

There was some discussion at the hearing as to what really was the actual amount of the paid-up capital. Their Lordships then expressed their opinion upon the point, and stopped the learned counsel for the respondent. They were of opinion that it should be taken at 17,100*l*., the amount found by the learned Recorder.

The Company was originally formed in the Colony of Victoria by articles of association, dated the 25th of April 1861, and on the 18th of August 1864 it was duly registered as a Company limited by guarantee under an Act of the Legislature of Victoria, which followed and adopted the provisions of the Companies' Act, 1862. By that registration the Company, by virtue of the section of the Colonial Act, corresponding with s. 196 of the Companies' Act of 1862 became subject to all the provisions, so far as they are applicable to the present case, of the Colonial Companies' Act, in the same manner in all respects as if it had been formed under that Act.

The articles of association contained no restriction or limitation on the Company's power of borrowing. As regards the Directors, however, their authority to borrow was limited; for it was expressly stipulated by article 50 of the association, which were registered under the Companies' Act, and of which the Bank was bound to take notice, "that, subject and without prejudice to the power therein given to the meetings of shareholders, and the conditions and restrictions therein contained [264] the Directors for the time being should have, amongst others, the following powers,—that is to say, the power of borrowing and taking up, on the credit of the said Company, or of its property, any sum or sums of money from time to time, but so, nevertheless, that the total amount to be so taken up should not exceed in the aggregate, *as an existing debt at the same time*, one-half of the then actually paid-up capital of the said Company, and that for the purpose of securing any sum or sums which might be so borrowed by the Directors, they should be at liberty to mortgage, with or without power of sale, and otherwise to charge and incumber, all or any part of the property, estate, and effects, real and personal, of the said Company, and to accept, make, or indorse, any bill of exchange or promissory note on behalf of the said Company, or to overdraw the account of the said Company at their bankers, or to execute and give any bond, covenant, or other obligation binding the said Company, and the affairs and concerns of the said Company, both in India and Victoria and elsewhere, and that the entire and sole management, conduct, and regulation of the business and affairs of the said Company, both in India and Victoria and elsewhere, according to the provisions and subject to the restrictions of the said articles of association, should be confided to, and be under the direction of, the said Directors for the time being, who should have and might exercise all the powers which might be exercised by the whole of the shareholders."

It was, therefore, clearly beyond the authority of the Directors to borrow or take up, upon the credit of the Company as an existing debt at the same time, an amount or amounts exceeding one-half of the actually paid-up capital of the Company. There is no doubt that the authority of the Directors, limited as it was by the articles of association, was capable of being extended under the provisions of article 31. But by that article one-half of the votes of all the shareholders given at a general meeting called for the purpose was necessary.

The article is in the following words:—"One-half of the votes of all the shareholders given at a general meeting called for the purpose shall be competent *and necessary* to make, to enlarge, extend, rescind, alter, or repeal, wholly or in part, all or any of [286] the provisions or powers herein contained, or to remove any Director or trustee, or to increase or diminish the number of Directors; but upon all other questions or business to be transacted at any meetings (except as herein specially mentioned) a majority of the votes of the shareholders present in person or by proxy and not declining to vote shall decide."

It was not contended that the authority of the Directors either to borrow or to mortgage was ever extended at a general meeting of the shareholders called for the purpose, but it was contended by the learned Counsel for the respondents, that the limitation of the power of borrowing and of mortgaging, contained in article 50, was merely a limitation of the authority of the Directors conferred by the same article; that it was not part of the constitution of the Company, which, if the Company had been originally formed under the Companies' Act of 1862, must have been contained in the memorandum; and, consequently, that it was not a limitation of the general powers of the Company, or of the whole body of shareholders; and that the acts of the Directors in excess of their authority might be ratified by the Company and rendered binding.

Their Lordships are of opinion that the above contention is correct, and they will proceed to consider whether the acts of the Directors in borrowing in excess of their authority were ever duly ratified by the Company.

The learned Recorder considered that there was sufficient evidence to show that the shareholders acquiesced in and approved of the acts of the Directors in borrowing and mortgaging, and he relied upon what took place at the half-yearly meetings held in 1868 and 1869.

A ratification is in law treated as equivalent to a previous authority, and it follows that, as a general rule, a person, or body of persons, not competent to authorize an act, cannot give it validity by ratifying it.

By the 21st of the articles it is provided that an ordinary half-yearly meeting shall be held during the months of October and April in each year. By the 22nd, that an extraordinary general meeting may be called at any time for a special object. By the 25th, that a notice shall be sent to each shareholder [286] stating the day and place of the meeting, and "also the business

* [This passage should be read with what follows at 286. In *Grant v. United Kingdom Switchback Railway Company* (1898) 40 Ch. D. 135 C. A. Lord Justice COTTON observed:—"Two passages in *Irvine v. Union Bank of Australia* were referred to. Being in the same judgment, they must be taken together, and they appear to me to express what I have said—that power to do future acts cannot be given to Directors without altering the articles, but that a ratification of an unauthorized act of the Directors only requires the sanction of an ordinary resolution of a general meeting, if the act was within the powers of the Company."]

proposed to be transacted thereat." By the 26th, that at every general half-yearly meeting the accounts and a statement of the Company's affairs, &c., shall be laid before the shareholders, and such meeting "may examine, allow, and confirm, or reject the accounts and report of the Directors or auditors, so as to bind all the members for the time being of the Company, and all persons claiming under them." The notice that a half-yearly meeting was to be held would sufficiently indicate that it was for the purposes mentioned in article 26, but would not indicate that it was for any other purpose.

The report of the Directors referred to in article 26 seems to their Lordships the same thing as the statement of the Company's affairs previously mentioned in the same article. There is nothing in the articles requiring the Directors to circulate the reports among the shareholders before the meetings. There is no evidence in the case that the reports were in fact circulated before the half-yearly meetings, and the form of the reports bearing dates on the days of the half-yearly meetings looks as if they were produced for the first time when laid before those meetings.

Their Lordships think that it would be competent for a majority of the shareholders present (though not a majority of the shareholders of the Company), at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the Directors in excess of their authority: and they are not prepared to say that, if a report had been circulated before a half-yearly meeting distinctly giving notice that the Directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report, to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting.*

But if the object was to give the Directors in future an extended authority beyond what is given by article 50, their Lordships think that it would be an alteration of the provisions contained in the articles which, under clause 31, that could [287] only be made by a vote of one-half of all the shareholders of the Company.

There is a wide distinction between ratifying a particular act which has been done in excess of authority and conferring a general power to do similar

*[See per SWINFEN EADY, J., in *Boschoek Proprietary Company, Limited v. Fuke*, (1906), 1 Ch. 148:—

"The argument that Rigby had not served two complete years was based on the contention that his election or appointment by Fuke on February 3, 1903, had not been duly ratified or confirmed by the Company in general meeting on August 10, 1903, because sufficient notice had not been given that the matter would be dealt with at that meeting. The report of the Directors is dated July 31, 1903, and was sent out with the notice convening the ordinary general meeting for August 10, 1903. The report contains this paragraph: 'Directors—You will be asked to ratify the election of Mr. C. D. Rigby as a Director, also to elect a new Director,' and the notice convening the meeting states that the meeting will be held for the purpose of receiving the Directors' report, and accounts, to June 30, 1903, and the election of Directors and auditors. In my opinion this was sufficient notice to the shareholders of the intention to bring before the meeting the ratification of Mr. Rigby's election. See *Irvine v. Union Bank of Australia*, where Sir BARNES PEACOCK said that their Lordships are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the Directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting."

In my opinion this report and notice given amounted to sufficient notice of the business which was intended to be brought forward at the meeting, namely, to ratify the election of Mr. Rigby.]

acts in future. This distinction must be borne in mind in considering whether the ratifications at the half-yearly meetings of particular acts done previously to those meetings gave validity to acts of a similar character done subsequently. For instance, it is important in considering whether the ratification at the half-yearly meeting held on the 30th April 1868, of the act of the Directors in borrowing 13,000*l.*, when 10,000*l.* previously borrowed remained unpaid, if made out, so far extended the powers of the Directors as to authorize them to take up, as an existing debt at the same time, a further sum of 23,000*l.* when the sums of 13,000*l.* and 10,000*l.* should have been paid off, notwithstanding the provisions of article 31, which rendered the votes of one-half of all the shareholders to be given at a general meeting necessary to enlarge or extend any of the powers contained in the articles.

Their Lordships are of opinion that the ratification at a half-yearly meeting of a particular act in excess of authority would not extend the authority of the Directors so as to authorize them to do similar acts in future.

Their Lordships have now to apply the above principles to the facts of the case.

The moneys claimed in the present suit were advanced in February 1871, 10,000*l.* under the letter of credit No. 130, and 5,000*l.* under the letter of credit No. 135. The balance remaining due of all sums previously advanced by the Bank had been reduced at the end of 1870 to 8*l.* 8*s.* 9*d.* The last general half-yearly meeting of the Company was held on the 13th October 1869. At that meeting the Directors submitted their report for the period ending the 30th June 1869, and that report was adopted. According to the evidence the letter of credit No. 153 was issued on the 9th September 1869. The fact of the Directors having obtained that letter of credit could not and did not appear in the report of the Directors for the period ending June 1869, and the act of obtaining that letter of credit or of borrowing [288] money thereon does not appear to have been ever reported or made known to the shareholders, or ratified by them. The claim, therefore, as to that 5,000*l.* must be rejected, unless the ratification of the act of the Directors in obtaining previous letters of credit for 10,000*l.* and 5,000*l.* Nos. 130 and 141, as stated in the report of 29th October 1868, which was ratified at the half-yearly meeting held on that date, authorized the Directors to obtain the letter of credit No. 153 after the letter of credit No. 141 of the 11th September 1868, for 5,000*l.*, referred to in that report, had been paid off.

Their Lordships are of opinion that the ratification of the report of 29th October 1868 did not authorize the Directors to obtain the letter of credit No. 153, or to borrow the 5,000*l.* now claimed as having been advanced thereon on the 11th February 1871. The sum of 5,000*l.* advanced on the 17th February 1871, on letter of credit No. 153, must, therefore, be disallowed.

The only item remaining to be considered is the 10,000*l.* advanced on the 11th February 1871, on the letter of credit No. 130. That letter of credit, according to the evidence, was obtained on the 23rd December 1867. It authorized the Chartered Bank of India, Australia, and China, in Rangoon, they then being the agents there of the Union Bank, to honour the Rice Company's drafts through their manager, Mr. Jamieson, on the Union Bank of Australia in London, to the extent of 10,000*l.*, *at any time until the 29th March 1869.*

The obtaining of that letter of credit was mentioned in the report of the Directors, presented at the meeting of the 29th October 1868.

The following is the statement contained in the report:—"In addition to the Bank credit for 10,000*l.*, with which Mr. Jamieson had been hitherto furnished to enable him to conduct the financial wants at Rangoon, another credit for 5,000*l.* has been forwarded, which Mr. Jamieson advises will be of great assistance in his operations." That report was read and adopted at the said meeting.

It did not necessarily follow, because a letter of credit for 10,000*l.* was obtained, that the Directors would act upon it, in [289] violation of article 50 by taking up upon it an amount exceeding in the aggregate as an existing debt at the same time more than one-half of the paid-up capital of the Company. The Directors did not exceed the authority conferred upon them by the articles of association by obtaining the letter of credit; the excess of authority was in taking up upon it a sum in excess of the amount which they were authorized to borrow.

Under the letter of credit a sum of 5,000*l.* might have been taken up and paid off, and then another sum of 5,000*l.* taken up under it, without an excess of authority.

At the time of the adoption of the report, on the 29th of October 1868, the letter of credit then existing was to expire on the 25th March 1869. It was not mentioned in the report that the credit obtained was to expire on that day, but every shareholder must have known that letters of credit, in practice, are for a limited time. It is not at all unusual, but it is not a matter of course, to extend the time if the original credit has not been acted upon.

Even if the adoption of the report mentioning the credit for 10,000*l.* authorized the borrowing at one time of the whole amount (which their Lordships are disposed to think it did not), it by no means follows that it authorized the renewal of the letter of credit and the acting upon it after the time originally limited had expired.

There was nothing in the report to lead to the supposition that the Directors had any intention to renew the letter of credit or to borrow money upon it after the 29th March 1869. The shareholders present at the half-yearly meeting might have had very good reasons for considering that it was expedient to obtain a letter of credit for 10,000*l.*, or even to borrow upon it 10,000*l.* at one time during the currency of the letter of credit, without considering whether it would be prudent or advisable to borrow 10,000*l.* at one time on the 11th February 1871, more than two years after the date of the meeting of October 1868, and when the Company might possibly consist of an entirely different body of shareholders.

But however this may be, their Lordships are of opinion that there was no evidence to show that any sufficient notice of the [290] substance or effect of the reports, which were intended to be presented at the half-yearly meetings above referred to, was given to the shareholders of the Company in pursuance of the 25th clause of the articles of association so as to lead the absent shareholders to know, or even to imagine, that the Directors intended to report that they had exceeded their authority, or that, by the adoption of the report of the Directors, to be laid before the meeting, an act of the Directors, in excess of their authority, could be rendered binding upon the whole body of shareholders.

Their Lordships being of opinion that the act of borrowing in excess of authority was never ratified, it is not necessary to consider whether, if it had been duly ratified, the property of the Company would have become charged as a security for the repayment of the amount.

The case of *The Royal British Bank v. Turquand* (5 E. & B., 248) and the same case in error (6 E. & B., 327), were cited in the course of argument to show that the excess of authority was a matter only between the shareholders and the Directors, and that it does not affect the rights of the Bank. In that case it was said by C. J. JERVIS: "We may now take it for granted that the dealings with these Companies are not like dealings with other partnerships, and that parties dealing with them are bound to read the Statute and the deed of settlement; but they are not bound to do more. The party here" (that is in *Turquand's* case) "on reading the deed of settlement would find not a prohibition from borrowing, but a permission to do so on certain conditions." In the present case, if the Bank had referred to clause 50 of the articles of association they would have found that the Directors were expressly prohibited from borrowing beyond a certain amount.

The case of *The Royal British Bank v. Turquand* (5 E. & B., 248) was decided with reference to a Company registered under 7 and 8 Vict., c. 110, and Chief Justice JERVIS remarked that the lender, finding that the authority might have been made complete by a resolution, would have had a right to infer the fact of a resolution authorizing that which on the face of the document [291] ment appeared to be legitimately done. In the present case, however, the Bank would have found that, by the articles of association, the Directors were expressly restricted from borrowing beyond a certain amount, and they must have known that if the general powers vested in the Directors by article 50 had been extended or enlarged by a resolution of a general meeting of the shareholders under the provisions of s. 31, a copy of that resolution ought, in regular course, to have been forwarded to the Registrar of Joint Stock Companies, in pursuance of s. 53 of the Companies' Act, and would have been found amongst his records.*

Their Lordships are of opinion that the learned Recorder was correct in holding that this case is different from that of *The Royal British Bank v. Turquand* (5 E. & B., 248).

It is unnecessary to consider what would have been the rights of the Bank if the amount which they advanced had not been more than one-half of the actual paid-up capital, but had been advanced at a time when an unpaid debt on account of moneys previously borrowed from other persons, together with the money lent by the Bank, would have exceeded the amount which the Directors were authorized to borrow. In the present case, the 10,000*l.* and 5,000*l.* were both lent by the Bank itself.

It was argued that the advances made by the Bank under the letter of credit did not amount to a lending by the Bank or a borrowing by the Directors. There is nothing in that objection. If, however, it was not a

* [See *per* STIRLING, J., in *re London and New York Investment Corporation*, (1895) 2 Ch. 860 at 871:—

"It is said that they must be taken to have had notice that a special resolution sanctioning the issue of the preference shares had not been passed, because if it had been passed a copy of such resolution ought, in accordance with s. 53 of the Companies Act, 1862, to have been found in the office of the Registrar of Joint Stock Companies. Such a view of the legal position appears to be sanctioned by what is laid down in *Irvine v. Union Bank of Australia*

Notwithstanding these circumstances, I am not persuaded that the rights of the preference shareholders were affected thereby. Such notice as they had of the absence of a special resolution was constructive only; and if, in point of fact, the preference shareholders were ignorant of the omission, and such ignorance is attributable as it seems to be in the present case to the frame of the prospectus issued by the Company, I do not think that mere constructive notice would prejudice their rights against the Company whatever might be the effect of such notice as against third parties."

borrowing, the Directors had no power to pledge the property sought to be affected by the equitable mortgage as a security for the repayment of it. It was only for securing moneys borrowed that the Directors were authorized to mortgage or charge the property of the Company.

For the above reasons their Lordships are of opinion that the plaintiffs are not entitled as against the defendant to a charge on the property beyond the amount of one-half of 17,100*l.*, the paid-up capital of the Company.

The amount, therefore, allowed to the plaintiffs by the decree of the lower Court must be reduced, and their Lordships will humbly advise Her Majesty that the decree be reversed, and [292] that it be declared that the plaintiffs had a valid equitable mortgage on the property mentioned in the plaint for the principal sum of 8,550*l.* only.

It was objected at the hearing on the part of the appellant that the decree ought to have been for a foreclosure, and not for a sale, but at the close of the case their Lordships were informed that the property had been sold under the decree, and that the money had been deposited in Court; and that the appellant does not object to the sale.

Their Lordships will, therefore, further advise Her Majesty that it be ordered that the costs of the suit in the lower Court, both of the plaintiffs and of the defendant respectively, as taxed by the lower Court, be paid to the said parties respectively out of the proceeds of the sale of the property which are now in Court, and that out of the balance of such proceeds there be paid to the plaintiffs a sum of rupees equivalent, at the rate of exchange current between Rangoon and England at the time of the filing of the suit, to the principal sum of 8,550*l.*, with interest thereon at the rate of 8 per cent., from the 5th of October 1872, to the date of the sale of the property, together with a proportionate part of the accumulations, if any, of the proceeds of the sale, and that the residue of the said proceeds and of the accumulations thereon, if any, be paid to the defendant, appellant.

The respondents must pay the costs of this appeal.

Decree varied.

Agents for the Appellant: Messrs. *Larford and Waterhouse.*

Agents for the Respondents: Messrs. *Murray, Hutchins & Co.*

NOTES.

[COMPANY LAW.

A. — THE HEADNOTE.

As the headnote to this case is extremely defective, we give below the propositions of law laid down in this case:—

I. IMPLIED POWERS OF BORROWING—

The power of borrowing may arise by implication:—3 Cal. 280 at 283—285.

II ACTS ULTRA VIRES OF DIRECTORS AND INTRA VIRES OF COMPANY—

1. Where the Articles of a certain incorporated Company required authorisation by special resolution for the Directors to borrow in excess of the powers conferred on them, *held* that such borrowing without a special resolution was *ultra vires* of the Directors, and invalid.

2. Where such act in excess of authority is *intra vires* of the said Company, it may render the same valid by ratification of its meeting:—3 Cal., 280 at 285 and 286.

III. RATIFICATION OF A PARTICULAR ACT AND ALTERATION OF POWERS—

1. A ratification of a particular act does not authorise doing similar acts in future. There is a wide distinction between ratifying a particular act which has been done in excess of authority and conferring a general power to do similar acts in future :—3 Cal., 280 at 287.

2. To give powers for similar acts in future would be altering the articles and this could be done only at meetings convened as prescribed :—3 Cal., 280 at 286.

IV. WHAT MAY BE RATIFIED—BY WHOM—

A ratification is in law treated as equivalent to previous authority and it follows that as a general rule, a person or body of persons not competent to authorise an act cannot give it validity by ratifying it :—3 Cal., 280 at 285.

V. CONSTRUCTIVE NOTICE OF CONDITIONS ATTACHED TO POWERS—

Constructive notice of acts and omissions in respect of conditions attached to powers is presumed as well where the powers are dependent on resolutions that require to be filed with the Registrar of Joint Stock Companies under the Companies' Act as where such conditions are defined in the Articles :—3 Cal., 280 at 291.

VI. OBITER—NOTICE OF BUSINESS TO BE TRANSACTED—

Their Lordships are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the directors had done an act in excess of their authority and that the meeting would be asked by confirming the report, to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the meeting :—3 Cal., 280 at 286. See as to this (1906) 1 Ch., 148.

VII. FACTS—

Where a Bank advanced money to an incorporated company on pledge of securities by the Directors for an amount in excess of their powers of borrowing which was however within those of the company and for which they should have been specially authorised by a resolution that should be filed under the Companies Act with the Registrar of Joint Stock Companies, *held* that the Bank had constructively notice of the limits of authority and that the security for the excess amount was invalid.

Where there was a previous ratification, the particular act thereby authorised was good, but it did not enure to authorise similar acts subsequently thereto.

B.—NOTES.

I. DISTINCTION BETWEEN WHAT IS ULTRA VIRES OF THE COMPANY AND WHAT IS ULTRA VIRES OF THE DIRECTORS—

If a corporation has no power or capacity with respect to a particular matter, other than what is expressly given to it by provisions which themselves limit the extent of such capacity or power; then such limitation is itself an essential part of the capacity or power, and is effectual against any one. Instances are where a corporation has no implied power to borrow and its express power limits the amount—a borrowing in excess is simply invalid. But this is not so where there is an implied power and the attempt is made to limit the exercise of this in amount :—Brice on *Ultra Vires*, 3rd Edn., p. 617.

II. WHAT MAY BE RATIFIED—

"Agreements, proceedings, acts, etc., made, done or concurred in by the managing body, and *a fortiori* by subordinate agents, *ultra vires* of such body or agents, but *intra vires* of the corporation may be ratified or be confirmed by acquiescence." "The above proposition seems fully established without qualification" :—Brice on *Ultra Vires*, 3rd Edn., p. 682.

As to what is sufficient to show knowledge and acquiescence, see *Ho Tung v. "Man on" Insurance Co.*, (1902) A. C. 232.

III. DISTINCTION BETWEEN RATIFICATION OF AN UNAUTHORISED ACT AND AN ALTERATION OF THE ARTICLES—

"The power to do future acts cannot be given to Directors without altering the articles, but a ratification of an unauthorised act of the Directors only requires the sanction of an ordinary resolution of a general meeting if the act is within the powers of the company :—*Per* Lord Justice COTTON in *Grant v. United Kingdom Switchback Railways Company* (1888) 40 Ch. D., 135 at 139, C. A.

The ratifying a particular contract which had been entered into by the Directors without authority and so making it an act of the company is quite a different thing from altering the articles. To give the Directors power to do things in future which the articles did not authorise them to do, would be an alteration of the articles, but it is no alteration of the articles to ratify a contract which has been made without authority—*ibid*.

IV. CONSTRUCTIVE NOTICE OF LIMITS OF POWERS—

Although the general rule is that persons dealing with a company are not to be troubled with inquiry as to internal management, this case [(1875) L.R., 7 II. 869] lays down that notice of the limitation on power is presumed where such limitation is contained in the memorandum or articles of association and of resolutions that should be filed with the Registrar:—3 Cal. at 291. See (1895) 2 Ch., 860 at 871 extract from which are given at p. 3 Cal., 291. Where the claim is through another without notice, see (1904) 1 Ch., 32; (1901) 1 Ch., 115.

V. NOTICE OF RESOLUTIONS BEFORE MEETINGS—

See on the point left undecided by Sir BARNES PEACOCK at 3 Cal., 286, the case of *Boschock Proprietary Company, Limited v. Fuke* (1906) 1 Ch., 148 extracts from which are given at that page.

Notice need not specify why the meeting was called :—*Grant v. United Kingdom Switchback Railways Co.* (1888) 40 Ch. D. 135.]

[293] APPELLATE CIVIL.

The 9th August, 1877.

PRESENT :

MR. JUSTICE WHITE AND MR. JUSTICE MITTER.

Bhago Bibee and others.....Defendants

versus

Ram Kant Rdy Chowdhry and others.....Plaintiffs.*

Sale for arrears of Revenue—Under-tenure, Suit to avoid—Permanent Settlement—Structures and Improvements within the meaning of excep. 4 to s. 37 of Act XI of 1859—Decree for ejectment.

In a suit to avoid an under-tenure by the purchasers at an auction-sale for arrears of Government revenue, the defendants contended that the tenure was created prior to the Permanent Settlement, and that some portion of the lands comprised in it were covered with permanent structures and improvements, and that, accordingly, it was protected under exceptions 1 and 4 to s. 37 of Act XI of 1859; but the lower Court gave a decree to the plaintiffs and

* Special Appeal No. 1892 of 1876, against the decree of Baboo Nobin Chunder Pal, Second Subordinate Judge of Chittagong, dated the 29th May 1876, modifying the decree of Moulvi Ali Ahmud, Munsif of Sitakoond, dated the 30th April 1875.

- * annulled the under-tenure. *Held* by WHITE, J., that, notwithstanding a party may fail to show that his tenure was created prior to the Permanent Settlement, yet he is entitled to the benefit of the 4th exception in respect of any permanent structures that may be upon his holding.

Brojo Soondur Biswas v. Gouri Persaud Roy (S. D. A., Dec. 1852, p. 645) followed.

Moonshi Serujal Islam for the Appellants.

Babu Aukhil Chunder Sen for the Respondents.

The facts and arguments in this case are fully set forth in the **Judgment** of

- * **White, J.**—This was a suit brought by the special respondents against the special appellants (who are grouped together as first party defendants in the first Court) to avoid an undertenure in certain villages, part of an entire mehal, which the respondents had jointly with second party defendant purchased at a Government revenue sale, and which villages, on partition, fell to the [294] share of the respondents. The written statement of the added defendants, Sohina Bibi and Nowa Bibi and Kerban Ali, which embodies the case of the special appellants, after stating that a certain portion of the lands claimed are not in their possession or belong to their undertenure, as regards the rest of the disputed lands (comprising 6 kanees 5 gandas), claims in effect the benefit of the exceptions in s. 37 of Act XI of 1859. It is alleged, first, that the undertenure comes within the first exception, as it is a mokurari taluk held at a fixed rent from the time of the Permanent Settlement; and, secondly, that there are permanent holdings and other improvements on the disputed lands, which are further protected by the 4th exception of s. 37 of Act XI of 1859.

In proof of the antiquity and nature of the undertenure, the defendants produced an old talukdari potta of the 15th Jait 1155 M., and certain dakhilas.

The first Court did not pronounce any decided opinion as to the genuineness or otherwise of these documents, but was of opinion that the potta, if proved, was not of sufficient antiquity to establish the defendants' claim to exemption under the first exception. Being, however, of opinion that the defendants were at all events entitled to a right of occupancy in the lands comprised in the potta, the first Court held that the plaintiffs could not recover khas possession, and were only entitled to rent, and decreed accordingly.

The lower Appellate Court has reversed the decree, and awarded to the plaintiffs possession of the lands, and thus in effect annulled the under-tenure.

Two objections are taken by the defendant No. 1 in special appeal: one is, that the Judge has defectively investigated their claim to exemption under the first exception in s. 37, inasmuch as he has not found whether their potta and dakhilas are genuine or the reverse, and inasmuch as it mainly depends upon the result of that enquiry whether their claim to exemption is made out or not. The judgment of the lower Appellate Court on this point runs thus:—"The defendants' taluk does not come under the exceptions mentioned in s. 37, Act XI of 1859. Whatever right they had having been sold at auction for [293] arrears of rent, all the incumbrances formerly imposed have ceased to exist. Hence, whatever may be the length of their possession, it cannot be maintained."

We think the objection taken by the special appellants is well founded. The first Court came to no positive finding as to the proof of the potta and dakhilas; but decreed in favour of the defendants on other grounds. We are unable to gather from the decree of the lower Appellate Court how it has dealt with the documentary evidence adduced by the defendants, or whether it

considered it at all ; or if it held the potta to be proved, what weight it gave to it in its decision, or whether it gave it any weight. If the potta is found to be genuine, it is certainly a document of the utmost importance in the case, for it appears to be confirmatory of a previous potta, and although its date falls short of the date of the Permanent Settlement by a short period of time, the document, if genuine, furnishes ample evidence from which the Court may presume that the undertenure existed at the time of the Permanent Settlement.

As the potta purports to be more than thirty years old, its mere production constitutes *prima facie* proof of its execution, if it is produced from the proper custody ; and if the potta is produced by the special appellants and relates to the undertenure, of which they are, and their predecessors have been, in possession, the custody is proper. The law on the subject, which is similar to the English law, is to be found in s. 9 of the Indian Evidence Act, 1872. We draw attention to the above matters, because the first Court appears to have fallen into errors on both these points.

We may add also that the first Court was mistaken in supposing that the defendants in this case had a right of occupancy irrespective of their undertenure. No such right was claimed or proved by the defendants, and such a right cannot be presumed to exist merely because the defendants have occupied for a long period of time under a *taluki* potta.

The second objection taken is that, assuming the under tenure not to fall within the first exception of s. 37, yet that, as regards so much of the lands comprised in it as is covered with permanent buildings and other improvements, the defendants are [296] entitled to exemption from ejectment under the 4th exception of that section.

It has been decided by this Court in the case of *Shank Tofail Ally v. Ram Kant Roy Chowdhry* (1 Special Appeal No. 1796 of 1876 unreported) and three other appeals of the same year, that, notwithstanding a party may fail to show that his tenure comes within any of the first three exceptions of s. 37, yet that he is entitled to the benefit of the 4th exception in respect of any dwelling-houses or other permanent structures that may be upon his holding. These decisions are based upon an old decision of the Sudder Dewany Adawlut in the case of *Brojo Soondur Biswas v. Gouri Persaud Roy* (S. D. A., Dec., 1852, p. 645).

If this matter had not been the subject of previous decision by this Court and of the late Sudder Court, I should not, speaking for myself, be prepared to accede to this interpretation of s. 37 without much further argument on the point. But as there appears to be no conflicting decisions on the point, and the rulings of this Court have unquestionably a tendency to encourage improvements on the land, and to mitigate the severity of the Revenue Sale Law, I am willing to acquiesce in their application to the present case.

The claim of the special appellants under the 4th exception of s. 37 is to be found in the 4th paragraph of the defendants' written statement to which I have above referred. It mentions, amongst other things, land for *nij* cultivation, but that item does not come under the exception. As regards the remaining items contained in that paragraph, the lower Appellate Court must enquire into their existence, and in the event of its finding that in consequence of non-proof of the existence of the undertenure at the time of the Permanent Settlement, the plaintiffs are entitled to annul the undertenure, the Court will limit the recovery of possession by the plaintiffs to such lands comprised in the tenure as are applied to agricultural purposes ; but as regards the remaining

land on which any structures are erected or improvements made of the character mentioned in the 4th exception of s. 37, the Court will declare the first party defendants entitled to retain the same, they paying rent for the same.

[297] The result is, that the decree of the lower Appellate Court will be set aside, and the suit remanded in order to pass a fresh decision in accordance with the above directions, after finding upon the following issues :—

1. Whether the potta and dakhilas of the defendant No. 1, or any of them, are proved, and, if proved, are genuine ?

2. If the potta be genuine, whether the undertenure of the defendants existed at the time of the Permanent Settlement ?

3. If the undertenure did not exist at the time of the Permanent Settlement, whether any and what structures and improvements within the meaning of the 4th exception to s. 37 of Act XI of 1859 have been erected or made upon any of the lands comprised in the tenure ?

4. If so, how much of the lands are applied or appropriated to agricultural purposes, and how much to the structures and improvements above mentioned ?

5. What rent shall be paid by the defendants for the lands appropriated to such structures and improvements ?

Costs will abide the result.

Mitter, J.—I concur in this order of remand, and only desire to add as to the second point that if the lower Appellate Court finds any portion of the tenure used for the purposes mentioned in the 4th exception to s. 37, he is to except that portion from the decree of ejectment which the plaintiff may recover on the defendants' failure to prove that the tenure existed before the Permanent Settlement.

Case remanded.

NOTES.

[ACT XI OF 1859, S. 37, CL. 4—

(a) Though doubts were expressed as to the soundness of this case, it is settled that the benefit of this clause can be availed of when the other clauses do not apply :—(1902) 9 C. W. N., 852.

(b) It does not matter whether the improvements have been effected by the present holder or by some previous occupier :—(1881) 8 Cal., 110.

(c) Leases though not expressly for gardens are within this clause :—(1885) 12 Cal., 327.

(d) The benefit of the fourth exception must be limited to improvements effected *bona fide* and to permanent buildings erected, before the revenue sale, and should not be conceded to anything subsequently constructed, or which appears to have been constructed merely for the purpose of defeating the rights of an auction-purchaser :—(1881) 8 Cal., 110.

(e) The purchaser must avoid the encumbrances, before the estate should vest in him free from them, and where a second sale was held consequent on his default, he could not avoid them :—(1903) 31 Cal., 393.

[298] APPELLATE CIVIL.

The 11th September, 1877.

PRESENT :

MR. JUSTICE JACKSON AND MR. JUSTICE WHITE.

Surdharee Loll.....Plaintiff

versus

Mansoor Ally Khan and others.....Defendants.

Jurisdiction—Appeals—Sonthal Pergannas—Act XXXVII of 1855, ss. 2, 4—Act XIV of 1874—Act XV of 1874.

The High Court has no jurisdiction to entertain appeals in civil suits tried in the Sonthal Pergannas.

THE facts of this case, so far as they are material, appear in the judgment of the Court.

Baboo Kally Mohan Dass for the Appellant.

Baboo Sreenath Doss and Baboo Gooroo Doss Bannerjee for the Respondents.

Jackson, J.—This is an appeal from the judgment and decree of Mr. C. T. Manson, Deputy Collector, also called Extra Assistant Commissioner of Rajmehal, which is admittedly and entirely within the Sonthal Pergannas. The appeal is valued at Rs. 5,922.

By Act XXXVII of 1855 of the Governor-General in Council, the Sonthal Pergannas were removed from the operation of the general laws and regulations of the Bengal Code, except so far as was thereafter provided.

By s. 2† of that Act the administration of civil justice was vested in officers to be appointed by the Lieutenant-Governor of Bengal. There was a proviso that all suits beyond the value of Rs. 1,000 were to be tried and determined, according to the general laws and regulations, in the same manner as if that Act had not been passed.

The 4th‡ section declared that all decisions in civil suits passed by such officers to the extent of the powers conferred [299] on them were final, and it

* Regular Appeal No. 254 of 1876, against the decree of C. T. Manson, Esq., Extra Assistant Commissioner of Rajmehal, in Zilla Bhagalpore, dated the 21st of July 1876.

† [Sec. 2 :—The administration of civil and criminal justice, and the collection of the revenue, not being permanently-settled land revenue, within the said districts, are hereby vested in the officer or officers to be so appointed. Provided that all civil suits, in which the matter in dispute shall exceed the value of one thousand rupees shall be tried and determined according to the general laws and regulations, in the same manner as if this Act had not been passed. Provided also, that all permanently-settled land revenue shall be collected and paid at the same places and in the same manner as if this Act had not been passed.]

Proviso as to suits exceeding the value of Rs. 1,000.

Collection of permanently settled land revenue.

‡ [Sec. 4, Cl. 1 :—All decisions in civil suits and sentences in criminal cases, which shall be passed by such officer or officers, to the extent of the powers which may be from time to time conferred upon them respectively by the Lieutenant-Governor of Bengal, according to the

was made lawful for the Lieutenant-Governor to direct that an appeal shall lie in any class of civil suits or criminal trials from any officer appointed under the Act to any other officer appointed under the same. There was separate provision made for appeals being allowed in like manner by the direction of the Lieutenant-Governor between the officers of those *pergannas inter se*, and authority was also reserved to direct that any class of criminal trials should be referred for sanction to the Sudder Court. The effect of these sections, it seems to me, was absolutely to take away the right of appeal under the general law in all civil suits tried and determined in the Sonthal Pergannas, save only, in such cases as might be provided for by order of the Lieutenant-Governor of Bengal; and it does not seem to be the case that the Lieutenant-Governor, by his order, did make any case tried in the Sonthal Pergannas appealable to the Sudder Court. That was the state of the law down to 1874, when, on the 8th December 1874, Act XIV and Act XV were passed, the one called "The Scheduled Districts Act," and the other "The Laws' Local Extent Act." By the former of these Acts, the Sonthal Pergannas find their place among the Scheduled Districts of Bengal, and Act XXXVII of 1855 was repealed. By the second of these Acts, s. 3, the Acts mentioned in the first schedule, one of which is the Code of Civil Procedure, Act VIII of 1859, were declared to be in force throughout the whole of British India except the Scheduled Districts, and it is only by the provisions of the Code of Civil Procedure that, generally speaking, the right of appeal arises in civil suits and proceedings. That being the general state of the law, it would lie upon the appellant to show that, according to s. 8, cl. (c), of the Laws' Local Extent Act, that any Act or Regulation allowing general right of appeal had been previously extended, or had been declared to be in force, in any of the Scheduled Districts. That I think is not very likely, considering that the very essence of Act XXXVII of 1855 was to take away such appeals, and consequently it would be for the appellant to show that, by any other Regulation made before or since the passing of Act XV of 1874, an appeal to the High Court had been [300] specially allowed. Nothing of the kind has been brought to our notice. It appears to me, therefore, that, so far as our present information extends, we have no jurisdiction to entertain an appeal, and that the appeal must be disallowed. Considering first our warrant of jurisdiction, and in the next place that the objection which has been taken was suggested by the Court, we think the dismissal of the appeal should carry no costs.

White, J.—It appears to me that we have no jurisdiction in this case. Under Act XV of 1874 the Sonthal Pergannas is one of the Scheduled Districts to which Act VIII of 1859, viz., the Civil Procedure Code, does not extend.

provisions of this Act, shall be final. Provided that no sentence of death, passed by any such officer, shall be carried into effect until it shall have been confirmed by the Sudder Court, and provided also that it shall be lawful for the said Lieutenant-Governor to direct that an appeal shall lie in any class of civil suits or criminal trials from any officer appointed under this Act, to any other officer appointed under the same, and also to direct the officer or officers appointed under this Act, to refer to the Sudder Court for sentence any class of criminal trials.

• Cl. 2:—Upon the receipt of any criminal trial, referred to the Sudder Court under Clause 1 of this section, the said Court shall, without submitting the proceedings for the futwa of their Law Officer, proceed to pass final judgment, or such other order as may seem to the Court requisite and proper, in the same manner as if the trial had been referred in ordinary course by a Sessions Judge; and in any case in which sentence of death passed by an officer under this Act shall be transmitted to the Sudder Court for confirmation, the said Court may either confirm the same or pass such other judgment warranted by law as may appear to the said Court to be just and proper.]

Looking to the exceptions mentioned in s. 8* of Act XV of 1874, it is possible that, notwithstanding this, Act VIII of 1859 may, prior to Act XV of 1874 coming into force, or subsequent thereto,* have been extended to, or declared to be in force in, the Sonthal Pergunnahs by the Governor-General in Council or the Local Government. But it is for the appellant to satisfy the Court on these points, which he has not done. *Prima facie*, therefore, the jurisdiction of this Court is taken away, and the appellant not having shown that Act VIII of 1859 was, before or after 1874, extended to the Sonthal Pergunnahs, we must hold that we have no jurisdiction.

Appeal dismissed.

NOTES.

[See *Sorbojit v. Gonest* (1884) 10 Cal. 761.]

[3 Cal. 300]

APPELLATE CIVIL.

The 6th July, 1877.

PRESENT :

MR. JUSTICE BIRCH AND MR. JUSTICE R. C. MITTER.

Bhoobun Chunder Sen.....One of the defendants

versus

Ram Soonder Surina Mozoomdar and others.....Plaintiffs.

Sale for arrear of revenue—Suit to set aside—Fraud—Act XI of 1859—Limitation—Agent—Contract Act (IX of 1872), ss. 182 and 185—Form of decree.

When one of several co-sharers fraudulently contrived to have an estate brought to sale for arrears under Act XI of 1859, and purchased it in the *benami* of his son,—*Held*, that

*[Sec. 8 :—Nothing herein contained shall—

Savings. (a) bar the power of the Governor-General in Council or the Local Government, under any law for the time being in force, to extend to any place any Act mentioned in the said first schedule ;

(b) extend any Act empowering the Local Government to extend the same or any part thereof, or affect in any manner the exercise of such power ;

(c) affect the operation of any Act or Regulation heretofore extended to or declared to be in force in any of the Scheduled Districts ;

(d) revive any enactment which has been repealed either generally or with reference to some special subject ;

(e) repealed by Act VIII of 1887 ;

(f) repealed by Act XII of 1891 ;

(g) extend Act No. IX of 1861, to any part of the territories subject to the government of the Governor of Bombay in Council ;

(h) repealed by Act VIII of 1887 ;

(i) extend to the villages mentioned in the schedule to Act No. IV of 1868 any law not now in force therein ;

(j) extend to any of the towns of Calcutta, Madras and Bombay, any law not now in force therein ;

(k) affect the operation of any enactment not mentioned in any of the schedules hereto annexed.]

† Regular Appeal, No. 139 of 1876, against the decree of Baboo Nobin Chunder Ghose, Roy Bahadoor, Second Subordinate Judge of Zillah Mymensingh, dated the 17th of March 1876.

another co-sharer aggrieved by the sale could maintain a suit to have the property reconveyed, though the period limited by s. 38 [301] of Act XI of 1859, and art. 14 of the second schedule to Act IX of 1871, for a suit to set aside the sale, had expired.

SUIT to set aside an auction-sale held under the provisions of Act XI of 1859 on the ground of fraud.

The plaintiffs alleged that they jointly with the second defendant were owners of a certain settled mehal; that the second defendant, who was also their agent, they being purdanashin ladies, fraudulently allowed the Government revenue of their portion of the estate to fall into arrears; that he led the other co-sharers, who were ready to make the payment on their (the plaintiffs') behalf to suppose he was going to save the estate from sale; but that instead of doing so, he allowed the estate to be put up for sale without notice to the plaintiffs, and on the day of sale, the 30th December 1872, after making false representations to those present as to the condition of the estate, purchased in the name of his son, the third defendant, for a small consideration. The plaint was filed on the 31st March 1875. The second and third defendants pleaded, *inter alia*, that the suit, being to set aside a sale for arrears of Government revenue, should have been brought within one year from the date on which the sale was confirmed by the Commissioner, and that, not having been so brought, it was liable to be summarily dismissed. The plaintiffs obtained a decree in the first Court.

The third party-defendant appealed to the High Court.

Baboo Kally Mohun Dass, Baboo Bhoobun Mohun Dass, and Baboo Jogesh Chunder Dey for the Appellant.

Baboo Mohini Mohun Roy and Baboo Nullit Chunder Sen for the Respondents.

The following **Judgments** were delivered :--

Birch, J. (after stating the facts, continued as follows):—I do not treat the suit as one brought to annul the sale on the ground of its having been made contrary to the provisions of Act XI of 1859. What the plaintiff seeks to establish in this suit [302] is, that by the fraud of the defendant they have been deprived of their property, and they ask to be relieved from the effect of that fraud and to be placed in the position in which they were before the auction sale took place. To such a suit the provisions of Act XI of 1859 in restriction of suits to annul sales cannot, in my opinion, be extended. We have to look to the general law of limitation, and treating this as a case for relief on the ground of fraud, the suit is clearly within time. [His Lordship then proceeded to deal with the facts of the case.]

The Subordinate Judge has decreed the suit and ordered that the plaintiffs obtain possession of the share claimed with costs and interest thereon from defendants 2 and 3. He has also made the said defendants liable for the costs of Government with interest.

I take the same view of the evidence as the Subordinate Judge has. But I think that the form of the decree must be different. Our order will be, that the defendant No. 3 do reconvey to the plaintiffs the property which is the subject of this suit, upon receiving from them the sum of Rs. 220 with interest thereon at 4 per cent. from the date of payment thereof; that the cost of the stamp for conveyance and the registration thereof be borne by the defendant No. 3; that in default of the conveyance being executed within two months from the date of this decree, the conveyance be executed by the

Court, the cost of the transaction being added to the costs of this appeal. The order of the lower Court is modified. The costs in this Court to be borne by defendant No. 3 with interest at 6 per cent. The order of the Subordinate Judge as to costs in the lower Court will stand.

Mitter, J.—I am also of opinion that the plaintiffs in this case upon the facts, which appear to me to have been satisfactorily established by the evidence, are entitled to recover possession of the share of the zamindari for which this suit has been brought, and to obtain a conveyance of the same from the defendant-appellant.

Although in the plaint there is also a prayer for the reversal of the auction-sale, I do not think that, under the circumstances of this case, that prayer can be granted.

[303] In this view of the case, it does not fall within the provisions of art. 14 of the second schedule of the Limitation Act, or s. 33 of the Revenue Sale Law. It should be considered simply a suit to obtain a certain relief on the ground of fraud, and consequently art. 95 is applicable to it. Putting the case, therefore, in the most favourable position as regards the defendants, the knowledge of the fraud cannot possibly date back further than the date of the auction sale. The present suit having been brought within three years from that date is, therefore, not barred by limitation.

The mehal seems to have been sold for an arrear of five annas of the revenue kist of September 1872. It is stated by the plaintiffs that Bhim Narain, second defendant, father of Bhoobun Chunder, defendant No. 3, the appellant before us, was entrusted by all the co-sharers with the entire management of the estate; and that it was his duty, therefore, to see that the whole of the revenue due in that kist was paid. But upon the evidence I am not prepared to say that this part of the plaintiffs' case has been established. I am inclined to believe that it was not a premeditated default on the part of any one of the co-sharers to further a fraudulent scheme. It was merely the result of an accidental negligence on the part of some one of the co-sharers. It is deposed to by the plaintiffs' witnesses themselves that one Hurry Dass Chuckerbutty was employed by some of the co-sharers, for instance, Wooma Soondery and Bissessuri, two of the plaintiffs in this suit, to deposit in the Collectorate their proportionate shares of the revenue. The evidence as to the whole mehal being in the possession of Bhim Narain on behalf of the rest of the co-sharers is neither clear nor satisfactory. But upon the evidence I am satisfied that, shortly before the day of the sale, the defendant Bhim Narain undertook to make an attempt to save the mehal from the impending auction sale by putting in an application to the Collector under s. 6 of the Revenue Sale Act on behalf of all the co-sharers.

The learned pleader for the appellant has drawn our attention to several discrepancies in the depositions of the plaintiffs' witnesses upon this point, but these discrepancies, far from [304] affecting their credibility, appear to me to be such as would naturally occur in the statements of truthful witnesses speaking to events which had happened some time before.

I am of opinion, therefore, that it has been well established in this case that before the auction sale Bhim Narain undertook to make an application on behalf of all the co-sharers under s. 6 of Act XI of 1859. He was employed for this purpose by one of the co-sharers, viz., Radha Kissen Surma Mozoomdar, a witness in this case, and Haranund Nundi, another witness of the plaintiffs, who came to Nusseerabad on their behalf to protect their interests

after the mehal had fallen into arrears. Bhim Sein, I think, having accepted this engagement, became an "agent" of the plaintiffs for this special purpose within the meaning of s. 182* of the Contract Act. It is said that this was a mere gratuitous offer on the part of Bhim Sein, and there was no consideration for it. But that circumstance would not take away from him the character of an "agent" see s. 185.*

Now it is clear from the evidence that Bhim Sein intentionally, and with a view to cause wrongful loss to the plaintiffs and equally wrongful gain to himself, neglected to perform his duties as an "agent." He not only omitted to make an application to the Collector as he undertook to do, but by fraudulent misrepresentations prevented others from making a similar application on behalf of the plaintiffs. I entirely concur with the lower Court in its opinion that the statements of the plaintiffs' witnesses, Chunder Nath Dey, Ram Gopal Nag, and Brojnath Bose, are fully reliable upon this point; they proved beyond doubt that, on the day of auction sale, Bhim Sein in the Collector's cutcherry showed them a petition which he said he would present to the Collector as soon as he would come to Court. They went away with this assurance.

It is evident from the deposition of the plaintiffs' witness No. 4, Juggobundhoo Bose, that these representations were falsely made by Bhim Sein to successfully carry out a fraudulent scheme of purchasing this mehal in the *benami* of his son. He had with him at that time a muktarnamah executed by his son, who was not at Nusseerabad, but at his house, which was at some [305] distance from that place, empowering the witness Juggobundhoo to bid for the property at the impending auction sale. Then we have the fact clearly established that when the Collector came to Court, he did not make even any show of attempt to save the property. These facts leave no reasonable doubt in my mind that Bhim Sein accepted the agency on behalf of the plaintiffs to make an application under s. 6 of Act XI of 1859 with a view that he might with more facility carry out his intention of purchasing the property himself. This was clearly a fraud against the plaintiffs, and under these circumstances it seems to me just and equitable that Bhim Sein should not be allowed to reap the benefit of his fraud. The plaintiffs are therefore entitled to the relief proposed to be given by my learned colleague.

Appeal dismissed.

NOTES.

[FRAUD OF CO-SHARERS.

I. LIMITATION—

- (a) Where a plaintiff, one of several co-sharers, has lost his property by reason of the fraud of his co-sharers who by a contrivance purchased the property the sale need not be formally set aside; but the plaintiff may obtain relief by getting the property reconveyed to him; art. 95 applicable, not art. 12:—(1907) 34 Cal. 241; (1909) 13 C. W. N., 518; (1902) 1 C. L. J., 565.

'Agent' and 'principal' defined.

Consideration not necessary.

*[Sec. 182:—An agent is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the principal.]

†[Sec. 185:—No consideration is necessary to create an agency.]

- (b) Co-sharer defaulting, brought estate to sale and purchased it himself in the name of others dissuading intending bidders. It was held that this did not constitute fraud, as "the defendants in no way prevented the plaintiffs from becoming aware of the existence of the arrears or from paying it off, as he could if he chose." This case was distinguished on the ground that there was an undertaking to apply to the Collector to save the mehals from the impending sale:—(1889) 16 Cal., 194.

II. REMEDY—NOT BY SETTING ASIDE SALE, BUT BY RECONVEYANCE OR DAMAGES—

- (a) Where a sale under Act XI of 1859 took place through the fraud of the purchaser in collusion with the owner's servant, a suit to set aside the sale will not lie, but a suit may be brought for damages or reconveyance against the purchaser:—(1883) 10 Cal., 63 13 C. L. R., 131.
- (b) Where several of the purchasers were innocent and *bona fide* purchasers, the remedy of reconveyance was refused:—(1904) 32 Cal., 111.
- (c) No suit for setting aside the sale in respect of a portion only:—(1905) 9 C. W. N., 805.]

[3 Cal. 305]

APPELLATE CIVIL.

The 27th August, 1877.

PRESENT :

MR. JUSTICE KEMP AND MR. JUSTICE LAWFORD.

Kudomee Dossee and others.....Defendants
versus
 Joteeram Kolita.....Plaintiff.

Hindu Law—Divorce—Established custom.

Where a Hindu husband sued his wife for restitution of conjugal rights, and the defendant pleaded divorce, it was held, that though the Hindu law does not contemplate divorce, still in those districts where it is recognized as an established custom, it would have the force of law.

THE plaintiff in this case, who was a Hindu inhabitant of Assam, sued the female defendant, one of the special appellants in the High Court, for restitution of conjugal rights. The defendant, among other pleas, averred that the plaintiff had divorced her, and had executed a deed to that effect, and that he, consequently, was not entitled to maintain this action.

[306] The Munsif dismissed the case of the plaintiff, holding that there was a custom in the Province of Assam "for men and women to assent to divorce by deed in this way." On appeal, the Judge held that the Hindu law of Bengal proper applied to Assam, and inasmuch as the Hindu law forbids divorce, even if such a custom should exist, of which there was no evidence, it would not override the law. Accordingly, he reversed the decision of the Munsif, and awarded a decree to the plaintiff. The defendants preferred a special appeal to the High Court.

Baboo Bhoobun Mohun Dass appeared for the Appellant.

The respondent did not appear.

* Special Appeal No. 2812 of 1876, against the decree of W. E. Ward, Esq., Officiating Judge of Assam, dated the 6th September 1876, reversing a decree of Baboo Huro Kanto Surma, the Munsif of Gowhaty, dated the 30th March 1876.

The **Judgment** of the Court was delivered by **Kemp, J.** (who, after stating the facts, continued as follows):—In special appeal it is contended that the Judge committed an error in law in holding that in Assam a Hindu cannot divorce his wife, and that he has also erred in law in holding that a custom, if proved, cannot have the force of law so as to override the Hindu law; further, that if the Judge thought there was no evidence of the custom, he should have remanded the case to the first Court for the purpose of taking evidence on that point. We think that the Judge was right so far in holding that the Hindu law does not contemplate divorce; but we think that he was clearly wrong in holding, as he has done, broadly, that a custom, even if established, cannot override the general provisions of the Hindu law. There can be no doubt that the Hindu law has been affected in particular districts by particular usages, and these usages have hitherto been respected unless clearly repugnant to the principles of Hindu law—see page 387 of *Shama Churn's Vyavastha Darpana*. The text lays down that "reason and justice are more to be regarded than mere texts, and that wherever a good custom exists it has the force of law."

We, therefore, think that the Judge was wrong in holding, as he has done, that even if the custom were established, it would not affect the Hindu law. Now the Munsif has found that there is evidence of this custom, and that it exists in the province, [307] and we think that the Judge ought to have found on that part of the case, namely, whether the defendant No. 1 had established the custom set up by her in her defence. We, therefore, remand the case to the Judge to come to a finding on that point, taking evidence if necessary. Costs to follow the result.

Appeal allowed.

NOTES.

[HINDU LAW—DIVORCE—

- I. Divorce may be permitted by the customary law—(1876) 1 Bom., 347; (1894) 17 Mad., 479. See (1899) 23 Mad., 171.
- II. See also the Native Christian Marriage Dissolution Act, XXIV of 1866, for divorce on account of conversion to Christianity.]

[3 Cal. 307]

APPELLATE CIVIL.

The 14th September, 1877.

PRESENT :

MR. JUSTICE JACKSON AND MR. JUSTICE WHITE.

Goluknath Misser.....Plaintiff

versus

Lalla Prem Lal and others.....Defendants.*

Mortgage, Effect of subsequent mortgage—Extinguishment—Merger.

* A creditor holding a mortgage on the lands of his debtor does not necessarily surrender that mortgage, or lower its priority, by taking a subsequent mortgage, including the same lands with other lands, for the same debt. Whether the earlier mortgage becomes merged and extinguished or not is a question of intention.

* Special Appeal, No. 2054 of 1876, against the decree of E. S. Mosely, Esq., Officiating Judge of Zilla Bhagalpore, dated the 6th July 1876, affirming the decree of Baboo Gopinath Matey, Sudder Munsif of that district, dated the 4th of December 1875.

Baboo Mohini Mohun Roy, Baboo Tarucknath Dutt, and Baboo Juggud-doollabh Basack for the Appellant.

Mr. R. E. Twidale and Baboo Tarucknath Pait for the Respondents.

THE facts of this case are sufficiently stated in the **Judgment** of the Court.

White, J. (JACKSON, J., *concurring*).—It appears that in this case the defendants (who are grouped together as No. 1) borrowed from the special appellant (who is the plaintiff in the suit) on the 13th of Srawun 1271 F.S., Rs. 295 at 2 per cent. per mensem, and by a mortgage bond of that date, in order to secure the payment of that sum with interest, mortgaged to the plaintiff certain land which is described in the mortgage bond [308] as "20 bighas of 'Inglis' land belonging to us exclusively" (meaning defendants No. 1),—"that is to say, 10 bighas out of 50 bighas in Mouzah Kuchia, and 10 bighas in Mouzah Dowlutpore." Certain payments on account of the interest were made as appears by the endorsement on the bond; but in 1278 F.S. the whole of the principal sum and a large arrear of interest still remaining unpaid, the parties came to an adjustment of account, when Rs. 500 was found to be due for principal and interest upon the foot of the bond, and thereupon the defendant No. 2 executed to the plaintiff another mortgage bond to secure payment of the Rs. 500 with interest on that sum at the reduced rate of 1 per cent. per mensem. This second bond is dated the 21st of Bysack 1278 F.S. It mentions the previous mortgage bond, and the properties mortgaged by it are the same as those in the previous mortgage bond, with the addition of another 10 bighas out of the 50 bighas in Mouzah Kuchia. The schedule annexed to the bond states in effect the mortgaged properties to be 30 bighas of land composed of 20 bighas out of 50 bighas in Mouzah Kuchia and 10 bighas in Dowlutpore.

Shortly before this second mortgage bond was executed to the plaintiff, namely, on the 9th of Assin 1277, the defendants No. 1 mortgaged the whole 60 bighas of land to the special respondent (who is defendant No. 2) for Rs. 1,550 with interest at Re. 1-4 per cent. per mensem. The mortgage was in the form of conditional sale, and provided that, on failure to pay that sum together with the interest within four years, defendant No. 2 was to be at liberty to foreclose the mortgage and take possession of the property sold. The property in the respondent's conditional sale is described as 50 bighas in Mouzah Kuchia and 10 bighas in Mouzah Jamulpore, which is another name for Dowlutpore.

On default being made, the defendant No. 2, in December 1873, took proceedings to foreclose the mortgage, which resulted in his getting into possession of the whole 60 bighas.

The plaintiff brings this suit to establish a lien or charge in his favour upon 30 bighas of the land in the possession of defendant No. 2, and he claims Rs. 7,268 as the amount due upon the footing of his second mortgage bond: at the same time [309] he insists in his plaint that his previous mortgage of 1271 continues in force.

As the doctrine of tacking does not prevail in the mofussil of this Presidency, the plaintiff cannot avail himself of his second mortgage, which was subsequent to the conditional sale to the defendant No. 2; but the question remains whether, by reason of the plaintiff having taken the second mortgage of 1278, he has lost the priority which at the time when the conditional sale was made he unquestionably had under his previous mortgage of 1271; in other words, whether his previous mortgage has become merged or extinguished by his subsequent mortgage.

Both the lower Courts have held that s. 62 * of the Indian Contract Act, 1872, applies, and that the prior mortgage has become extinguished, and the plaintiff's suit has accordingly been dismissed.

I am unable to agree in the conclusion which they have arrived at. It depends upon the intention of the parties whether or not the earlier security has become merged or extinguished in the later one, and I think that the nature of the transaction and the acts of the parties, as well as the documents themselves, show that, in the present case, there is no such intention. There is nothing in the mortgage bond of 1278 which indicates that the plaintiff meant to forego the benefit of the security created by the mortgage bond of 1271. On the other hand, it refers to that previous mortgage as a then subsisting security. The bond of 1271 was not cancelled or returned to defendants No. 1, but has continued all along in the possession of the plaintiff, and has in point of fact been filed by him with his plaint. It is very improbable that the plaintiff, when adjusting the account of what was due upon the foot of the mortgage in 1278, and finding a large sum to be due for arrears of interest, and taking in consequence another mortgage of the same lands together with others, should relinquish, or intend to relinquish, his original and earlier security.

It is argued, however, that the property mortgaged is not the same, and therefore that a substitution of securities must have been intended, and a consequent extinguishment of the prior mortgage has taken place.

[310] I think this argument is founded upon a misapprehension of the real nature of the transaction.

The mortgage bond of 1271 gives the plaintiff the security of 20 bighas of land, namely, 10 out of 50 bighas in one village (which is a native expression for one-fifth of the land in that village) and 10 bighas situated in another village. The mortgage bond of 1278, which is made when the debt had become increased by large arrears of interest, extends the plaintiff's security to 30 bighas of land,—namely, 20 out of 50 bighas in the first village (which is equivalent to two-fifths of the lands in that village) and the same 10 bighas out of the second village. That the 10 bighas in Dowlutpore, the second village, are the same lands already mortgaged by the first bond there can be no doubt, and as to the two-fifths of the land in Kuchia, the first village, that must be taken to mean, in the absence of all evidence to the contrary, the one-fifth already mortgaged by the first bond and an additional one-fifth of the land in the village; this latter one-fifth being mortgaged to the plaintiff for the first time by the bond of 1278.

The transaction which took place between the plaintiff and the defendants No. 1 in 1278 was not intended to be, nor in point of fact was, a substitution of the later mortgage for the earlier one, but a giving of further security in consequence of the original debt having become increased by large arrears of unpaid interest, and therefore no merger or extinguishment of the previous mortgage in the later one has occurred. The circumstance that the original debt was in the mortgage bond of 1278, augmented by the addition to it of the arrears of interest, and that the interest upon the aggregate debt was reduced, appears to me to make no difference on this question, which is one of merger of securities.

Contracts changed,
rescinded or altered need
not be performed.

*[Sec. 62:—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original need not be performed.]

In *Tenison v. Sweeney* (1 Jd. and Lat., 717), where the same question arose, Sir EDWARD SUGDEN, afterwards Lord ST. LEONARDS, made the following remarks :—"Then another point was started that, as the successive mortgages were for the sums secured by the former mortgages and for the sums subsequently advanced, the old securities were merged in the new, and that the judgment-[311]creditor had a right to come in before the last mortgage. That is a very novel view of the operation of the deeds. I have had considerable experience in this particular department of the law, and I never before heard of such a doctrine. It is clear that the former mortgages continued untouched and operative, notwithstanding the new mortgages, and the new mortgages were for the purpose of letting in the further advances upon the property. Nothing could be more alarming to creditors than that a doubt should be thrown out whether, by taking a new security for their old debt and for further advances, they do not prejudice their original securities." See also *Mith v. Walter* (2 Y. and C. Ch., 354 and 361, before Vice-Chancellor KNIGHT BRUCE).

As the original mortgage is, in my opinion, not extinguished, and the defendant acquired the 60 bigas of land subject to that mortgage, the appeal should be allowed with costs, and the following decree substituted for the one made by the first Court, that is to say, declare 10 bigas out of 50 bigas, or one-fifth of the lands in Mouzah Kuchia, in the possession of the defendant No. 2, and 10 bigas of the lands of Mouzah Dowlutpore, also in the possession of defendant No. 2, are well charged with the payment to the plaintiff of the amount due upon the mortgage bond of 13th Srawun 1271 F. S., and also with the costs of this suit.

Let the amount due upon that mortgage bond for principal and interest down to three months from this date, after deducting any payments on account of interest made thereon, be ascertained.

On payment by defendant No. 2 to plaintiff of such amount and costs, let the above lands be held by defendant No. 2 discharged from plaintiff's mortgage of 1271.

On failure by defendant No. 2 to pay to plaintiff the amount so found due within three months from this date, let the lands hereby declared to be charged, be sold and the net proceeds of sale applied in and towards satisfaction of the amount so found due to the plaintiff, together with the costs of the suit; and if any balance remains due to the plaintiff after the net proceeds of sale shall have been so applied, let the same be paid to plaintiff by defendants No. 1, who are the plaintiff's mortgagors.

Appeal allowed.

NOTES.

INTENTION TO KEEP ALIVE THE SECURITY—

The fact of variation of interest and even the use of the words "to liquidate the debt" in the deed were held insufficient to negative the intention to keep the security alive for his benefit :—(1889) 16 Cal., 523.

The fact that the prior deeds were given up or cancelled may be circumstances from which inference can be made :—(1885) 10 Bom., 88.

Where satisfaction of the decree was certified to the Court and entered, the intention was not inferred :—(1888) 13 Bom., 348.

See our notes to 10 Cal., 1035 P. C.

See also (1880) 6 Bom., 561; (1896) 20 Mad., 274; (1903) 8 C. W. N., 385.]

[312] ORIGINAL CIVIL.

The 21st March, 1878.

PRESENT:

MR. JUSTICE PONTIFEX.

Ramkissen Doss

versus

Luckeynarain.

*Practice—Summons to the defendant to appear and answer—Fresh summons—
Rules of the High Court (4th December 1875), 1 and (9th February 1875) 8—
Limitation.*

A plaint was filed on 12th March 1875, and the summons to the defendant to appear and answer issued on 13th March 1875. With the exception of an application for substituted service made on 20th March 1875, and which was refused, no further steps were taken in the matter until 21st March 1878, when the plaintiff applied for a fresh summons to issue, the time for the return of the first summons having long since expired. *Held*, that the mere filing of a plaint, or the naked fact that a plaint is on the file, will not of itself prevent the operation of the law of limitation, and that as no steps had been taken to renew the summons for three years, and as no sufficient cause to excuse the delay had been made out, the application was out of time, and should be refused.

THIS was a suit to recover Rs. 19,983, balance due on two promissory notes payable on demand, and dated 1st March 1871 and 29th November 1872. It would appear that the demand for payment was made in November 1874; plaint filed 12th March 1875; and the summons to the defendant to appear and answer issued on the 13th March 1875. Service, however, could not be effected, and on 20th March 1875 the plaintiff applied for leave for substituted service, but which the Court refused. No further steps were taken in the matter, and the date for the return of the summons had long since expired. The plaintiff now learned that the defendant was dwelling at Delhi.

Mr. *Allen*, for the Plaintiff, applied on affidavit setting out the above facts, for a fresh summons to issue.

Pontifex, J.—The mere filing of a plaint, or the naked fact that a plaint is on the file, will not of itself prevent the operation of the law of limitation. A plaintiff is bound to conduct his suit with proper diligence, otherwise filing a plaint and abstaining from taking further proceedings would have greater effect in keeping alive a demand than obtaining a decree. By the first of the Rules of Court, the 4th of December 1875, which [313] govern the practice of this side of the Court, it is directed that a plaint shall be taken off the file unless within fourteen days after the institution of the suit a summons to the defendant to appear and answer is taken out and delivered to the Sheriff. By the 8th rule of the 9th of February 1875, the times are stated for which the summons is usually made returnable. But in cases where a defendant keeps out of the way to avoid service, or cannot be found after a *bond fide* endeavour has been made to serve him, it is the practice of the Court, upon application by the plaintiff, to renew the summons and extend its returnable period to three or six months, if a proper case be made. But it must be shown that a plaintiff has used proper diligence—*Urquhart v. Gilbert* (1 In. Jur., N. S., 224). Filing a plaint is similar to filing a bill in Chancery, and a plaintiff is bound to take every means in his power by proper proceedings to compel the defendant to appear, or to give him notice of the suit. And so long as he can show that he has diligently attempted to perform this duty, and only so long he is

entitled to insist upon the pendency of the suit as counteracting the ordinary law of limitation—*Hele v. Lord Beazley* (20 Beav., 135). If the first summons cannot be served, the plaintiff should apply within reasonable time after its returnable period for the issue of a fresh summons, and, if a proper case is made, the usual returnable period will be extended; and I think the first of the Rules of the 4th of December 1875 may be taken to furnish an index of what is a reasonable time. The suit ought, in fact, to be kept alive on the same principle, though under a different practice, as governed by the decision in *Doyle v. Kaufman* (L. R., 3 Q.B.D., 7) and *Manby v. Manby* (L.R., 3 Ch. D., 101). It is necessary that this practice should be strictly enforced, as there are too many cases on this side of the Court which are allowed to linger on the file without any serious attempt to bring them on for hearing. In the present case, no steps have been taken to renew the summons for three years, and as no sufficient case has been made by the plaintiff to excuse the delay, I must hold that the present application for the issue of a new summons is out of time, and I accordingly refuse it.

Application refused.

Attorneys for the Plaintiff: Messrs. *Swinhoe, Law and Co.*

NOTES.

[LIMITATION—MERE PRESENTATION OF PLAINT NOT SUFFICIENT—

Approved in *Gerender v. Juygadamba* (1879) 5 Cal., 126, where on the facts the delay was held to be satisfactorily accounted for. See also Civil Procedure Code, 1908, Sec. I, O. IX. rule 5.]

[314] APPELLATE CIVIL.

The 11th January, 1878.

PRESENT :

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE KENNEDY.

Golap Chand Marwaree.....Plaintiff

versus

Thakurani Mohokoom Kooaree and another.....Defendants

[2 C. L. R. 412 N.]

Promissory Note—Unstamped Document—Admissibility of evidence aliunde.

The plaintiff, in a suit on a promissory note written on unstamped paper, is not debarred from giving independent evidence of consideration.

Ankur Chunder Roy Chowdhury v. Madhub Chunder Ghose (21 W. R., 1) distinguished.

THIS was a suit by the endorsee of a promissory note to recover upon the note the sum of Rs. 1,878 and 7 annas. The note was unstamped, and was thereupon declared inadmissible as evidence. The Court at the same time refused to permit the plaintiff to prove consideration by other evidence. The lower Appellate Court upheld this decision, and the plaintiff preferred a special appeal to the High Court.

Special Appeal No. 2839 of 1876, against the decree of J. L. Lewis, Esq., Judge of Zilla Bhagalpore, dated the 13th September 1876, affirming the decree of Baboo Mothoora Nath Goopta, Subordinate Judge of that district, dated the 22nd of June 1876.

Baboo *Mohesh Chunder Chowdhry* for the Appellant.

Baboo *Taruck Nath Sen* for the Respondents.

The Judgment of the Court was delivered by

Kennedy, J.—The general principle seems well settled that the existence of an unstamped promissory note does not prevent the lender of money from recovering on the original consideration, if the pleadings are properly framed for that purpose: *Farr v. Price* (1 East, 55). In this country, the great power given of raising the true issues between the parties prevents the question of pleading having much importance. Our only difficulty arose from the decision of Sir R. COUCH in *Ankur Chunder Roy Chowdhry v. Madhub Chunder Ghose* (21 W. R., 1). [315] When that case, however, is examined, it does not support the proposition for which it was cited by the respondents' pleader. It is not very satisfactorily reported, there being no note of the argument or statement of the facts; but so far as we can gather, there had been no attempt in the lower Court to give independent evidence of the consideration, the contention for the plaintiff being that there was a sufficient admission of the note in the written statement; and I think it highly improbable that, considering the Judges who decided the case, they intended, without any allusion to *Farr v. Price*, to overrule Lord KENYON'S decision in that case, which precisely governs the present appeal, in which it appears that the plaintiff did seek to give evidence of the advance, the form of pleading being as I said not material.

Appeal allowed.

NOTES.

[INADMISSIBLE PRO-NOTE—EVIDENCE OF DEBT ALIUNDE—

Where the cause of action is otherwise complete it may be sued on, (1905) 29 Mad., 111, following (1881) 7 Cal., 256 and distinguishing (1886) 10 Mad., 94 as a case where the original consideration was time-barred.

See also (1905) 28 All., 298; (1881) 4 All., 135; (1899) 24 Bom., 360.

Where the cause of action is the pro-note itself, the suit fails if it is inadmissible:—26 Cal., 178, dissenting from (1896) 23 Cal., 851; (1900) 14 Bom., 102; (1888) 12 Bom., 443; 7 Mad., 440.

Consideration is not one of the terms of a contract within sec. 91 of the Evidence Act, 1872:—(1906) 33 Cal., 607.

Admission of secondary evidence when the opposite party does not produce the original:—See (1880) 2 Mad., 208; (1884) 7 Mad., 440.]

[3 Cal. 315]

PRIVY COUNCIL

The 6th and 7th December, 1877.

PRESENT:

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. F. SMITH, AND
SIR R. P. COLLIER.

Bannoo and others.....Defendants

versus

Kashee Ram.....Plaintiff.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu law—Joint Family—Joint Estate—Presumption.

In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is that everything in the possession of any one member of the family belongs to the common stock. The onus of establishing the contrary rests on him who alleges separate property.

But this presumption does not arise where it appears that there has been a division of the family property, and a separation in the family, all the members of which are living separately.

THIS was an appeal from a judgment of the Judicial Commissioner of Oudh, dated the 26th February 1875, confirming decisions pronounced by subordinate Courts in Oudh, in favour of the respondent, who was the plaintiff in the suit.

The only question arising on this appeal was as to whether the plaintiff had established his claim to succeed to certain [316] property which had been held by his deceased uncle, by reason that, at the time of his uncle's death, he and the plaintiff were members of a joint undivided family, and that the property in question was joint family property.

Mr. S. G. Grady and Mr. C. W. Arathoon appeared for the Appellants.

The Respondent was not represented.

Their Lordships' **Judgment**, reversing the judgments of the Court below, was delivered by

Sir M. E. Smith.—This is a suit brought in the Court of the Civil Judge of Lucknow, by Kashee Ram, a nephew of Ram Dyal, who died in the year 1873, against Mussamut Bannoo and Mussamut Munna, the widows of Ram Dayal, and Munna Lal his grandson, the son of his daughter. The claim is for an eight-anna share, or one-half, of all the property in possession of Ram Dyal at the time of his death. The property consists principally of moveable property, but the claim includes a pucca house and shop.

The claim is based on the foundation that Ram Dyal, at the time of his death, was a member of a joint family, consisting of himself and of the plaintiff Kashee Ram and his brother Kasho Ram,—those two being the sons of Ram Buksh, a brother of Ram Dyal. Kasho Ram did not join in this suit. The state of the family was this: Ram Gholam left four sons, Sheo Buksh, Ram Bilas, Ram Buksh and Ram Dyal. Sheo Buksh and Ram Bilas are dead; one dying without a widow or children, and the other leaving a widow only. Ram Buksh had two sons, Kashee Ram, the plaintiff, and Kasho Ram. Ram Dyal had

no son. The plaintiff admits in his plaint that his grandfather Ram Gholam divided the ancestral property amongst his four sons, though, according to his statement, the four sons did not take separately, but Sheo Buksh and Ram Bilas took one-half jointly, and so formed a separate family, and the other half was allotted to Ram Buksh and Ram Dyal. He contends that Ram Buksh and Ram Dyal remained a joint family. On the part of the present appellants, the defendants it is stated [317] that the division by Ram Gholam was not into two parts, as Kashee Ram contends, but that each of the sons took a separate share.

* There is no distinct proof, one way or the other, as to the nature of that division, but undoubtedly a division was made, and it may be taken as against the plaintiff that at all events the family was divided into two groups at that time. It further appears that, in the lifetime of Ram Dyal, Kashee Ram, the plaintiff, and his brother Kasho Ram, as between themselves, separated, and therefore the family was still further broken up. It also appears that, whatever the division of the property may have been by Ram Gholam, all the members of the family lived separately, and there was no commensality between them. In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is that all that any one member of the family is found in possession of, belongs to the common stock. That is the ordinary presumption, and the onus of establishing the contrary is thrown on the member of the family who disputes it. Having regard, however, to the state of this family when the present dispute arose, their Lordships think that that presumption cannot be relied upon as the foundation of the plaintiff's case, and therefore as he seeks to recover property which was in the possession of Ram Dyal and was ostensibly his own at the time of his death, it lies upon him to establish by evidence the foundation of his case, viz., that the property was joint property to which he and his brother Kasho Ram, as surviving members, were entitled. It may be stated that the issue in the case, which is the only one material to be decided, raises distinctly that question. The issue is, "Was the plaintiff joint with Ram Dyal at his death?" The evidence is extremely scanty, and what there is of it is very unsatisfactory. That remark was made by the Commissioner upon the appeal from the Civil Judge, and was also made by the Judicial Commissioner when the question came before him on the right of appeal.

(Their Lordships, after analysing the evidence relied on by the plaintiff, and commenting on the judgments of the lower Courts, concluded by advising Her Majesty to reverse these [318] judgments and to dismiss the plaintiff's suit with costs in the Courts below, and they allowed the appellant the costs of the appeal.)

Appeal allowed.

Agent for the Appellants: Mr. T. L. Wilson.

NOTES.

[PRESUMPTION OF PROPERTY BEING JOINT IN HINDU FAMILY—

See (1883) 9 Cal., 237 and (1890) 15 Bom., 201 as to circumstances when the presumption is the other way. See also (1883) 8 Bom., 154; 18 All., 90.]

[3 Cal. 318]

APPELLATE CIVIL.

The 21st December, 1877.

PRESENT :

MR. JUSTICE AINSLIE AND MR. JUSTICE KENNEDY.

Chutterdharee Lall.....Decree-holder
versus

Rambelashee Koer and others.....Judgment-debtors.

[- 1 C. L. R. 347.]

Security Bond—Surety—Execution—Act VIII of 1859, ss. 204, 342.

A bond given as security for costs under s. 342 of Act VIII of 1859 may be enforced in a summary way by proceedings in execution.

Ram Kishen Doss v. Hurkhoo Singh (7 W. R., 329) and *Gujendro Narain Roy v. Hemanginee Dossee* (13 W. R., 35) distinguished.

IN this case, Chutterdharee Lall, the present appellant, had obtained a decree against one Mohabir Persaud and another in the Court of the Subordinate Judge of Tirhoot. An appeal was filed against this decree in the High Court. Before the hearing of the appeal, the then appellants were called upon, under s. 342† of Act VIII of 1859 to furnish security for costs of the appeal. One Brojo Coomar Singh stood surety for these costs and signed a security bond to that effect. The appeal was thereupon heard and dismissed. Brojo Coomar Singh having in the meantime died, Chutterdharee Lall applied for execution of his decree for costs against his representatives. The Subordinate Judge refused such application, on the ground that the High Court had not specifically named the surety, Brojo Coomar Singh, in its final decree. Chutterdharee Lall appealed to the High Court.

[319] Baboo *Rajendro Nath Bose* for the Appellant.

The Respondents were unrepresented.

The Judgment of the Court was delivered by

Ainslie, J.—It appears to us that this case is clearly distinguishable from the cases of *Ram Kishen Doss v. Hurkhoo Singh* (7 W. R., 329) and *Gujendro Narain Roy v. Hemanginee Dassee* (13 W. R., 35), in which it was held that s. 204 † does not apply to parties who have become sureties after the

* Miscellaneous Regular Appeal No. 218 of 1877, against the order of Baboo Grish Chunder Ghose, First Subordinate Judge of Zilla Tirhoot, dated the 24th of March 1877.

† [Sec. 342 :—It shall be in the discretion of the Appellate Court to demand security for costs from the appellant or not, as it shall see fit, before the respondent is called upon to appear and answer. Provided that the Court shall demand such security in all cases in which the appellant is residing out of the British Territories in India and is not possessed of any land or other immoveable property within those territories independent of the property to which the appeal relates; and in the event of such security not being furnished at the time of presenting the memorandum of appeal or within such time as the Court shall order, the Court shall reject the appeal.]

‡ [Sec. 204 :—Whenever a person has become liable as security for the performance of a decree or of any part thereof, the decree may be executed against such person to the extent to which he has rendered himself liable, in the same manner as a decree may be enforced against a defendant.]

Decree against sureties.

decree. In the present case the security was demanded and taken under s. 342 before the decree, for the purpose of securing to the respondent his costs in the event of his being successful.

The case must, therefore, go back to the Subordinate Judge in order that he may allow execution to proceed against the sureties; but before doing so, it will, of course, be necessary that the decree-holder should give the surety notice of his intention to proceed against him instead of proceeding against the original judgment-debtor; he should be served with notice to show cause why the decree should not be executed against him.

We may also observe that in this case the original surety appears to be dead. It will, therefore, also be necessary, unless it has already been done in an earlier stage of the proceedings, to issue a notice under s. 216 before any steps are taken for enforcing the decree against the respondents.

Appeal allowed.

NOTES.

[STATUTORY PROVISION—

The Civil Procedure Code (1908), sec. 145, enacts expressly as follows:—Where any person has become liable as surety—

- (a) for the performance of any decree or any part thereof, or
- (b) for the restitution of any property taken in execution of a decree, or
- (c) for the payment of any money or for the fulfilment of any condition imposed on any person under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47.

Therefore, this and other cases are now within these express provisions of the Code (1889) 16 Cal., 323 was a decision under the C., P. C., 1882.

In (1880) 2 All., 604 F.B., the summary proceedings were held applicable to security for costs in respect of Privy Council appeals.]

[320] APPELLATE CRIMINAL.

The 9th January, 1878.

PRESENT:

MR. JUSTICE AINSLIE AND MR. JUSTICE McDONELL.

The Empress

versus

Thacoor Dyal Sing and another.*

Criminal Procedure Code (Act X of 1872), s. 530† - Constructive Possession—Intermediate holders.

In a case of disputed possession between two rival zamindars, constructive possession through intermediate holders (*ticcadars*), to whom the ryots pay rents, is not such possession as is contemplated by s. 530† of the Code of Criminal Procedure.

THE reference to the High Court arose out of the following circumstances:—Disputes arose between one Sidhu Singh and Kasa Singh on the one side, and Dirgopal Singh and Thacoor Singh on the other, concerning their respective shares as rival zamindars to certain villages. Each party was, under s. 491 of the Criminal Procedure Code, bound down by the Deputy Magistrate of the sub-division to keep the peace for six months. Sidhu Singh and Kasa Singh appealed to the Magistrate of the district, who, while upholding the order of the Deputy Magistrate, suggested that the case seemed one of disputed possession, and might therefore be dealt with under s. 530 of the Code of Criminal Procedure. The Deputy Magistrate thereupon commenced proceedings under this section against the parties. A proportion of the villages comprising the lands in dispute were admittedly not held directly by the zamindars, but through *ticca* or intermediate holders to whom the ryots paid their rents. The Deputy Magistrate decided against the claim of Dirgopal Singh and Thacoor Dyal, and they appealed to the Magistrate of the district, who referred the matter to the High Court.

* Criminal Reference No. 2790 of 1877 from the order of W. S. Wells, Esq., Magistrate of Shahabad, dated the 13th December 1877.

† [Sec. 530:—Whenever the Magistrate of the district, or a Magistrate of a division of a district, or Magistrate of the first class, is satisfied that a dispute,

Magistrate how to proceed if any dispute concerning land, etc., is likely to cause breach of the peace.

parties concerned in such dispute to attend his Court in person, or by agent, within a time to be fixed by such Magistrate, and to give in a written statement of their respective claims, as respects the fact of actual possession of the subject of dispute.

Party in possession to be continued until ousted by due course of law.

Such Magistrate shall, without reference to the merits of the claims of any party to a right of possession, proceed to inquire and decide which party is in possession of the subject of dispute.

After satisfying himself upon that point, he shall issue an order declaring the party or parties to be entitled to retain possession until ousted by due course of law, and forbidding all disturbance of possession until such time.

Explanation.—Such Magistrate may satisfy himself of the existence of a dispute likely to induce a breach of the peace from a report or other information; but the question of possession must be decided on evidence taken before him.]

Baboo Gopal Lall Mitter and Baboo Anund Gopal Paul for the Appellants.

[321] The Judgment of the Court was delivered by

Ainslie, J. (who, after disposing of the case on grounds immaterial to this report, proceeded as follows):—Independently of this there is another reason for which the order must be set aside. In the order of the Magistrate by which he referred the case to the Deputy Magistrate for explanation, it is said that the petitioner before him had asserted that six and twenty villages out of the thirty which formed the subject of the order were actually held in *ticca*. The Deputy Magistrate in his reply does not deny that there are certain villages in the possession of *ticcadars*, but he contends that there being a dispute between the contending parties as to collection of rent, it is necessary to decide the question of possession in respect of all the villages held in *khas* and *ticca* jointly, by which he apparently means all the villages, whether held *khas* or leased out. No doubt it has been held that questions between zamindars as to the right of collecting rent directly from the ryots may be considered by Magistrates, and that this right of so collecting rents is, in fact, possession within the meaning of s. 530; but that does not apply when there is an intermediate holder who admittedly receives rents from the ryots. Therefore, the order of the Deputy Magistrate is clearly bad as to all the villages which are not held direct by one or other of the zamindars, but are in the possession of farmers. Whether they be six and twenty in number or less is immaterial. It does not appear on this record which villages are held in farm and which are not. Therefore, we are unable to set aside any specific portion of the order of the Deputy Magistrate.

The only question before us is whether we ought to quash his proceeding altogether or direct a further enquiry. We think, on the whole, that it is unnecessary that any further enquiry should be held on the present proceedings. They originated in a suggestion of the Magistrate of the district, and it appears that the sub-divisional officer would not, but for that, have taken any proceedings under s. 530. He was satisfied with the steps that he had taken in binding down both parties in recognizances to keep the peace. It is still open to him, if he thinks fit, to make an enquiry, [322] and he is satisfied that unless proceedings be taken under s. 530, breach of the peace is imminent, he can institute proceedings afresh; but if he should deem it proper to record any fresh proceeding under s. 530, it will be necessary for him to ascertain clearly and define the particular villages or portions of villages to which the enquiry is to apply, excluding all those which are not in the immediate possession of either one party or the other.

NOTES.

[STATUTORY ALTERATION:—

In the Cr. P. C., 1882, the words 'any *tangible immoveable property*' were substituted for 'any land or any houses, water, fisheries, crop or other produce of land.'

This case was not followed in (1878) 5 C. L. R., 287; see also (1885) 11 Cal., 413.]

[3 Cal. 322]

APPELLATE CIVIL.

—→
The 28th November, 1877.

PRESENT :

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE McDONELL.

Gungapersad and others.....Plaintiffs

versus

Gogun Sing.....Defendant.

Registration—Dowl Fehrist—Act VIII of 1871.

A *Dowl Fehrist* being merely a memorandum by a zamindar's agent of the rates of rent agreed upon, and to which the tenants affix their signatures in token of such agreement, is not a contract, and does not require to be stamped or registered.

THIS was a suit for arrears of rent at a certain rate admittedly in excess of the rent previously paid by the defendant. In proof of his claim for the excess rate, the plaintiff filed a *dowl fehrist*, purporting to be a memorandum containing a list of the holdings and rates of rents of the ryots with their signatures appended. The plaintiff obtained a decree in the Munsif's Court. The lower Appellate Court, however, reversed the finding of the Munsif on the ground that the *dowl fehrist* which formed the base of the plaintiff's claim was not registered, and therefore not receivable in evidence.

The plaintiff preferred a special appeal to the High Court.

Bahoo Unnoda Pershad Banerjee and Bahoo Neelmadhub Sen for the Appellants.

[323] Bahoo Kalee Kissen Sen, for the Respondent.

The Judgment of the Court was delivered by

Jackson, J.—The question that arises in this special appeal is whether the lower Appellate Court is right in reversing the decree of the Court below, and apparently dismissing the suit on the ground of the reception of a document called *dowl fehrist*, which, in the opinion of the lower Appellate Court, was inadmissible, because it was not registered and not stamped. It is not discoverable from the judgment of the Munsif that any objection had been taken to the *dowl* in the Court of First Instance on that ground. The contest before him appears to have been whether the *dowl* was genuine or not,—that is to say, whether it recorded facts which were actually true. But the Judge holds that it was "nothing more or less than the record of the new rates of rent, and that the signatures of the ryots were taken to it in testimony of their agreement to cultivate the lands at the rate mentioned. It specified seven years as the period for which these holdings were to continue, and should therefore have been registered." Now it seems that the plaintiff when he filed his plaint, filed not only the jumma-wasli-bakoes relating to the years in dispute, but at a later stage of the case a document was also filed, which, as Mr. Hallett says, "it pleased the plaintiff to call a *dowl fehrist*." Mr. Hallett does not say why the plaintiff should not have been pleased to call

* Special Appeal No. 2545 of 1876, against the decree of J. R. Hallett, Esq., Second Subordinate Judge of Bhagulpore, dated the 11th August 1876, reversing a decree of Moulvi Syed Khajeh Fokhruddin Hossein, Munsif of Monghyr, dated 25th February 1876.

it a *dowl fehrist*, nor does he suggest any other appropriate name by which it ought to be called. But the use of it is to be found in the judgment of the Munsif. He says :— "From the testimony of the plaintiff's witnesses, who are trustworthy persons and proprietors of the mouza, as well as from that of the patwari, the writer of the *dowl*, it is fully proved that the *dowl* was prepared correctly and faithfully, and that it was accepted by all the tenants," and there was evidence which the Munsif accepted to show that rent has been collected from the ryots afterwards in accordance with that *dowl*. Therefore we understand the *dowl* was merely a memorandum or record by the zamindar's agents of the rent which had been settled between the zamindar and the ryots, [324] and that the various ryots affixed their signatures to this *dowl* in testimony of their admission of the correctness of the jumma thereon recited as having been imposed on them. The *dowl* was not in itself a contract. It was no more a contract than are chittas or measurement papers, or what are called *suruthalic* papers, which are constantly signed by ryots, monduls, and other persons in testimony of their concurrence. It appears to us that there is nothing in the law to require a *dowl fehrist* to be either registered or stamped, nor, on the other hand, is it a document which could be regarded as binding or conclusive evidence of a contract. It is a matter of observation of course, and throws the burthen of explanation upon any ryot who having put his signature to it, afterwards disputes the facts which it recites. It may fairly be asked how came you to sign this document if you were not a consenting party to it. It seems to us, therefore, that the Judge was wrong in saying that this document was inadmissible, and that he ought to have taken it into consideration together with the other evidence. The case will be remanded to the lower Appellate Court accordingly.

Case remanded.

NOTES.

[This case was followed in (1880) 5 Cal., 864 where it was held that the lessee's signing an entry in the lessor's accounts showing the area demised and the lease was no more than an admission. Where however the acceptance of a written proposal to take a lease is endorsed on it, that would constitute a lease :—(1881) 10 C. L. R., 121.]

[3 Cal. 324]

PRIVY COUNCIL.

The 27th and 28th June, 1877.

PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND
SIR R. P. COLLIER.

Ashgar Ali and others.....Plaintiffs

versus

Delroos Banoo Begum.....Defendant.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Purdah Woman—Execution of Documents.

A Court, when dealing with the disposition of her property by a *purdah* woman, ought to be satisfied that the transaction was explained to her, and that she knew what she was doing.

especially in a case where, without legal assistance, for no consideration, and without any equivalent, she has executed a document, written in a language she does not understand, which deprives her of all her property. In the case of a *pardahnashan* woman, who has no legal assistance, the ordinary presumption, that if a person of competent capacity signs a deed he understands the instrument to which he has affixed his name, does not arise.

[325] The decision of the High Court that the endowment created by the document was not of such a public character as would sustain a suit under Act XX of 1863, not dissented from.

THIS was an appeal from a decision of a Division Bench of the Calcutta High Court, dated the 20th April 1875, reversing a decision of the Judge of the 24-Pergannas, dated the 21st March 1874, and dismissing the suit instituted by the appellants in the latter Court.

The facts of the case and the questions therein raised for determination are set forth in the report of the case in the Court below (15 B. L. R., 167).

At the hearing of the appeal Mr. *Leath*, Q. C., and Mr. *Doyne* appeared for the Appellants, and Mr. *Cowie*, Q. C., and Mr. *J. D. Mayne* for the Respondent.

Their Lordships' **Judgment**, affirming the decision of the High Court, was delivered by

Sir M. E. Smith.—This suit was instituted under Act XX of 1863, against the respondent, as the *mutawalli* of a Mahomedan religious endowment, for malversation in wasting and misappropriating the estate. The plaintiffs (appellants) sought to obtain an account, the removal of the respondent from the office of *mutawalli*, and the appointment of two of the plaintiffs, who are her nephews and next heirs, in her place. The allegation in the plaint, which is the foundation of the plaintiffs' case, is as follows: "That the defendant has, by a registered *wagfnamah* of the 25th Zikad 1268, Hijri," answering to the 10th September 1852, "endowed the entire estate held and owned by her to the Imambara for religious purposes." The Judge of the Court of the 24-Pergannas made a decree in favour of the plaintiffs, establishing the validity of the endowment, and granting the relief prayed. This decree was reversed by the High Court, on ground that the allegation in the plaint, which has just been cited, was not established. It was also held that the endowment, if established, was not of such a public nature as would sustain a suit under Act XX of 1863.

[326] The respondent inherited a large estate from her mother, Nigarara Begum, having survived two brothers, who died in their mother's lifetime. Two of the plaintiffs are the sons of one of these brothers; the other three plaintiffs are persons in no way connected with the family, but who claim the benefit of the endowment. The mother, Nigarara, died in 1850; and about two years afterwards the *tauliutnamah* relied on was executed. The family are Mahomedans of the Sheah sect. The *tauliutnamah* is dated the 10th September 1852, and the material parts of it are these: "I make a trustworthy declaration and a legal acknowledgment, and give in writing to the effect that "I consider it indispensable and incumbent upon me to continue and perpetuate the ceremonies for pious uses of such description as '*fathia*' (offering prayers for the dead) '*hazrat*', on whom be the benedictions, etc., which is the fixed and settled usage of my family. I have no lawful children or grandchildren who may be my legal heirs, therefore, *talooka* of Chitpore," describing certain property, "and all the compensation money, etc., the price "of which at present, is estimated at one lakh of Rs. (1,00,000) which I hold in

" my possession, without any one having any share therein, and without there being any other co-partner, as my legal hereditary right, having received the same from my ancestors in accordance with what is laid down in separate documents, the same for special pious purposes I have made *wagf* in perpetuity, with all inherent adventitious rights and interests, large and small, lying therein attached thereto, and arising therefrom, with all appurtenances particularly of pious uses. As long as I live, the wife of my brother of blessed memory, Mussuminat Jigri Khanum, the daughter of the late Moonshi Hidayat Ali, shall remain *mutawalli* of the aforementioned *wagf*. If I, the endower, die before the aforesaid lady, then the affairs connected with *tauliut* shall, in a perfect form, revert to the aforementioned lady. Should the aforementioned lady die before me, I, the bequeather, alone will act as a *mutawalli* of the *wagf* endowed property. The one of us two who may survive the other shall, either at the time of death or previous to it, appoint whomsoever she finds most worthy and befitting as a trustee (*mutawalli*) to the endowment." Then the deed goes on, "The specification of the [327] expenses is this: All the income derived from the aforementioned endowment has, after the payment of the Government revenue, been divided into 28 parts. Of these, 15 parts are to be applied to the expenses of the *fathia* of the Lord of the Universe, the last of the prophets (Mahomed) and the Imams, the blessing and peace of God be with them all, and the expenses of the ten days of Mohurram and all the holy days, the repairs of Imambari and tombs; seven parts thereof shall be received by all the *amlahs* and servants, whose names are inserted at the foot of this or other documents bearing the seal and signature of me, the declarant, which they may have in their possession, some from generation to generation, and others as long as they retain the service, as detailed in separate documents; and six parts thereof will be received by us, the *mutawallis*, in equal shares." Now, the effect of this instrument is to devote all the property which this lady possessed to religious uses, to destroy her rights as proprietor, and to constitute her one only of the *mutawallis* for the management of the endowment, giving her three-twenty-eighths parts of the income of the whole property only for her management. The deed was written in Persian, a language the Begum did not understand. Her case is, that although she executed the instrument, its contents were not explained to her, and that she was ignorant that its effect would be that which has just been described.

Their Lordships are of opinion, agreeing with the High Court, that it is not established that the Begum understood the full import and effect of the document she executed. It is incumbent on the Court, when dealing with the disposition of her property by a *purdahnashin* woman, to be satisfied that the transaction was explained to her, and that she knew what she was doing; and especially so in a case like the present, where, for no consideration, and without any equivalent, this lady has executed a document which deprives her of all her property.

A mutation of names from her own alone, to her own and Jigri Khanum's as *mutawallis* was effected; but the *mooktearnamah* was not proved. Undoubtedly, also, the estates were afterwards described in several documents as *wagf mehals*, and she herself was described in many transactions relating to the [328] estates as *mutawalli*. Receipts for rents were given first in her own and Jigri's name as *mutawallis*, and, after Jigri's death, which happened about two years after the deed, in her own name of *mutawalli*. *Pottahs* were granted in which she is so described. Suits were also brought in which she is plaintiff with a similar description. On the other hand, for more than twenty years,

notwithstanding she was nominally described in the transactions to which I have referred as *mutawalli*, she actually dealt with the property as her own. She granted *mourusi* leases, sold parts, and mortgaged other parts, and in every way treated the property as her own, and as if it were not subject to a religious trust. Those acts, which extended over the whole time from the execution of the deed to the commencement of the suit, are very strong to show her own consciousness, that while she was described as *mutawalli* she really believed herself to be the proprietor and owner of the property, and had no idea that she had reduced herself to the state of a mere manager of it, entitled only to three-twenty-eighths parts of the income for her maintenance.

Her own evidence, with reference to the deed, is given in an apparently candid manner. She admits its execution, and that she intended to create some trust for religious purposes; but she denies that she knew what was the full extent and import of the deed. She says: "I executed the *taulrutnamah* when "I was residing in this house. I have been, prior to the execution of the "*taulrutnamah*, residing and am still residing in this house, since my mother's death. When my mother died I was then at Moorsshedabad. A year after "my mother's death I came here, but on the way my nephews Nawab Ashgar "Ali and Nawab Ahmed Ali, the plaintiffs in this suit, stopped my boat. I "was detained for twenty days near Roushenabad, and then I applied to the "Magistrate and got my boat released. After this I came here. Two or three "years after I came here, I executed this *taulrutnamah*. I myself do not know "how to read and write. I told Ali Zamir, my servant, to draw out a will, or "some such writing, as will after my death be able to keep up the religious "ceremonies of my mother. Then he brought to me a writing which he read "to me." She says in [329] another place that it was read in Persian: "He "also told me that, after my death, whoever will be the *mutawalli* will perpetuate "the works (i.e., the religious affairs) of my mother. I do not understand "Persian." Then there is a note by the Commissioner. "A portion of the "document marked 'A' was read to the witness, and she says, I do not "understand it. That portion being translated into Urdu by Abdool Aziz, "she says: I now understand it. My object in making the *taulrutnamah* "was not what is stated in the part marked A." This part of the deed is not identified, but no doubt it was a material part. Then there is this question, "Whether for the purpose of perpetuating the ceremonies "observed in your family from ancient time, you executed the *taulrutnamah* ? "Answer, Moonshi Ali Zamen brought to me a writing saying that I shall have "absolute power over the properties during my lifetime" If the deed was thus represented to her, then it did not carry out her intentions. It was a deed which not only did not carry them into effect, but was entirely and absolutely opposed to them. She intended and desired to retain the estate for her own life, and to create an endowment by way of testamentary disposition of it after her death. The person who prepared the *taulrutnamah* may have been aware that she could not effect her purpose by such a disposition, and having prepared this deed may have led her to suppose that it did carry out her purpose, without explaining to her that it would deprive her of her property and leave her in the state of a mere manager of it, liable to be deprived of that management if she broke any of the trusts of the deed. It is impossible to suppose that she could have been conscious of the tenor and effect of the deed, when immediately after, and ever after, she wholly disregarded the trusts of it by the mode in which she dealt with the property.

There are eight witnesses to the deed; one only has been called, and he does not prove that the deed was read over and explained. This witness does

not say that he was present when it was read over to her in Persian. Undoubtedly, if a person of competent capacity signs a deed, it is to be presumed that he understood the instrument to which he has affixed his name; [330] but in the case of a *pardahnashin* woman, who had, as in this case, no legal assistance, the ordinary presumption does not arise; and it is incumbent upon the Court to be satisfied, as a matter of fact, that she really did understand the instrument to which she has put her name. This seems to have been the view of the High Court, which it has expressed in two passages of the judgment. The Court says: "It is clear that she had no professional assistance at the time. Ali Zamen is described as an old and trustworthy servant, but not a lawyer."—(it may be observed, the respondent says that this is the only deed that he ever drew as far as she knows),—"and none of the witnesses examined for the plaintiffs prove that the Begum, in creating the *waqf* was in any way cognizant of the effect of her act. It has been generally held in this country that *pardahnashin* ladies have a claim to special consideration, particularly in cases where they deny on oath an effectual knowledge of documents which they are said to have made." And, again, the Court says: "In this case we have an illiterate and prejudiced woman, with no professional assistance, executing a deed written in a language which she did not understand, and which, as she swears, was not explained to her, by which she completely divests herself of the whole of a large property, and then immediately sets to work to do a series of acts which would have the effect of turning her out of the *mutawalliship* she had created for herself, and of throwing her upon the world absolutely penniless. Before we come to such a conclusion we ought to have very distinct proof that the real purport of the *waqf* deed was properly explained to Delroos Banoo Begum, and that she knew what she was about, and that it is not too much to say that no such proof has been attempted to be given by the plaintiffs."

Their Lordships having come to this conclusion upon the main facts of the case, it is not necessary for them to determine the other point which the High Court decided,—namely, that this endowment was not of such a public character as would sustain a suit under Act XX of 1863, but their Lordships desire to say that they see no reason for disagreeing with that part of the judgment.

[331] In the result, their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

Appeal dismissed.

Agent for the Appellants: Mr. T. L. Wilson.

Agents for the Respondent: Messrs. Wrentmore and Swinhoe.

NOTES.

[I. PURDAHNASHIN, DEEDS BY—

For nature and *onus* of proof, see (1909) 12 C. L. J., 115, 357, where all the cases on the point are collected.

II. ACT XX OF 1863, WHEN APPLICABLE—

See (1891) 19 Cal., 275; (1896) 18 All., 227.]

[3 Cal. 331]
APPELLATE CIVIL

The 8th December, 1877

PRESENT.

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP

Krishna Mohun Bose.....Defendant

versus

Okhilmoni Dossee.....Plaintiff.

Maintenance, Suit for—Limitation—Act XIV of 1859, s. 1, cl. 13—Act IX of 1871, sch. II, art. 128.

A claim once barred cannot be revived by a change in the law of limitation. This principle applies as well to a claim for arrears of maintenance or any other claims, as to one for possession of land.

THIS suit was instituted by the widow of one Gocul Chunder Bose, against her late husband's brother, for maintenance. Gocul Chunder Bose died in Magh 1251 B.S. (1845), and the lower Court found that the plaintiff had neither received nor made any claim for maintenance from that date till the year 1278 B.S. (1871). The present suit was filed on the 17th September 1873. The Court of First Instance gave the plaintiff a decree, finding that, under Act IX of 1871, the law of limitation in force at the time of filing the plaint, the claim was not barred. The Lower Appellate Court upheld this decision, and the defendant preferred a special appeal to the High Court.

Baboo Chunder Madhab Ghose and Baboo Bhonur Chunder Banerjee for the appellant. The suit is barred by limitation. [332] The lower Court having found that no payments had been made to the plaintiff, she should, under Act XIV of 1859, the law of limitation then in force, have brought her suit within twelve years of her husband's death. Having failed to do so, her right is extinct, and cannot be revived by any change in the limitation law. Act IX of 1871, therefore, does not apply to this case. When a suit for the recovery of land is barred by Statute of Limitation, the right is extinct: *Gunga Gobind Mundul v. The Collector of 24 Pergunahs* (11 Moore's L. A., 345, s. c., 7 W. R., P. C. 12), see also *Thakoor Kapil Nath Sahai Deo v. Government* (13 B. L. R., 445, at p. 460) and *Noron Chunder Bose v. Kally Coomra Ghose* (1 L. R., 1 Cal., 328).

Baboo Radhika Churn Mitter for the respondent.—The law of limitation applicable was that in force when the plaint was filed. A debt is not necessarily extinguished although barred by limitation. See s. 60 of the Contract Act, which permits a creditor to appropriate money of his debtor to a barred debt.

The following judgments were delivered:

Markby, J.—In this case plaintiff sues to recover Rs. 1,750 on account of arrears of maintenance at Rs. 50 a month. The person whom she sues is her husband's brother. It has been found that the father of the plaintiff's husband, and of the defendant, died, leaving certain property, which had descended to him from his father; and the first Court held that the plaintiff was entitled to an allowance of Rs. 16 a month out of this property, and gave her a decree for Rs. 560. This decree was appealed against, but the appeal

* Special Appeal No. 228 of 1876, against the decree of W. Macpherson, Esq., Officiating Judge of Zilla Cuttack, dated the 9th September 1875, affirming the decree of W. Wright, Esq., Subordinate Judge of that district, dated the 24th September 1874.

was dismissed. The defendant has now brought the case here on special appeal.

Before us it is not denied that the plaintiff, upon the death of her father-in-law, became entitled to maintenance out of the ancestral estate, but it is contended that, under the circumstances of this case, that right was extinguished by the operation of the law of limitation as interpreted in India. It is conceded that, having regard to the peculiar words of art. 128, sch. II of Act IX of 1871, that Act which was [333] in force when this suit was brought, creates no bar to the maintenance of this suit; but it is contended that, under the provisions of the prior Statute, Act XIV of 1859, this claim for maintenance was extinct prior to the passing of Act IX of 1871, and that a claim which has once become extinct cannot be revived by a change in the law of limitation.

I think this contention is well founded. The facts are these: the plaintiff's father died in 1845, and from that time at any rate the plaintiff has lived apart from her husband's family, receiving nothing from them, and making no claim upon them. By cl. 131 of s. I of Act XIV of 1859, the period of limitation for suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate, is twelve years from the death of the person on whose estate the maintenance is alleged to be a charge, or from the date of the last payment to the plaintiff by the party in possession of the estate on account of such maintenance. Under that Statute, therefore, the plaintiff's right to bring a suit for maintenance was certainly barred in 1868. But the case of *Gunga Gobind Mundul v. The Collector of the 24-Pergunnahs* (11 Moore's I. A., 345; s. c., 7 W. R., P. C., 12) establishes upon a firm basis the principle that where a suit for the recovery of possession of land is barred by a Statute of Limitation, the right is extinct: and to this extent the Statutes of Limitation in India cease to be merely Statutes which regulate the practice of the forum, and become Statutes affecting the right. In fact, they become to this extent Statutes of prescription.

Then, is there anything peculiar in the case of a suit to recover the possession of land upon which any distinction can be based, and upon which it can be argued that whilst in this case the right is extinct where the remedy is barred, it is, nevertheless, not so in other cases. There has generally been more reluctance to apply rules of prescription to titles to land than to any other cases; and if the right to land is extinguished by a neglect to pursue the remedy, I should be disposed to say that *a fortiori* other rights are extinguished also. This seems to have been the view taken in this Court in two recent decisions. Thus Act XXV of 1857 provides that [334] no suit or other proceeding for the recovery of property seized under that Act shall be had or taken unless the

* [Art. 128, schedule II.]

Description of Suit.	Period of limitation.	Time from which period begins to run.
By a Hindu for maintenance.	Twelve years.	When the maintenance sued for is claimed and refused.]

† [Sec. 1, Cl. 13:—To suits to enforce the right to share in any property moveable or immoveable on the ground that it is joint family property; and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate—the period of twelve years from the death of the persons from whom the property alleged to be joint is said to have descended, or on whose estate the maintenance is alleged to be a charge; or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share, or on account of such maintenance, as the case may be.]

same be instituted within one year of the seizure. That section was repealed by Act IX of 1871. But the Court (Sir RICHARD COUCH, C.J., and BIRCH, J.) said, "the right to bring a suit was extinguished and it was not revived by the repeal of the Act" (13 B. L. R., 445 at p. 460). So in a case before Mr. Justice PONTIFEX—*Nocoor Chunder Bose v. Kally Coomar Ghose* (I. L. R., 1 Cal., 328)—the plaintiff sued on a promissory note payable on demand. Under Act IX of 1871, which was in force when the suit was brought, the suit would not have been barred; but under Act XIV of 1859 the suit was already barred on the 1st of April 1873, when Act IX of 1871 came into operation. PONTIFEX, J., said,—“It is impossible for me to hold that plaintiff is not barred now because he has deferred the institution of his suit until after the 1st day of April 1873.” The learned Judge must, therefore, have thought that the debt was extinguished by the operation of the previous Statute.

It has been pointed out to me that s. 60 of the Contract Act appears to proceed upon the principle that a debt barred by limitation is not extinguished, because that section allows a creditor to appropriate the money of his debtor to a barred debt. This provision might certainly appear at first sight somewhat in contradiction with Mr. Justice PONTIFEX's judgment, but I should not be inclined upon the strength of this provision to dispute the propriety of that decision. I would rather treat this provision of the Contract Act as anomalous, and in conflict with the general principles of Indian law. It seems to me that in this country it is essentially necessary to take this view when the policy of the Legislature in matters of limitation has been so unsettled. There have been three Statutes of Limitation in less than twenty years, each laying down rules differing considerably from those of its predecessor. It would create great confusion if every time a new Act of Limitation were passed, rights which were supposed to be barred were again revived: and the great advantage of a law of limitation, that it enables men to reckon upon security from further [335] claim and to act accordingly, would be entirely lost. In my opinion the right of the plaintiff to maintenance having become barred prior to the passing of Act IX of 1871, it was also extinguished, and being extinguished it was not revived by the alteration which this Statute made in the period of limitation applicable to suits of this nature.

The result is, that the judgments of the Courts below must be reversed, and the suit dismissed with costs; and the plaintiff, respondent, must also pay the costs of this appeal.

Prinsep, J.—I have had much doubt regarding the extinction of the right to sue for maintenance merely because the remedy was barred by Act XIV of 1859, for if it has not been extinguished, the bar to a suit has been removed by the present Limitation Act (IX of 1871): but having regard to the terms of the judgment of the Privy Council in *Gunga Gobind Mundul's case* (11 Moore's I. A., 345; s. C., 7 W. R., P. C., 21), and the cases decided by this Court which have just been quoted, I feel that I cannot do otherwise than agree in the order which it is proposed to make. (See *Abdul Kurim v. Manji Hansraj*, I. L. R., 1 Bom., 295; and *Ramchandra v. Soma*, I. L. R., 1 Bom., 305 note).

Appeal allowed.

NOTES.

[DEBT NOT EXTINGUISHED THOUGH REMEDY BE BARRED:—

This case together with (1878) 4 Cal., 283 was overruled in (1880) 6 Cal., 340. See (1876) 1 Mad., 228; (1877) 1 Mad., 301; (1880) 5 Cal., 897.]

[3 Cal. 335]

The 20th December, 1877.

PRESENT.

MR. JUSTICE AINSLIE AND MR. JUSTICE KENNEDY.

Womda Khanum.... Judgment-debtor

versus

Rajroop Koer..... Decree-holder.

[1 C. L. R. 295.]

Mortgage Decree - Appointment of Manager - Execution Sale—

Act VIII of 1859, s. 243.

Section 243†, Act VIII of 1859, does not apply to a decree on a mortgage, when the decree declares that certain property is to be sold in satisfaction of the mortgage debt. A manager, therefore, cannot be appointed under s. 243 in such a case.

THE plaintiff in this case obtained a decree for sale of certain mortgaged property. At the conclusion of the year of grace, [336] execution was taken out for sale of the land in question. The judgment-debtor objected to the sale, and applied for the appointment of a manager under s. 243 of Act VIII of 1859. The lower Court refused the application, whereupon the judgment-debtor appealed to the High Court.

Baboo Amarendra Nath Chatterjee for the Appellant.

Moonshee Mahomed Yusoof for the Respondent.

The judgment of the Court was delivered by

Ainslie, J.—Section 243 does not apply to a decree founded on a mortgage, when that decree declares that certain property is to be sold in satisfaction of the mortgage debt. The creditor's right of sale in such a case rests on the mortgage decree, and not on the attachment in execution. The decree cannot be varied by proceedings in execution thereof. The appeal must be dismissed with costs.

Appeal dismissed.

* Miscellaneous Regular Appeal, Nos. 215, 216 and 217 of 1877, against the order of Baboo Matadin Roy Bahadur, Subordinate Judge of Zilla Gya, dated the 5th of June 1877.

† [Sec. 243:—When the property attached shall consist of debts due to the party who may be answerable for the amount of the decree, or of any lands, houses or other immoveable property, it shall be competent to the Court to appoint a manager of the said property, with power to sue for the debts, and to collect the rents or other receipts and profits of the land or other immoveable property, and to execute such deeds or instruments in writing as may be necessary for the purpose, and to pay and apply such rents, profits or receipts towards the payment of the amount of the decree and costs; or when the property attached shall consist of land if the judgment-debtor can satisfy the Court that there is reasonable ground to believe that the amount of the judgment may be raised by the mortgage of the land, or by letting it on lease or by disposing by private sale of a portion of the land or of any other property belonging to the judgment-debtor, it shall be competent to the Court, on the application of the judgment-debtor for such period as it may think proper to enable the judgment-debtor to raise the amount. In any case in which a manager shall be appointed under this section, such manager shall be bound to render due and proper accounts of his receipts and disbursements from time to time as the Court may direct. (Extended to rent suits by Act XIV, 1868, s. 6).]

When the property attached consists of debt or immoveable property, a manager may be appointed.

Court may postpone sale of land if satisfied that amount of judgment may be raised by mortgage, etc.

Manager to render accounts.

debtor, to postpone the sale

NOTES.

[I. RECEIVER WHEN MORTGAGE DECREED*The Statute law altered : -*

C. P. C., 1908 Sch. I, O. 40, r. 1 corresponding to s. 503 of C. P. C., 1882:

Where it appears to the Court to be just and convenient the Court may by order

(a) appoint a receiver of any property whether before or after decree

(b) remove any person from the possession, or custody of the property,

(c) commit the same to the possession, custody or management of the receiver

It was held in (1902) 7 C. W. N., 152 that this decision lost its value after the statutory change, and that a receiver can be appointed.

II POSTPONEMENT OF SALE :-

The provisions of sec. 305 C. P. C., 1882, were held inapplicable to mortgage decrees, — (1896) 6 M. L. J., 187. This rule has received Legislative sanction, for, in the C. P. C. 1908, Sch. I, O. 21, r. 83 the following clause has been added -

" (3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage or of a charge on such property."]

[3 Cal. 336]

APPELLATE CIVIL.

The 10th December, 1877.

PRESENT :

SIR RICHARD GARTH Kt., CHIEF JUSTICE AND MR. JUSTICE BIRCH.

Gunoo Singh.....Plaintiff

versus

Latufut Hossain and others.....Defendants.

[- 1 C. L. R. 91.]

Mortgage—Covenant not to alienate.

An agreement recited that A had executed a bond in favour of B, in which it was declared, "I promise to repay the whole principal, with interest, in the month of Phalgun, 1271, F. S., and till payment of the amount I will not transfer any property by conditional sale or mortgage." The bond contained no further proviso declaring invalid future alienations of the lands belonging to A, in the manner specified in the bond. *Held*, that the instrument did not operate as a mortgage by A.

Rajkumari Ram Gopal Narayan Singh v. Ram Dutt Chowdhry (5 B. L. R., 264) distinguished.

ON the 1st of Sawan 1270 Fash (30th July 1863) one Doulut Singh lent and advanced certain moneys to the [337] defendant Chatru Singh, and in consideration of the loan Chatru Singh executed a bond for the amount, which also contained the following agreement: "I promise to repay the whole principal, with interest, in the month of Phalgun 1271, F. S. (March 1864), and till the payment of the amount I will not transfer any property by conditional sale or mortgage." On the 15th February 1866, the defendant Chatru Singh, in consideration of moneys lent, by a registered

* Special Appeal, No. 2499 of 1876, against the decree of Baboo Mathura Nath Gupta, First Subordinate Judge of Zillah Bhagalpore, dated the 14th or August 1876, reversing the decree of Moultie Mohamed Nurul Hossein Khan, Munsif of Bagoa Serai, dated the 29th of November 1875.

mortgage bond mortgaged to the present plaintiff certain lands therein specified the property of the said Chatru Singh. Doulut Singh brought an action on the bond, and obtained a decree on the 29th of March, and, in execution of this decree, attached, and on the 7th August 1869 sold by auction-sale, the lands comprised under the last-mentioned mortgage bond. The present suit was instituted for the recovery of Rs. 663-5 principal and interest due on this mortgage bond, by sale of the land comprised therein.

The Lower Appellate Court, overruling the decision of the Court of First Instance, found that the prior bond given by the defendant Chatru Singh to Doulut Singh was in the nature of a mortgage deed, and created a valid charge on the property sold under the decree of the 29th March 1866.

The plaintiff preferred a special appeal.

Baboo *Amarendra Nath Chatterjee*, for the Appellant.

Mr. *R. E. Twidale* and *Moonshe Mohamed Yusoof* for the Respondents.

The judgment of the Court delivered by

Garth, C.J.—In this case we think that the Subordinate Judge has taken a wrong view of the so-called instrument of mortgage. We consider that it did not amount to a mortgage at all, but that it was merely a covenant not to alienate any property of the debtor until payment of the money advanced. The case decided by the Full Bench—*Rajkumar Ram Gopal Narayan Singh v. Ram Dutt Chowdhry* (5 B. L. R., 264)—which has been [338] relied upon by the respondent, is, in our opinion, an authority in favour of the view which we now take. The instrument before the Court in that case referred to a specific property by name; and there were expressions in the instrument which led the Court to think, that the parties intended that property to be pledged. But the Chief Justice in that case expressly says, that if the question there had been whether a bond for payment of money, with a simple covenant not to alienate the obligor's property until payment, constituted a mortgage, he thought that question should be answered in the negative.

Now here we have precisely that case. We have simply a covenant that the debtor, the person borrowing the money, will not part with any of his property until payment of the debt; and we have no such expressions as those which in the Full Bench case induced the Court to hold that the instrument amounted to a mortgage. Those expressions were,—“should we make all these transactions with respect to the said land” (that is, the particular lands which were mentioned in the bond) “the instrument relating thereto shall be deemed invalid, and as executed in favour of nominal parties for evading payment of the money covered by the said land.” In the absence of any such expressions here, we think that the Full Bench decision does not apply, and that this deed merely amounted to a general covenant not to part with any of the debtor's property.

The result will be, that the decision of the Subordinate Judge will be reversed, and the judgment of the Munsif restored with costs in this Court and in the Court below.

Appeal allowed.

NOTES.

[COVENANT NOT TO ALIENATE, NOT A MORTGAGE :—

Followed in (1881) 8 C. L. R., 454. See also the following cases :—(1879) 2 All., 449; (1878) 1 All., 611; (1884) 9 Bom., 233; (1887) 12 Bom., 291; (1890) 12 All., 175.]

[339] *The 11th January, 1878.*

PRESENT :
MR. JUSTICE JACKSON AND MR. JUSTICE KENNEDY.

Gobind Ram Marwary.....Plaintiff
versus
Mathoora Sabooya and others.....Defendants.*

Hundi—Notice of Dishonour.

Previous formal written notice of dishonour of a hundi is not necessary before suit brought, unless it can be shown that the parties charged have been prejudiced by such omission.

THIS was a suit for the recovery of principal and interest on a hundi, drawn by one Chatanki Loll on Maduri Lal of Calcutta, in favour of the defendants Thakoor Ram and Chooti Sahoo. The hundi was afterwards indorsed to Gobind Ram Marwary, the plaintiff, by the defendants Thakoor Ram and Chooti Sahoo. The defendant Mussamut Mathoora Sabooya had been made a party on the allegation that the second and third defendants had in reality indorsed the hundi to the plaintiff under her authorization and behalf. For the defence it was urged (among other matters) that no formal written notice of dishonour had been served. The Court of First Instance overruled the point as to notice of dishonour, but found for the defendants as regards another issue on the facts. The Lower Appellate Court, on the alleged authority of *Jeetun Loll v. Sheo Churn* (2 W. R., 214), *Radha Gobind Shaha v. Chunder Nath Doss Shaha* (6 W. R., 301), and *Anunt Ram Agurwala v. Nuthall* (21 W. R., 62), held, that formal notice of dishonour was necessary before suit brought, and on this ground alone dismissed the appeal, giving no judgment on the question of fact. The parties appealed specially to the High Court.

Messrs. *R. E. Twidale & M. L. Sandel* for the Appellant.

[340] Baboo *Taruck Nath Sen* for the Respondents.

Jackson, J.—The Lower Appellate Court dismissed the appeal of the plaintiff, and, it may be said, virtually dismissed his suit, on the ground that notice—that is to say, formal written notice—of dishonour had not been served on the defendants. Now, neither the case which the Lower Appellate Court cites, *Anunt Ram Agurwala v. Nuthall* (21 W. R., 62), nor any other case, has been brought to our notice which decides that in this country either a written formal notice of dishonour is necessary, or that the absence of such a notice would be a sufficient defence unless it is shown that by such absence the defendant has been prejudiced. So far, therefore, the judgment of the Lower Appellate Court appears to be erroneous, and must be set aside. [The learned Judge then proceeded to consider the other points in the case, and with reference to them, the case was remanded to the Lower Appellate Court.]

Case remanded.

NOTES.

[NOTICE OF DISHONOUR IN RESPECT OF HUNDIS :—

The Negotiable Instruments Act, 1881, enacts as follows :—

Sec. 80.—The drawer of a bill of exchange or cheque is bound in case of dishonour by the drawee or acceptor thereof to compensate the holder, provided due notice of dishonour has been given to or received by the drawer as hereinafter provided.

* Special Appeal, No. 670 of 1877, against the decree of Baboo Mathoora Nath Goopta, First Subordinate Judge of Bhagalpore, dated the 19th December 1876, affirming the decree of Baboo Lalgopal Sen, Sudder Munsif of that district, dated the 29th of August 1876.

Sec. 93 :—When a promissory note, bill of exchange or cheque is dishonoured by non-acceptance or non-payment, the holder thereof or some party thereto who remains liable thereon must give notice that the instrument has been so dishonoured to all other parties whom the holder seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon.

Nothing in this section renders it necessary to give notice to the maker of the dishonoured promissory note or the drawee or acceptor of the dishonoured bill of exchange or cheque.

These provisions are applied in the case of hundis by the Bombay High Court in the absence of usage to the contrary : 24 Bom., 488 and by the Allahabad High Court as reasonable rules : 6 All., 78. See also (1883) 12 C. L. R., 333 as to the requirement to give notice of dishonour.].

[3 Cal. 340]

ORIGINAL CIVIL

The 12th February and 4th March, 1875.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR JUSTICE MARKBY.

Eliza SmithPlaintiff

versus

The Secretary of StateDefendant

In the Matter of Act II of 1874

Res Judicata - Civil Procedure Code (Act X of 1877), s. 13 - Application under the Administrator-General's Act (XXIV of 1867), s. 60 - Act II of 1874, s. 63 - "Smt."

An application by petition under s. 63 of Act II of 1874 is a suit within the meaning of s. 13* of Act X of 1877, and therefore such an application is barred by the disposal of a former application in the same matter under the same section, or under s. 60† of Act XXIV of 1867, which the Act of 1874 repeals—this is so whether the order is one for payment of money or one dismissing the petition.

* [Sec. 13.—No Court shall try any suit or issue, in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title.]

Res judicata.

† [Sec. 60.—If any claim shall be hereafter made to any part of the securities, moneys, or proceeds which shall be carried to the account or credit of the Government of India under the provisions of this Act, and if such claim shall be established to the satisfaction of the Comptroller-General or the Accountant-General to the Government of Fort St. George, or Bombay, as the case may be, the Govern-

ment of India shall pay to the claimant the amount of the principal so carried to the credit and account of the said Government of India or so much thereof as shall appear to be due to the claimant. If the claim shall not be established to the satisfaction of the said Comptroller-General or Accountant-General, as the case may be, the claimant may apply by petition to the High Court at the Presidency town against the Secretary of State for India, and after taking evidence, either orally or on affidavit in a summary way, as the said Court shall think fit, the said Court shall make such order on the petition for the payment of such portion of the said principal sum as justice shall require, and such order shall be binding on all parties to the suit.]

S. 63, Act II of 1874,* contemplates that the money which is the subject of the petition may be claimed by parties other than the applicant, and that [341] those parties may appear and be represented at the hearing; and the words "binding on all parties" were intended to make the order binding upon such parties as well as on the petitioner.

The order passed under that section can be reviewed under s. 623 of Act X of 1877.

APPEAL from a decision of KENNEDY, J., dated the 26th of November 1877. From the petition it appeared that, on the 24th of June 1873, the petitioner, Eliza Smith, applied under Act XXIV of 1867 for an order that the defendant should pay to her the sum of Rs. 82,695-8-11, or such other sum as should be in his hands, to the credit of the estate of R. J. H. Magness, deceased, whose niece the petitioner claimed to be. On that hearing an order was made adjourning the hearing, and directing the defendant, out of the moneys in his hands belonging to the estate of the said R. J. H. Magness, to pay to Messrs. Robertson, Orr, Harris and Francis, the petitioner's Attorneys, Rs. 1,000, for the travelling and other expenses of the petitioner and her witnesses to attend before the Court for examination. The further hearing of the application took place on the 8th of July 1873, when witnesses were examined in support of the application: and after hearing evidence, the Judge (MACPHERSON, J.) expressed his opinion that the petitioner had not proved her identity, and on that ground refused the application. On the 22nd of December 1873, the petitioner applied to the Court to review the former decision, or to grant her leave to renew the application, but that application was refused.

The petitioner subsequently discovered further evidence in the matter, having met with a Mr. DuBois, whom she had previously known, and who recognized her and who made an affidavit in her favour.

The petitioner, with this additional evidence, again applied on the 10th of April 1874 for a rule calling on the Secretary of State to show cause why a review should not be granted, and MACPHERSON, J., made an order that the petitioner should be at liberty to renew her application for payment to her of the moneys in the hands of the defendant belonging to the estate of R. J. H. Magness on notice to the defendant of such application.

[342] On the 10th of August 1874, the petitioner, in accordance with the leave reserved, renewed her application before PONTIFEX, J., who ordered that it be dismissed with liberty to the petitioner to renew the application before MACPHERSON, J. The application was accordingly renewed before MACPHERSON, J., on the 17th of August 1875, who, not being satisfied with the affidavit of DuBois, dismissed the application. The application on which the order

* [Sec. 63:—If any claim be hereafter made to any part of the securities, moneys, or proceeds

carried to the account and credit of the Government of India under the provisions of this Act, and if such claim be established to the satisfaction of the Comptroller-General or the Accountant-General to the Government of Port St. George or Bombay, as the case may be, the Government of India shall pay to the claimant the amount of the principal so carried to its account and credit or so much thereof as appears to be due to the claimant.

Mode of proceeding by claimant to recover principal money so transferred.

If the claim be not established to the satisfaction of the said Comptroller-General or Accountant-General, as the case may be, the claimant may apply by petition to the High Court at the Presidency town against the Secretary of State for India, and, after taking evidence either orally or on affidavit in a summary way as the Court thinks fit, the Court shall make such order on the petition for the payment of such portion of the said principal sum as justice requires, and such order shall be binding on all parties to the suit, and the Court may direct by whom the whole or any part of the costs of each party shall be paid.]

appealed from was made on further affidavits of a Mr. Johannes and Mr. Patterson, which, she submitted, corroborated the evidence of Mr. DuBois.

The petitioner applied on the 29th of October 1877 to the Comptroller-General by letter enclosing copies of all her evidence, and received in reply a letter stating that the money would not be paid out to her without an order of Court.

On her application, the following judgment was delivered :—

Kennedy, J.—In this case it seems to me that one of the principles which operate in inducing the Courts to view with the greatest possible disfavour attempts to reargitate a case once decided applies with more than ordinary force.

The application is one to get out money transferred to Government under the provisions of an Act which contemplates such transfer not being made till after the lapse of very many years. Therefore, in all cases the applications must refer to circumstances at a very distant date. Now lapse of time tells with more deteriorating influence against a true than a false case. The man who tells what he remembers, tells it with greater hesitation and risk of falling into error in proportion to the time that has elapsed. It is not so where a case is not based on memory but on imagination. Here the applicant had an opportunity of coming into Court, making her application and producing all the evidence available, which failed to induce the Judge who tried the case to believe her story. I cannot say that he decided absolutely that her case was false, but he reserved no leave for further application, and at least declined to decide it to be true; and the question would (to put it at the very best for the petitioner) still remain, is her case false or true? Now if it be [343] a false case, it would be most dangerous to give her the opportunity of improving the imperfect evidence, and thus making it appear true, especially after the lapse of years had rendered it impossible to produce contradictory evidence, and this danger is one of the reasons for refusing again to agitate a decided issue. On these grounds, as well as on the ground of the necessity for finality, I should have been inclined to think that the ordinary principle of estoppel applies to such applications.

I do not, however, think that I am left to these considerations. The new Procedure Code incorporates all summary and miscellaneous proceedings by directing the procedure thereby prescribed to be followed in all civil proceedings other than suits and appeals, and by the 13th section, wherever an issue has been determined between the parties, that issue cannot be raised in any other proceeding between them. This is an express provision, as it seems to me, to refuse the application. The application is refused with costs.

From this decision the petitioner appealed, on the ground that s. 13 of Act X of 1877 did not apply to the application so as to prevent the Court from entertaining it; that the refusal of the petitioner's previous applications did not preclude her from making any fresh application in this matter on additional evidence, inasmuch as such previous applications were refused simply on the ground that the Court was not satisfied of the identity of the petitioner as niece of the said Captain Magness, and not on the ground that it was of opinion that the petitioner was not the party she represented herself to be; and that the Court ought to have heard and decided the application, inasmuch as it was based on additional evidence and on the fresh refusal of the Comptroller-General on such evidence, to admit the petitioner's claim without an order of a Court of Justice.

Mr. Jackson (Mr. Branson with him) contended that the application was not barred by s. 13, Act X of 1877, not being a suit within the meaning of that section; and referred to a former case—*Joyrance Dossee v. The Secretary of State* (unreported)—in which two applications were allowed to be made. Act II [344] of 1874, s. 63, says that the Court may make such order "for payment of such portion of the claim as justice requires."

[The Advocate-General.—I read these words as descriptive of the petition, and not as referring to the order the Court may make.] It is submitted they refer to the nature of the order to be made. Under that section an order refusing payment of any portion would not be binding, as it is not an order for payment. It is in the discretion of the Court to allow any number of applications. If it is of opinion they were improper applications, it has power now, under Act II of 1874, to deal with them in their order as to costs, and not to give costs, or to give them against the applicant. An appeal is precluded in cases where an "order for payment" is made. [MARKBY, J. Might not the word "binding" have been introduced to bind the Crown, which might otherwise have been considered not bound. In that view it would not bar an appeal.] It is submitted it was intended to bar an appeal in a case supposed by the section: this is not such a case. Any number of applications can be made in case of discovery of fresh evidence. This is an application which it is in the discretion of the Court to grant.

The Advocate-General, Officiating (Mr. Paul) and the Standing Counsel (Mr. J. D. Bell) for the respondent were not called on.

The judgment of the Court was delivered by

Garth, C. J.—This was an appeal against an order of Mr. Justice KENNEDY, dismissing an application made by the plaintiff under s. 63 of Act II of 1874.

His Lordship considered that as a previous application of precisely the same nature had been made under the repealed Administrator-General's Act (No. XXIV of 1867, s. 60) to enforce the same claim, and which had been heard and decided against the applicant, she was barred by s. 13 of the new Civil Procedure Code (Act X of 1877) from renewing the application.

There is no doubt that, in the years 1871 and 1872 Mrs. Smith did apply to the Court under Act XXIV of 1867 to obtain the [345] sum now claimed, which application was refused; and that, in the year 1873, another application for the same sum was made by her to Mr. Justice MACPHERSON, which was also refused.

A further application for a review of his order was then made to Mr. Justice PONTIFEX, which was unsuccessful, and another similar application was afterwards made to Mr. Justice MACPHERSON, which was also unsuccessful.

The application to Mr. Justice KENNEDY was made on the 26th of November last, upon certain fresh evidence, which, it was said, supplied the defects which had previously induced the Courts to decide against the applicant; and it has now been contended before us—

1st.—The application is not a suit within the meaning of s. 13 of Act X of 1877, and consequently that the applicant is by law entitled to repeat the application as often as she thinks proper: and

2ndly.—That if it were a question for the discretion of the Court to rehear the application or not, the learned Judge ought, in the exercise of that

discretion, to have reheard the case, inasmuch as the new evidence, now brought, before the Court, was such as the applicant could not, by using reasonable diligence, have procured before.

It will not be necessary for us to enter upon this last point, because we think, upon consideration, that Mr. Justice KENNEDY was quite right in deciding that the application was barred under s. 13. It is the first time we believe that the question has been raised since the passing of the new Code, and it is desirable that it should be settled by an Appellate Court.

Section 13 provides "that no Court shall try any suit or issue in which the matter in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties"

Now there is no doubt here that the matter in issue, which is the claim made by Mrs. Smith to the fund in question, has been decided in the former application as between her and the Secretary of State, but then it is said, in the first place, that this is not a "suit" properly so called; and in the next place, that the issue in the former case was not finally decided, [346] because the only order made upon the application was one dismissing the petition.

The 63rd section of Act II of 1874 (which is in the same terms precisely as s. 60 of the repealed Act XXIV of 1867) enacts "that, on the application being made, the Court shall make such order for payment of such portion of the sum claimed as justice shall require, and that such order shall be binding upon all parties to the suit."

It seems clear from the language here used that the proceeding for which the section provides is to be considered a summary "suit", but the appellant contends that the order made by the Court is not to be binding upon anybody unless it is one for payment of the whole or some portion of the money claimed, or, in other words, that the decision of the Court is to bind the Secretary of State if the applicant succeeds, but that it is not to bind the applicant if the Secretary of State succeeds.

We consider that this is not the true meaning of the section, and that the words "binding upon all parties to the suit" were inserted with a different intention altogether from that which the appellant would ascribe to them. The section contemplates that the money, which is the subject of the petition, may be claimed by parties other than the applicant; and that those parties may appear and be represented at the hearing, although they may not have joined in the petition; and the words in question appear to be inserted for the purpose of making the order of the Court binding upon those other parties as well as upon the petitioner.

We think, therefore, *first*, that this proceeding must be considered as a "suit", and *secondly*, that the issue raised in it having been once decided as between the appellant and the Secretary of State, no fresh suit or application can be made which raises the same issue.

This rule need be productive of no injustice, because, if the proceeding is a suit, there is no reason why the order made upon it should not be reviewed under s. 623 of the Code; and we are not prepared to say that Mrs. Smith, if an application upon sufficient grounds were made in this case to the Court below

[347] would not be entitled to a review. That, however, would be a matter entirely in the discretion of the learned Judge who hears the application, and we give no opinion upon it.

The appeal is dismissed with costs.

Appeal dismissed.

Attorney for the Appellant : Mr. *Lestie*.

Attorney for the Defendant. - The Government Solicitor Mr. *Sanderson*.

NOTES

[RES JUDICATA- 'SUITS,' WHAT ARE :--

See as to what are suits within the provisions of the Civil Procedure Code, relating to *Res Judicata*, *Manju Nath v. Venkatesh*, 6 Bom. at 61, 7 All. at 252, 2 All. 294

MISCELLANEOUS PROCEEDINGS--

Will be 'suits' within the meaning of the *Res Judicata* rule when they are treated as such by the Legislature. - See 25 Cal., 116 (under Bengal Tenancy Act) 20 Cal., 395 (proceedings under the Probate and Administration Act) 19 Bom., 821.]

[3 Cal. 347]
APPELLATE CIVIL.

The 21st December, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MARKBY, AND
MR JUSTICE AINSLIE.

In the matter of Thomson's Policy.

*Stamp Act (XVIII of 1869), ss. 34¹, 41,¹ Sch. II, cls. 5, 20 — Policy of
Assurance—Assignment and Re-transfer by Endorsement.*

A policy of insurance bore three endorsements: the first, an assignment of all the right, title, and interest of the assured to the P Bank; the second, a re-transfer from the P Bank to the assured, all claims having been satisfied, the third, an assignment by the assured similar to the first assignment to Messrs. B. R. S. and Company.

* Reference from the Secretary to the Board of Revenue, N.-W. Provinces, under s. 41 of Act XVIII of 1869, dated the 20th August 1877.

†[Sec. 34. —(a) When any moveable or immoveable property is sold, the full consideration-money directly or indirectly paid or secured, or agreed to be paid or secured, for the same, shall be truly set forth in words at length in the principal or only instrument whereby the property sold is conveyed to, or vested in, the purchaser or in any other person by his direction.

(b) When any property is sold and conveyed subject to any mortgage or bond or other debt, or to any gross or entire sum of money, such debt or sum shall be deemed the consideration-money or part of the consideration-money (as the case may be) in respect whereof the duty chargeable under the 1st schedule to this Act shall be paid, notwithstanding the purchaser is not or does not become personally liable for such debt or sum, or does not agree to pay the same or to indemnify the seller against the same.

(c) If the full consideration-money is not set forth as aforesaid, the purchaser and the seller shall each be liable to fine not exceeding five hundred rupees, and shall also pay a fine of five times the amount of the excess of duty with which such instrument would have been chargeable under this

* Act, if the full consideration-money had been duly set forth in such instrument, in addition to the duty actually paid for the same.]

‡[Sec. 41. —(a) The Chief Controlling Revenue Authority may state any case coming before it under this Act and refer such case with its own opinion thereon, if the case arise in the Presidency of Fort St. George or the Presidency of Bombay, to the local High Court, and if it arise in any other part of British India, to the High Court at Fort William.

(b) Every such case shall be decided by at least three Judges of the High Court to which it is referred, and in case of difference the opinion of the majority shall prevail.

(c) If the High Court is not satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the Court may refer the case back to the Revenue Authority by which it was stated to make such additions thereto or alterations therein as the Court may direct in that behalf.

(d) The High Court upon the hearing of any such case shall decide the questions raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded; and it shall send to the Revenue Authority by which the case was stated, a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Revenue Authority shall, on receiving the same, dispose of the case conformably to such judgment.]

Held by MARKBY and AINSLIE, JJ., that the first and third endorsements were liable, as collateral instruments under Sch. II, cl. 20* of the General Stamp Act, to a stamp of one rupee, and that the second endorsement was not chargeable with stamp duty :

Held by GARTH, C.J., that none of the endorsements were chargeable with duty.

THIS was a reference made by the Board of Revenue, North-Western Provinces, to the High Court, under s. 41 of Act XVIII of 1869. The facts of the case were as follows :—A policy of assurance for Rs. 3,000, issued by the Indian Life Assurance Co., [348] Limited, in favour of one William McGregor Thomson, bore the three following endorsements :

" I do hereby assign all right, title, and interest in the within Life Policy " for Rs. 3,000 to the Punjab Bank, Limited

(Sd.) W. MCGREGOR THOMSON.

" 15th March 1872 "

" All claims of the Bank under this policy security having been satisfied, " it is hereby retransferred to Mr. William McGregor Thomson as fully as if it " had never been transferred to this Bank.

(Sd.) T. D. P. MASSON,

Punjab Bank, Limited.

" 1st September 1874."

" I hereby assign all right, title, and interest in the within Life Policy for " Rs. 3,000 to Messrs Bheem Ray Sons and Co.

(Sd.) W. MCGREGOR THOMSON.

" 15th March 1875."

The question for the consideration of the High Court was, whether these endorsements should be stamped, and, if so, what stamps they should bear ?

The Advocate-General, offg (Mr. Paul) and the Legal Remembrancer (Mr. H. Bell) for the Government.

The following judgments were delivered :—

Markby, J. (AINSIE, J., concurring).—Even if we assume that the transfer of a policy of insurance is a conveyance of property situate in British India so as to be *prima facie* chargeable under art. 15, sch. I of the Stamp Act (as to which we express no opinion), still the difficulty arises with regard to the endorsements which the Board of Revenue consider ought to be stamped as conveyances, that it is impossible to say that any specific sum was paid as consideration for either of these transactions.

[349] Under s. 34† vendor and purchaser, in cases of sale, are both required to set forth truly in words the full consideration-money directly or indirectly paid or secured, etc., etc., under certain penalties for failure to do so. Section 11 is restricted in its application to bonds, mortgage-deeds or settlements, and in the case of a conveyance, an option as to the amount of stamp to be used with a corresponding limitation of the rights secured by the instrument, is not allowed.

* [Cl. 20 :—Bond or mortgage-deed executed as a collateral security for the perform- } Proper
ance of any act, where such performance is secured by some instrument : Stamp
previously executed on stamped paper in accordance with the law in force }
in British India at the time of its execution. } Duty-Two
Rupees]

† [Sec. 34—q. v. *supra* I. L. R., 3 Cal. 347.]

It appears to us that no penalty could be imposed under s. 34, and that no Court could refuse to receive the instruments before us under s. 18.

The fact is, that the first (and presumably the third instrument) was only an assignment by way of collateral security without any consideration, capable of being settled as a sum of money. The consideration for the assignment was apparently a promise to advance money, such loan being primarily secured by a bond separately chargeable with stamp duty. The money paid was not paid as purchase-money of the endorser's interest in the policy.

Nothing was intended to be paid as purchase-money, the whole sum paid was intended to be refunded to the payer. No doubt if the debtor should die before the repayment of the debt, and if the creditor should find it necessary to fall back on the policy for satisfaction thereof, it may be said that he will eventually pay the undischarged balance of the loan, *plus* the premia paid on the policy subsequent to its assignment, as the price of such assignment; but it is clear that in this view nothing was ever paid in respect of the first assignment, and no one could specify in respect of it or of the third endorsement at the date of its execution (which is the date on which the instrument must be stamped) that anything ever would or will be paid. It follows, that the penal provisions of ss. 18 and 34, which refer to an instrument not properly stamped *at the time of execution*, failed to touch such instruments, for no Court and no Collector can say that an instrument is improperly stamped unless it or he can state what the proper stamp should have been.

We, therefore, think that the first and third endorsements are not chargeable with stamp duty as 'conveyances.' Nor do we consider that the second endorsement is chargeable as the [330] acknowledgment of the satisfaction of debt. It is a retransfer of the policy, and nothing more. It merely recites the fact that the debt has been satisfied in order to explain under what circumstances the policy is retransferred.

As collateral instruments not otherwise provided for, the first and third endorsements are, supposing the transaction such as above stated, liable to a stamp of one rupee. The other endorsement is, in our opinion, not chargeable with stamp duty.

Garth, C.J.—I am of opinion that none of the instruments in question endorsed on the policy of assurance are chargeable with duty. I consider that they are not chargeable as 'conveyances' because the policy of assurance which they purport to transfer, is not 'property' within the meaning of the Stamp Act. It is merely a contract by the assured with the insurance office, which may or may not, according to circumstances, prove a beneficial one to the former. Such a contract, in my opinion, is not included in the definition "property existing in British India."

Even assuming that such a transfer were a conveyance of property within the meaning of the Act, I consider that it would not be chargeable with duty for the reasons given by my learned brothers.

As regards the second instrument, I think it is not chargeable as an acknowledgment of the satisfaction of a debt, because it does not appear that any debt to the Bank had been satisfied, or that the claims alluded to were debts, or in the nature of debts, or that the amount of the claims, whatever they were, exceeded Rs. 20.

It is possible, no doubt, that the first and third instruments may have been collateral securities; but we have no information to guide us as to whether

they do properly come under that description or not, and I feel very strongly that, in giving an opinion upon questions submitted to us by the Board of Revenue, which may serve in the future as "guide to the Board in imposing" taxes upon the public, we are bound to advise upon the *actual facts before us*, and have no right to speculate upon the possible nature of transactions, of which we have no certain knowledge.

NOTES.

[STATUTORY CHANGE.—

The Stamp Act I of 1879 included among exempted transfers "*transfers by endorsement of a policy of insurance*" extending the exemption in the Act of 1869 to every kind of transfer whether consideration is mentioned or not. See the Stamp Act, 1899, Sch. I, Art. 62, cl. (c).

Interest on policy of insurance is provided for in Stamp Act, Schedule I, Article 62.]

[354] APPELLATE CIVIL.

The 7th December, 1877.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE MITTER.

Mahtab Chunder Bahadoor, Maharajah of Burdwan.....Judgment-debtor
versus

Ram Lall Mookerjee.....Decree-holder.

[1 C. L. R. 158].

Execution of Decree—Interest on Costs.

When a decree gives interest upon the principal sum recovered only, and no mention is made as to interest on costs, the successful party is not entitled to such interest.

THE facts of the case so far as they are material to this report are as follows :—On the 21st June 1876, the Judge of Burdwan passed a decree against the Maharajah of Burdwan, ordering him to pay the decree-holder (the respondent) a certain claim which had been proved against him, together with interest at 5 per cent. and costs.

The decree-holder executed his decree for costs and interest, whereupon the Maharajah made an objection to the payment of interest on the costs, on the ground that the decree was silent as to that point.

The Subordinate Judge overruled the objection, and the Maharajah thereupon preferred the present appeal.

Baboo Jugadanund Mookerjee (with him Baboos Chunder Madhub Ghose and Bussunt Coomar Ghose), for the appellant, contended that the Court below was in error in awarding interest on costs when the decree was silent on the subject; and cited *Mosoodun Lal v. Bheekarre Singh* (6 W. R., F. B., Mis. Rul., 109), *Ulfutunnissa v. Mohan Lal Sukal* (6 B. L. R., App., 33), *Amceeroonissa Khatoon v. Meer Mahomet Mozaffir Hossein Chowdry* (18 W. R., 103), *Sadasiva Pillai v. Ramahnya Pillai* (L. R., 2 I. A., 219), *Rajah Leelanund Singh v. Maharajah Joy Mungul Singh* (15 W. R., 335).

* Miscellaneous Regular Appeal, No. 209 of 1877, against the order of the Subordinate Judge of Zilla Hooghly, dated the 11th of May 1877.

[352] Baboo Shamlail Mitter, for the respondent, argued, that the Subordinate Judge rightly overruled the objection that was made as to the non-payment of interest on costs, and quoted *Digamburree Dabee v. Nundgopal Banerjee and Jugodumb Dabee* (1 W. R., Mis. Ap., 1), *Kirkland v. Modde Pestonjee Khoorsedjee* (3 Moore's I. A., 227), *per* KNIGHT BRUCE, V. C., as authorities showing that interest had been allowed on costs; and *Rajah Leelanund Singh v. Maharajah Luckmissur Singh Bahadoor* (13 Moore's I. A., 490), as analogous to such decision.

The judgment of the Court, delivered by MITTER, J., so far as it is material to this report, was as follows —

Mitter, J.—In this case two objections have been raised before us in appeal: *First*, that the judgment of the lower Court is wrong in allowing interest upon costs when the decree does not expressly award it. *Secondly*, that the lower Court was not right in awarding interest upon the principal sum decreed after the 18th September 1876, when the judgment-debtor deposited the money due from him in the Collector's office, and that at any rate the lower Court should not have awarded interest after the date when the Collector of Burdwan by a roohocary informed the Court that he had no objection to pay the money deposited to the decree-holder.

As regards the first question, although it seems that the practice of the Court was not uniform for some time upon this matter, the later decisions establish that this Court has refused to allow interest upon costs in cases where the decree is silent about it. Of those latter cases *Ulfutunnissa v. Mohan Lal Sukul* (6 B. L. R., App., 33) and *Amcerounissa Khatoon v. Meer Mahomet Mozaffir Hossein Chowdry* (18 W. R., 103) are clearly in point. We think that these decisions are in accordance with the principle laid down in the Full Bench decision (6 W. R., F. R., Mis. Rul., 109). Following these decisions, we therefore think that the judgment of the lower Court upon this point is not right. The judgment creditor is not entitled to interest upon the costs awarded in the decree.

[353] The learned Judge then proceeded to consider the other objection, which is not material to this report.

Markby, J.—I concur.

• *Appeal dismissed.*

NOTES.

[See the case of *Forrester v. The Secretary of State for India in Council* (1877) 3 Cal. 161 P.C.]

[3 Cal. 353]

ORIGINAL CIVIL.

The 25th January and 11th February, 1878.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MARKBY.

Hemendro Coomar Mullick, son of Rooplall MullickPlaintiff.

versus

Rajendrolall Moonshoe and another.... Defendants.

[—1 C. L. R. 488]

Joint contractors, Suit against—Res judicata—Contract Act (IX of 1872), s. 43.

A suit in which a decree has been obtained against one of several joint makers of a promissory note, is a bar to a subsequent suit against the others. The effect of s. 43* of the Contract Act is not to create a joint and several liability in such a case. That section merely prohibits the defendant in such a suit pleading in abatement, and thus places the liability arising from the breach of a joint contract and the liability arising from a tort on the same footing.

The rule laid down in the case of *King v. Hoare* (13 M. & W., 491, 505), and *Brinsmead v. Harrison* (L. R., 7 C. P., 547), is one of principle, not merely of procedure.

APPEAL from a decision of KENNEDY, J., dated the 20th of August 1877. The suit was brought to recover the sum of Rs. 1,000, with interest at 12 per cent. per annum, due on a promissory note payable on demand, made in Calcutta by one Gourhurry Shaw, in his name and in the names of his partners, the defendants, on the 20th of November 1873. The plaintiff, on the 2nd September 1874, brought a suit against the two present defendants and Gourhurry Shaw on the promissory note, and in that suit the defendants did not appear. The suit was heard as an undefended suit, and the plaintiff obtained a decree against the defendant Gourhurry alone for the whole amount of the note, the decree ordering that the suit should be withdrawn as against the two present defendants with liberty [354] to the plaintiff to bring a fresh suit against them for the same matter. No satisfaction of the decree having been obtained, the present suit was brought to recover the amount against the two defendants as to whom the suit had been withdrawn.

At the hearing the preliminary question was suggested by the Court that the suit was not maintainable, and after argument the suit was disposed of on this point.

Any one of joint promisors may be compelled to perform.

Each promisor may compel contribution.

Sharing of loss by default in contribution.

* [Sec. 43:—When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.]

Kennedy, J.—In this case I am asked to hold that the 43rd section of the Contract Act converts into a joint and several promise every joint contract, because it makes in the absence of special agreement every joint contract enforceable against any one of two or more joint promisors. I cannot hold that. The Statute makes no further alteration than it professes to do: it leaves the law without the slightest change, except that it abolishes the plea in abatement for non-joinder of defendants in the very cases in which it was available in the later state of the law. Before the Contract Act the promisee could compel one of the promisors to perform a joint and several promise, unless he was met by the plea in abatement; and when he was compelled to make them all parties, yet so soon as judgment was recovered, he could enforce it against any one of them: and we must remember that the question of pleading really had little, if anything, to do with the objection. The language of PARKE, B., in *King v. Howe* (13 M. & W., 491, 505) puts the reason in a very clear light. He says:—"We do not think that the case of a joint contract can in this respect be distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tortfeasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case and not in the other; but for the purpose of this decision they stand on the same footing, whether the action is brought against one or two, it is for the same cause of action. The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense; that if sued severally, and he does not plead in abatement, he is liable to pay the entire debt: but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all and the several bonds of each of the obligors, and gives different remedies to the obligee." And he proceeds at p. 506, after a reference to the effect of a plea in abatement—"These considerations lead us quite satisfactorily to our own minds to the conclusion that where judgment has been obtained for a debt as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party."

This decision was referred to and upheld in *Brinsmead v. Harrison* (L. R., 7 C. P., 547), affirming the judgment of the Common Pleas (L. R., 6 C. P., 584). Indeed, that being the case of a tort, is somewhat stronger, as in that case a plea in abatement for non-joinder of a defendant could never have been maintained.

How does the question now stand affected by the Contract Act? I confess myself to be wholly unable to see that, except so far as the question of pleading, it has made any difference in the liabilities of the parties. There was a decision of *Ram Nath Roy Chowdry v. Chunder Seckur Mohapattur* (4 W. R., 50), which might seem favourable to the plaintiff's contention. It is not very clearly reported, but it would seem that the bond there was executed only by one party, the person first sued, and the subsequent suit only based on a supposed equitable liability of the defendant. However that may be, the decision was afterwards considered in a case before Sir R. COUCH and AINSLIE, J.—*Nuthoo Lall Chowdry v. Shoukee Lall* (10 B. L. R., 200)—in which the Court dissented from the case of *Ramrutton Roy* (4 W. R., 50), which was a decision of the majority (E. JACKSON and TREVOR, JJ., against STEER, J.), and it was there laid down in express terms (see p. 204) that if there be a joint contract, not a joint and several but a joint contract, and the party sues upon it and gets judgment, he cannot bring a fresh suit against the parties [356] who were jointly

liable but were not included in the former suit. This is a direct decision of the Appellate Court, and the language of the Statute by no means contemplates successive suits. This very case shows the necessity of such a rule. A speculative attorney might bring three suits instead of one, and I am bound to put the construction in the language of the Statute, which prevents such an abuse as this—an abuse in the possibility of which KELLY, C.B., much relies in *Brinsmead v. Harrison* (L. R., 7 C. P., 547). The plaintiff may select one. He may sue all, but he cannot do both, he must make this selection and abide by it.

In this case, to use the words of Lord Justice TURNER in *Ex parte Higgins* (3 De Gex & J., 38), the plaintiff has made his deliberate election to pursue his remedy "against one debtor, and that having failed, he is now attempting to have recourse to the others"; and I must, therefore, dismiss this suit against the now defendants with costs on scale 2. The order withdrawing the suit against these defendants with liberty to sue again made as it were behind the backs of these defendants cannot in any way prejudice them.

From this decision the plaintiff appealed. The appellant having died pending the appeal, his son was substituted as a party appellant in the suit.

The ground of appeal was "that the Court was in error in holding that the suit could not be maintained by reason of the judgment recovered in the former suit, the said judgment remaining and being unsatisfied, and leave having been by the said judgment reserved to the plaintiff to bring a fresh suit against the present defendants."

Mr. Hill (Mr. Bonnerjee with him) for the appellant contended that the suit was not barred. The effect of s. 43 of the Contract Act was to make each one of several joint contractors severally liable; to make every joint contract in fact a joint and several one. Since that Act the case of *King v. Hoare* (13 M. & W., 494, 505) as to a suit against one of two joint debtors being a bar to a suit [357] against the others, would not be law here. Nor would it in England since the passing of the Judicature Act; see the Schedule Order 19. The contract if joint is a contract that the creditor may sue the debtors jointly or severally, but each debtor has a right to refuse to be sued alone by pleading in abatement; see *per* ALDERSON, B., in *King v. Hoare* (13 M. & W., 494, 505), at p. 498. By Statute 3 & 4 Will. IV, c. 12, the plea in abatement was abolished as to a co-contractor out of the jurisdiction, and in *Henry v. Goldney* (15 M. & W., 494) the effect of such abolition was said to be "to make contracts joint and several which at first were joint only," see *per* POLLOCK, C.B., at p. 199; and that is precisely what I contend is the effect of s. 43 of the Contract Act. Subject to the plea in abatement, "a joint bond is the bond of both obligees, and each of them is bound in the whole"—*Richards v. Heather* (1 B. & Ald., 33), *Whelpdale's Case* (3 Coke's Rep., Part V, 119). And where any part of the demand on a joint and several bond remains unsatisfied, you can sue the other of two co-contractors, though judgment has been obtained against one—*Lechmere v. Fletcher* (1 C. & M., 623) (GARTH, C.J.—In the case of tortfeasors you can only sue once.) A case of tort is different, there is only one cause of action. In case of contract there are many, see s. 43 of the Contract Act. s. 43, illus. (a). [MARKBY, J. referred to *Nathoo Lall Chowdry v. Showkee Lall* (10 B. L. R., 200). How do you get rid of that case?] That case draws a distinction between joint contract and joint and several contract, and it was, moreover, decided before the Contract Act. [MARKBY, J. —Did the Contract Act do more than bring the law in the Presidency towns into the same state as in the mofussil? I never heard of a plea in abatement in the mofussil, though the

judgment in that case seems to assume there was.) Several causes of action are created by the contract which nothing done by the plaintiff can defeat. It is submitted that the effect of the plea in abatement by s. 43 is the same as it was held to be in England in the abolition of that plea as to a co-debtor out of the jurisdiction. As to that see *Joll v. Curzon* (4 Com B., 245). [GARTH, C. J. — The abolition of the plea [358] in abatement by s. 43 of the Contract Act seems to me to leave the case of a contract in the same position as the case of a tort; and as to torts, the question has been decided by the case of *Brinsmead v. Harrison* (L. R. 7 C. P., 547).] In cases of tort the injury sustained by the person complaining is the whole cause of action; the cause of action is whole and undivided. In cases of contract, the cause of action is a breach by A when we sue him; a breach by B when we sue B, and so on there are several causes of action. There is no *res adjudicata* here to prevent this suit from being maintained. The only *res adjudicata* is under s. 2, Act VIII of 1859. But here the cause of action and the parties are not the same as in the former suit. In the former suit it was decided that Gourhurry Shaw had broken the contract: that is not the question here. Here also there is no merger: no extinguishing of the inferior remedy by the superior as put by PARKE, B., in *King v. Hoare* (13 M. & W., 494, 505).

Mr. T. A. Apear and Mr. Beeby for the respondents were not called on.

The following judgments were delivered:—

Garth, C.J.—This suit was brought against the defendants to recover the amount of a promissory note, which was alleged to have been made by them jointly with one Gourhurry Shaw. It appeared from the plaint, that a former suit had been brought by the plaintiff against Gourhurry Shaw and the defendants; but as the note was signed by Gourhurry alone, professing to act for himself and the defendants, and as the plaintiff did not prove at the trial that Gourhurry had authority to act for the defendants in making the note, the plaintiff obtained a decree against Gourhurry alone, leave being reserved to the plaintiff by the learned Judge to bring another suit upon the note against the present defendants.

No satisfaction of the debt having been obtained against Gourhurry under the former decree, the plaintiff brought the present suit; but the defendants object in the first instance, that [359] as the liability upon the note was a joint one, the judgment obtained against Gourhurry is a bar to this suit, and that the rule laid down in the case of *King v. Hoare* (13 M. & W., 494, 505) is applicable here. The defendants also raise the question, whether the plaintiff had authority to pledge their credit; but if they are right in the question of law, it is not necessary for us to enter upon the question of fact.

The learned Judge in the Court below has decided the point of law in the defendants' favour, and I entirely agree with him.

The rule which was laid down by the Court of Exchequer in the case of *King v. Hoare* (13 M. & W., 494, 505), and subsequently by the Exchequer Chamber in the case of *Brinsmead v. Harrison* (L. R., 7 C. P., 547) is not a rule of procedure only, but of principle,—viz., that a judgment obtained against one or more of several joint contractors or joint wrong-doers operated as a bar to a second suit against any of the others. There is but one cause of action for the injured party in the case of either a joint contract or a joint tort; and that cause of action is exhausted and satisfied by a judgment being obtained by the plaintiff against all or any of the joint contractors or joint wrong-doers whom he chooses to sue. If a plaintiff, under such circumstances, were allowed

to sue each of his co-debtors or wrong-doers severally in different suits, he would be practically changing a joint into a several liability.

This rule is so fully explained by BARON PARKER, in *King v. Hoare* (13 M. & W., 494, 505), and by Chief BARON KELLY in *Brinsmead v. Harrison* (L. R., 7 C. P., 547) that I do not think it necessary to enlarge further upon it.

It is a rule which in my opinion is founded on strict justice and public convenience; and it has been acted upon in this Court in the case of *Nuthoo Lall Chowdry v. Shoukee Lall* (10 B. L. R., 200).

It was much pressed upon us in the argument by Mr. Hill, that the effect of s. 43 of the Indian Contract Act is to enable a promisee to sue one or more of his joint promisors severally in two or more suits; or, in other words, to change a joint liability into a several one at the option of the promisee; but this, I conceive, is not the object or effect of the section. It merely [360] allows the promisee to sue one or more of several promisors in one suit; and so practically prohibits a defendant in such a suit from objecting that his co-contractors ought to have been sued with him.

It is true that the rule upon which I am acting may possibly lead to some hardship in cases when one or more of several co-contractors is out of the jurisdiction and the plaintiff, if he waits for his return, would be barred by the Statute of Limitation. But this is an injustice which the Legislature, if they so pleased, could easily remedy and which has been, in fact, remedied in England by the Statute of 19 and 20 Vict., c. 97.

I consider, therefore, that the appeal should be dismissed with costs on scale No. 2.

Markby, J.—This suit was brought against the defendants to recover the amount due upon a promissory note. It was stated in the plaint that the note was made by one Gourhurry Shaw, who carried on business in partnership with the defendants; that a suit had been previously brought against Gourhurry Shaw and the present defendants; and that on that occasion the plaintiff had obtained a decree against Gourhurry alone. By this decree the former suit as against the present defendants was ordered to be withdrawn at the request of the plaintiff with liberty to the latter to bring a fresh suit against them for the same matter.

It was admitted by the defendants that they carried on business as ordinary traders in partnership with Gourhurry Shaw, and they did not deny the making of the note by Gourhurry; but they denied that Gourhurry had any authority to bind his partners by the note, which they alleged to have been in fact made for the purchase of another business in which Gourhurry was concerned.

No evidence was given in the case, but it is admitted that nothing has been recovered by the plaintiff upon the decree against Gourhurry. The learned Judge below dismissed the suit upon the ground that the plaintiff having elected to take a decree in the former suit against one of the joint-makers of the note only, could not bring another suit against the other joint-makers.

The note was not produced, so that we do not know the exact form of it. The question, however, as I understand it, which is [361] submitted for our consideration, is this: if several persons carrying on an ordinary trading partnership make a joint promissory note, and one partner be sued upon it and a decree obtained, is any subsequent suit upon the same note against the remaining partners barred, even although nothing has been recovered upon the former

decrees? If this question be answered in the affirmative, the appeal is to be dismissed.

I also understand it to have been conceded on the argument that this is a question which is to be determined by the English Law of Contract, except so far as the same may have been modified by the Indian Contract Act. I think it impossible to deny that, under the English Law, this suit would have been barred, and notwithstanding the great authority of Mr. Justice WILLES, who seems to think otherwise, I should say, not as a mere rule of procedure, but upon principle of the Law of Contract. If this were a mere matter of procedure, the English law would not necessarily bind us. But I understand PARKE, B.'s judgment in *King v. Hoare* (13 M. & W., 493, 505), which is the leading authority to rest upon this, that under a joint contract to pay a sum certain, there is but one single obligation which may indeed be enforced severally, but can be enforced once only.

Other principles are stated in the judgment, but they are either based upon rules of pleading not applicable to the case now under consideration, or they apply only to cases where the suit is brought to recover damages and not for a sum certain.

Of course, in all questions of this kind, the liability must depend ultimately upon the intention of the parties, but I consider that it is now finally settled by the law of England that, apart from a Statute which I shall notice presently, and which is not applicable here, a joint promissory note creates an obligation which can be sued on once only.

If this be, as it seems to me to be, the true mode of stating the law, all difficulty about the further question which has been argued disappears. Mr. Hill contended that s. 43 of the Contract Act did away with the rule that the second suit was barred in such a case as this. But that section does no more than place the liability arising from the breach of a joint contract [362] and the liability arising from a tort upon the same footing, that is to say, that each wrong-doer is liable to be separately sued in respect of the whole liability. But it does not touch that which has been determined to be the nature of the obligation created by the breach of contract, —namely, that it is one which can be sued on once only.

I have searched into this matter with some care in order to see if the rule laid down in *King v. Hoare* (13 M. & W., 494, 505) was really binding upon us, because if it was not, I think it would require some consideration how far it is desirable that in such a case as this a note made by an ordinary trading partnership, the second suit should be barred. The rule laid down by PARKE, B., in *King v. Hoare* (13 M. & W., 494, 505) is very likely correct in theory. It is at any rate identical, or nearly identical, with the strict rule of the ancient Roman law. But it must be borne in mind that this rule was abolished in the Roman law 1300 years ago; and has been since repudiated in America and everywhere in Europe, except in England. Even in England, until the decision of *King v. Hoare* (13 M. & W., 494, 505) it was very doubtful whether the rule prevailed or not in joint contract; whilst since that time one learned Judge Sir James KNIGHT BRUCE has spoken of the rule in strong terms of disapprobation (27 L. J. Bank., 29). Lord MANSFIELD also expressed the opinion in *Rice v. Shute* (1 Sm. L. C., 6th ed., 513) that all contracts with partners were joint and several; and the rule in *King v. Hoare* (13 M. & W. 494, 505) has been since modified by Statute in England. The 19 and 20 Vict., c. 97 s. 11, directs that the period of limitation as to joint-debtors shall run notwithstanding that some are beyond

seas ; but expressly provides that the creditor shall not be barred as against those out of the jurisdiction by judgment recovered against those who remain within it. If the rule laid down in *King v. Hoare* (13 M. & W., 494, 505) be combined with the law of limitation here, which is very strict, it is by no means clear that a creditor might not very often be left to the choice between a remedy against an insolvent debtor and having his debt barred.

[363] I do not deny that there are important considerations of convenience the other way. These considerations have been pointed out and insisted on by several learned Judges of great experience in England, and just now by the Chief Justice. I only say that if I were at liberty to enter upon the general question of convenience, I should hesitate much before applying to this country without any qualification the rule laid down in *King v. Hoare* (13 M. & W., 494, 505). As it is, however, I am bound to follow that decision, and to hold that this being a case governed by the English law, the learned Judge was right in dismissing the suit.

Appeal dismissed.

Attorneys for the Appellant : Messrs. *Remfry and Rogers*.

Attorney for the Respondent : Baboo *B. M. Doss*.

NOTES.

[THE RULE IN KING v. HOARE.—

The question whether the rule in *King v. Hoare* is applicable to India, and if so, to what extent, is still an unsettled question and awaits to be resolved finally either by the Legislature or by the Privy Council.

The following latest cases may be referred to where all the cases are collected and reviewed from which different conclusions have been arrived at by the Judges.—

(1913) 49 I. C. 13 ; (1909) 33 Mad., 317.

See also Messrs. Pollock and Mulla on the Indian Contract Act, sec. 43]

[3 Cal. 363]
APPELLATE CIVIL.

The 11th January, 1878.

PRESENT :

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE KENNEDY.

Doss Money Dossee.....Defendant

versus

Jonmenjoy Mullick.....Plaintiff.*

[1 C. L. R. 446.]

Res Judicata—*Simple Mortgage Bond*—*Mortgagee's Lien*—*Money Decree*—*Mortgagor's Right, Title, and Interest sold*—*Registration Act, Summary procedure under*—*Act XX of 1866, s. 53*—*Act VIII of 1859, s. 2.*

A having a simple mortgage bond, which was specially registered, obtained a summary decree under the provisions of the Registration Act, and attached the lands under mortgage to him. Prior to A's decree those lands had been attached by other creditors and subsequent to A's decree they were sold to B. After such sale, A, under his attachment, sold the right, title, and interest of the mortgage which he himself purchased. A now sued the mortgagor and B to enforce his mortgage lien against the mortgaged properties.

Held that, according to the decision of *Syud Esmam Montaz-ood-deen Mahomed v. Rajcoomar Dass* (14 B. L. R., 408), the suit should be dismissed.

[364] *Quære*.—Whether s. 7 of Act VIII of 1859 would not be an answer to the suit as full relief might have been given in the summary suit?

THE plaintiff had a simple mortgage bond, dated 10th January 1871. The bond was specially registered and charged the lands in suit with other properties. Certain creditors of the mortgagor attached the land under mortgage, and the sale was fixed for 24th February 1871. In the meantime, and on the 21st February 1871, the plaintiff obtained a summary decree under the provisions of the Registration Act (Act XX of 1866), s. 53 †.

* Special Appeal No. 60 of 1877, against the decree of L. R. Tottenham, Esq., Judge of Zilla Midnapore, dated the 30th August 1876, reversing the decree of Baboo Jadoonath Roy, Subordinate Judge of that district, dated the 21st June 1875.

† [Sec. 53 :—Within one year from the date on which the amount becomes payable, or,

where the amount is payable by instalments, within one year from the date on which any instalment becomes payable, the Enforcement of such agreement.

the obligee of any such obligation registered with such agreement as aforesaid, whether under the said Act No. XVI of 1864 or under this Act, may present a petition to any Court which would have had jurisdiction to try a regular suit on such obligation for the amount secured thereby, or for the instalment sought to be recovered.

The petition shall, where a stamp is required by law, bear a stamp of one-fourth the value prescribed for a plaint in such a suit, and may be amended by

Stamp on petition.

permission of the Court, and the statements in the petition shall be verified by the petitioner in manner required by law for the verification of plaints.

On production in Court of the obligation and of the said record signed as aforesaid, the

Decree.

petitioner shall be entitled to a decree for any sum not exceeding the sum mentioned in the petition, together with interest at the rate specified (if any) to the date of the decree, and a sum for

costs to be fixed by the Court. Such decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure.]

The lands were sold under the creditors' attachment and purchased by the defendant. The plaintiff, on 30th July 1871, sold the right, title, and interest of the mortgagor in the mortgaged land under an attachment issued under his summary decree, and became the purchaser thereof. Being unable to reap the fruit of his purchase owing to the antecedent sale of the defendant, he now sued the mortgagor and the defendant to enforce his lien against the mortgaged properties. The Subordinate Judge dismissed the plaintiff's suit, but on appeal his order was set aside, and a decree passed, declaring that the property in suit was liable to be sold in satisfaction of the plaintiff's decree of the 21st February 1871. The auction-purchaser now appealed.

Baboos Srinath Dass and Bhowani Churn Dutt for the Appellant.

Baboos Mohun Mohun Roy and Rash Behury Ghose for the Respondent.

The judgment of the Court was delivered by

Kennedy, J. (after stating the facts as above mentioned, and remarking that it was difficult to believe that the plaintiff, when he obtained his decree, was not aware of the immediate proximity of the sale, or that the course he took was not adopted in reference to that fact, continued as follows):—The present suit is brought against the mortgagor and the first auction-purchaser to enforce the lien created by the mortgage bond against these lands.

[365] The difficulty in which the plaintiff has been placed is entirely one of his own creation. Instead of suing the mortgagor on his bond, and obtaining a decree declaring his lien and directing the lands to be sold towards satisfaction of it, he adopted a course which ensured the lands being sold so as to realize the smallest price possible. The course is one frequently adopted in Bengal, but this frequency cannot make it less liable to be stigmatized as oppressive if not fraudulent.

However this may be, the question for us now to decide is, whether the present suit can be maintained, and we have come to the conclusion that it cannot; and that the decision of the Full Bench in *Haran Chunder Ghose v. Dinobundhon Bose* (14 B. L. R., 108; S. C., 23 W. R., 187) precludes us from giving the relief he sought.

In the second suit, which was before the Full Bench, it appears that the nature of the proceedings must have been precisely the same as those here, for Mr. Justice JACKSON says, that in it "the plaintiff sought a fresh decree for the unsatisfied portion of his claim, as well as a declaration of lien as against the alienees. Upon the considerations already stated, I am of opinion that the Munsif, who granted only the latter prayer, was right, and that the Judge, who altered the decree, was wrong." The majority of the Bench, however, did not concur in this opinion, and both cases were dismissed.

We are unable to distinguish that case from the present, and think that we are bound to follow it notwithstanding some observations which were made in the judgment of the majority, which would be inconsistent with the ultimate decision, if they could be construed as the respondent here contends. Possibly they would apply in cases where the property had been alienated before the institution of summary proceedings by the mortgagee, and this view would reconcile with the Full Bench decision, the ruling of GLOVER and MITTER, JJ., in *Aruth Soar v. Juggunath Mahapatra* (23 W. R., 461), in which it appears that certainly before the decree the mortgaged property had been sold.

Here there being no intervening charge or interest, the plaintiff deliberately elected, for his own reasons, to take a mere [366] money-decree against the mortgagor. The Full Bench did not think it necessary to decide the

question raised under s. 7 of the Procedure Code, and for the same reason we need not now do so; but it is by no means certain that the operation of that section would not in itself be an answer to this suit, as a suit in which full relief could have been given, might, at the time of the summary decree, have been instituted against the mortgagor. We decide nothing about any other remedy which may be open to the mortgagee, but we must restore the judgment of the Subordinate Judge.

Appeal decreed.

NOTES.

[This case was **overruled** by a Full Bench of the Calcutta High Court in (1881) 7 Cal., 714 F. B.

See our Notes to that case. Consequent on that Full Bench decision, a review of this case was admitted :—(1882) 8 Cal., 700.]

**[3 Cal. 366]
FULL BENCH.**

The 15th February, 1878.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE KEMP, MR. JUSTICE L. S. JACKSON, MR. JUSTICE MARKBY, AND MR. JUSTICE AINSLIE.

**The Empress
versus
Baidanath Das.***

Offence punishable by Fine and Confiscation Act XXI of 1856, s. 49—Offences triable in a summary way—Summons Cases—Sentence—Criminal Procedure Code (Act X of 1872), ss. 4, 8, 148, 149 & 222.

An offence under s. 49 of Act XXI of 1856 can be tried summarily under s. 222 of the Criminal Procedure Code†, the confiscation provided by s. 49 being merely a consequence of the conviction, and not forming part of the punishment for the offence.

THE prisoner in this case was charged with the illegal possession of ganja, convicted under s. 49 of Act XXI of 1856‡, and sentenced by the Joint

* Criminal Reference, No. 48 of 1877, by H. Beveridge, Esq., Officiating Sessions Judge of Rungpore, dated the 30th August 1877.

† [Sec. 222 :—The Magistrate of the District may try the following offences in a summary way, and, on conviction of the offender, may pass such sentence as may be lawfully inflicted under section twenty of this Code :—

(1) Offences referred to in section one hundred and forty-eight of this Code. * * *]

‡ [Sec. 49 :—Every person other than a licensed manufacturer or vendor or a person duly authorized to supply licensed vendor, who shall have in his pos-

Penalty for illegal possession of country spirits, etc. session any larger quantity of country spirits or taree, puchwye, or intoxicating drugs, than may legally be sold by retail under the provisions of section 35 of this act, or shall transport by land or by water, or have in his possession, any spirituous liquors

made at a distillery worked according to the English method, or any imported spirituous or fermented liquors, in larger quantity than two gallons, without a pass from the Collector or other officer duly empowered in that behalf shall forfeit for every such offence a sum not exceeding two hundred rupees ; and the liquors and drugs together with the vessels, packages and coverings in which they are found, and the animals and conveyances used in carrying them, shall be liable to confiscation.

Provido.

Provided always that nothing in this section shall extend to any spirituous liquors, wines or beer, purchased by any person for his private use and not for sale.]

Magistrate of Rungpore to a fine of Rs. 100, or, in default, to rigorous imprisonment for one month. The Sessions Judge, referring to the case of *Judoonath Shaha* (23 W. R., Cr. Rul., 33), was of opinion that the order was illegal, as the Joint Magistrate had no power to try the case summarily or to pass sentence of rigorous imprisonment. He, therefore, referred the case under s. 296⁺, Act X of 1872.

[367] The High Court (MARKBY and PRINSEP, JJ.) held that the sentence of rigorous imprisonment was illegal, and modified the order in that respect. They referred the question as to whether the offence could or could not be tried in a summary way to a Full Bench, with the following remarks:--

Prinsep, J. (MARKBY, J., *concurring*). --The matter which remains for our decision is, whether an offence under s. 49, Act XXI of 1856, can be tried summarily by a Magistrate, under s. 222 of the Code of Criminal Procedure.

The punishment for that offence, on which this matter depends, is thus described: the offender "shall forfeit for every such offence a sum not exceeding Rs. 200." It is further stated, "and the liquors and drugs, together with the vessels, packages, and coverings in which they are found, and the animals and conveyances used in carrying them, shall be liable to confiscation."

Section 222 of the Code declares that the Magistrate of the district may try certain offences in a summary way, and among these offences are "offences referred to in s. 148 of this Code." Such offences are described in the Code, s. 4, as "summons cases," see definition.

Section 148 is to the following effect: "When a complaint is made before a Magistrate having jurisdiction in the case, that any person has committed, or is suspected of having committed, any offence triable by such Magistrate, and punishable with fine only, or with imprisonment for a period not exceeding six months, or with both, the Magistrate may issue his summons directed to such person, requiring him to appear at a certain time and place before such Magistrate to answer to the complaint."

So only offences punishable with "fine only, or imprisonment for a period not exceeding six months, or both," would be triable in a summary way under the first clause to s. 222 already quoted.

Is an offence under s. 49, Act XXI of 1856, one punishable with fine only, or does the confiscation which follows on conviction form a part of the punishment, so as to alter the character of the offence as regards the mode of trial to be adopted?

[368] In two reported decisions of this Court—*Khetter Mohun Chourunghee* (22 W. R., Cr. Rul., 43) and *Judoonath Shaha* (23 W. R., Cr. Rul., 33)—it has been held that such offences are not summons cases, and therefore are not triable in a summary way, because they are punishable with confiscation as well as with fine.

* [Sec. 296:—If the Court of Session or Magistrate of the district is of opinion that the judgment or order is contrary to law, or that the punishment is too severe or is inadequate, such Court or Magistrate may report proceedings for the orders of the High Court.

Report to High Court.

Provided that in Session cases if the Court of Session or Magistrate of the district considers that a complaint has been improperly dismissed or that an accused person has been improperly discharged by the Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial.]

We have great doubts regarding the correctness of those decisions—doubts which, we would add, are shared by the only Judge of this Court now present, who was a party to one of those decisions. We are informed that Magistrates constantly try offences of this description summarily, probably in ignorance of the rule laid down in these decisions; and we, therefore, think it right to submit the matter to be authoritatively settled by a Full Bench of this Court.

We are inclined to hold that such an offence can be tried summarily as a "summary case," for the following reasons, which we state, because the parties to this case are unrepresented, and therefore it is not probable that there will be any argument at the bar.

For the procedure in the trial of offences, the Code has divided them into three classes :

Summons cases, defined in s. 148. Warrant cases, defined in s. 149. Sessions cases, or trials in the Court of Session, defined in s. 4.

If the offence under s. 49, Act XXI of 1856, is not a summons case, it must be either a warrant case or a sessions case, and whatever opinion may be expressed regarding its falling under the category of summons cases, it clearly cannot fall within either of the two other classes. No special mode of trial has been prescribed for such an offence, and it is difficult to suppose that such cases were overlooked by the Legislature.

The proper solution of this difficulty seems to be to regard confiscation not as a punishment contemplated by the Code of Procedure so as to affect the mode of trial.

It may be said that a sentence is the declaration of the punishment imposed. Section 20 of the Code of Criminal Procedure sets forth the powers of Magistrates in passing sentence, [369] and these powers are limited to imprisonment, fine, and whipping. It is in consideration only of such punishments that the Code has prescribed the different modes of trial, and though confiscation of certain articles may be awarded on conviction of any offence under a special or revenue law, such confiscation is not taken into account by the Code so as to form a portion of the sentence, or to affect the nature of the offence or the mode of trial.

Further, we observe that s. 8 of the Code, in providing for the trial of offences under local or special laws, states that "no Court shall award any sentence in excess of its powers," and the powers of Magistrates in respect to passing sentences on persons convicted are set forth in s. 20, which, as already stated, only refers to three kinds of punishments—imprisonment, fine, and whipping. Confiscation under Act XXI of 1856, and also under the Salt Act, can, however, be ordered by a Magistrate.

Under these circumstances, we are inclined to hold that confiscation is no part of the sentence or punishment under the Code of Criminal Procedure, but that it follows as a consequence of the conviction.

*[Sec. 8 :—Offences punishable under any law, other than the Indian Penal Code containing no distinct provision as to the Court or officer before which or before whom they are to be tried may be inquired into and tried, according to the provisions hereinafter contained, by the Criminal Courts appointed under this Act. But no such Court shall award any sentence in excess of its powers.]

A Magistrate of the third class shall not try any such offence unless it is punishable with less than one year's imprisonment, nor shall a Magistrate of the second class try any such offence unless it is punishable with less than three years' imprisonment.]

The question referred is that stated in the first paragraph of this reference. If the answer to the question be in the affirmative, the conviction will stand. If the answer be in the negative, the conviction and sentence, including the order of confiscation, will be set aside and a new trial ordered.

No one appeared on either side before the Full Bench.

The judgment of the Full Bench was delivered by

Garth, C.J.--We are clearly of opinion, that an offence under s. 49, Act XXI of 1856, can be tried summarily by a Magistrate under s. 222 of the Criminal Procedure Code.

The confiscation, which is provided for by s. 49, is merely a consequence of the conviction, and does not form part of the punishment for the offence. We observe that, in the case of *Khetter Mohan Chourunghee* (22 W. R., Cr. Rul. 43), to which we are referred, the [370] question which we are called upon to decide was given up by the Government Pleader without argument; and that in the second case the learned Judges merely followed the ruling in the first, so that this would appear to be the first occasion on which the point has been seriously considered.

[3 Cal. 370]

ORIGINAL CIVIL.

The 18th February, 1878.

Narain Singh

versus

Ram Lall Mookerjee.

Practice—Immoveable property situate in different districts—Leave to admit plaint—Civil Procedure Code (Act X of 1877), ss. 2, 19—Charter Act, cl. 12.

Under s. 19 of the Civil Procedure Code, it is not necessary to obtain the leave of the Court to sue in respect of immoveable property situate partly within, and partly without, the ordinary original civil jurisdiction of the High Court.

THIS was a suit respecting immoveable property, part of which was situate within, and part without, the jurisdiction of the Court.

Mr. *Moyle* now moved to admit the plaint under cl. 12 of the Charter Act.

Mr. *Bonnerjee* as *amicus curie* called the attention of the Court to s. 19 of the Civil Procedure Code, which says that if a suit be to obtain relief respecting property or compensation for wrong to immoveable property situate within the limits of different districts, the suit may be instituted in any Court otherwise competent to try it within whose jurisdiction any portion of the property is situate; and to s. 2, which defines "district" as including the local limits of the ordinary original civil jurisdiction of a High Court; and asked whether applications of this nature should, for the future, be made under cl. 12 of the Charter or not.

Pontifex, J. admitted the plaint, and said that s. 19 of the Code gave the Court jurisdiction, and that it was not necessary to apply under cl. 12 of the Charter.

NOTES.

[THIS CASE NOT AN AUTHORITY NOW :—

The Civil Procedure Code, 1908, Sec. 120, expressly excludes the application of Sec. 17 (the section corresponding to Sec. 19 of C. P. C., 1877) to the High Court in the exercise of its original civil jurisdiction.

A similar provision was contained in Sec. 638 of the C. P. C. of 1932, excluding Sec. 19 thereof.]

[371] APPELLATE CIVIL.

The 4th January, 1878.

PRESENT:

MR. JUSTICE WHITE AND MR. JUSTICE MITTER.

Sobha Bibee.....Decree-holder

versus

Mirza Sakhamut Ali and others.....Judgment-debtors.*

Act VIII of 1859, ss. 208 and 364 —Application for execution of decree —
Right of appeal—Act XXIII of 1861, s. 11.

Where a decree had been purchased *benami*, and the party alleging herself to be the real purchaser had not been upon the record as a party, and an application for execution made by her under s. 208 of Act VIII of 1859 † had been refused, and there was a dispute as to who was the real purchaser of the decree,—*Held*, that the applicant was not a party to the suit within the meaning of s. 11 of Act XXIII of 1861, and had no right of appeal against the order refusing her application [compare s. 244 of the Civil Procedure Code (Act X of 1877)].

Abidunnissa Khatoon v. Amirunnissa Khatoon (I. L. R., 2 Cal., 327; S. C., L. R., 4 I. A., 66) followed.

APPLICATION under s. 208 of Act VIII of 1859.

The applicant, alleging herself to be the purchaser of a certain decree, applied to the Subordinate Judge of Dacca to be placed on the record as decree-holder and also for execution of the decree. It appeared that the decree had been purchased *benami* by a mukhtear for and on behalf of some person or persons whose names did not appear on the record; and that there had been a litigation between the applicant and certain other parties, in which it was decided by the High Court, on the 6th of January 1875, that the applicant had no interest in the decree. The Subordinate Judge rejected the application.

On appeal to the High Court:

Baboo Mohini Mohan Roy appeared for the Appellant.

Munshi Serajul Islam for the Respondents.

* Miscellaneous Regular Appeal, No. 263 of 1877, against the decree of Baboo Gunga Churn Sircar, Subordinate Judge of Zilla Dacca, dated the 16th of June 1877.

† [Sec. 208:—If a decree shall be transferred by assignment or by operation of law from the original decree-holder to any other person, application for the execution of the decree may be made by the person to whom it shall have been so transferred or his pleader, and if the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder.]

[372] The following Judgments were delivered :—

White, J.—The appellant in this case applied, under s. 208 of the Code of 1859, for leave to execute a decree, which she alleged she had purchased at an auction sale. The Court below, taking into consideration a certain judgment that had been passed by this Court in a suit to which the present appellant was a party, has decided that she is not entitled to take out execution of the decree, and, accordingly, has refused her application.

Now, by the 364th section of the Code, no appeal lies against this order, unless an express provision can be found in the Code which allows of an appeal. The only express provision is contained in s. 283 of the Code. This section has been repealed by Act XXIII of 1861, and s. 11 of the latter Act has taken its place. Hence, unless the appellant has a right of appeal under s. 11 of Act XXIII of 1861, she cannot carry the case further so far as the present suit is concerned. The only part of s. 11 which we need consider is that which directs that questions, "arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree and not by separate suit, and the order passed by the Court shall be open to appeal." It is perfectly clear that Sobha Bibee, the appellant, is not technically a party to this suit. She purchased, according to her statement, the decree on the 16th June 1870, and on the 5th July she applied to be made a party, but her application was refused.

It is argued, however, upon the authority of *Hurro Lal Dass v. Soojawut Ali* (8 W. R., 197), that although she has not been made a party to the suit, she is yet within the meaning of the 11th section, because she has by her purchase become the assignee of the decree, and as such is entitled to be made a party. We think that the doctrine laid down in *Hurro Lal Dass v. Soojawut Ali* (8 W. R., 197), if it be not taken to be overruled by the recent decision of the Privy Council in *Abdurunnissa Khatoon v. Amirunnissa Khatoon* [compare s. 244 of the Civil Procedure Code (Act X of 1877)], must at least be considered as confined to [373] cases in which there is no dispute as to the assignment of the decree having taken place, or as to the person who is the assignee. Their Lordships in dealing with the case before them, which in principle is substantially the same as the present, and in considering the judgment of the late Chief Justice of this Court, expressed their concurrence with the view which he had taken, viz., that the 208th section of Act VIII of 1859 was not intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree. That being so, it is clear that where such a contest existed, a party claiming to be the assignee of the decree would not be entitled to succeed in an application for execution made under s. 208 of the Code, and for the same reason would not be entitled to be made party to the suit. In no sense therefore could he be considered as coming within the meaning of s. 11 of Act XXIII of 1861. That there is a serious contest in this case as to the party who is the real transferee of this decree there cannot, we think, be a shadow of doubt, for it appears upon the proceedings that the purchase was originally made by a mukhtar *benami* for somebody else. Who that somebody else is, whether the present applicant or not, has been the subject of litigation, and is not yet finally determined. The certificate of sale was issued in the name of Fukeerunnissa, one of the defendants. She has tried to establish her title, and has failed. Her case came before this Court in 1875, in a suit to which the present applicant was a party, and this Court whilst negating Fukeerunnissa's claim pronounced a very strong opinion that the

present appellant had no title to be considered a *bona fide* transferee of the decree, but that a third person was the real purchaser. It is not necessary to determine now who is the real assignee of the decree. It is sufficient to say that it is a question which admits of very considerable doubt.

It appears to us, therefore, that the appellant who has neither been made a party to the suit nor is entitled to be made a party, cannot in any view of the case be treated as coming within the purview of s. 11. That being so by force of the 364th section of the Code of 1859, she has no right of appeal, and her case, so far as the proceedings in this suit are concerned, must rest where it is left by the lower Court.

[374] The appeal, therefore, will be dismissed with costs.

Mitter, J.—I am also of the opinion that, in this case, Sobha Bibee has no right of appeal. She applied under s. 208, Act VIII of 1859, as a transferee, to execute a decree which was obtained by a third party, and which she alleged she had purchased in execution of a decree against that third party. For reasons stated in the judgment of the lower Court, her application to execute the decree as a transferee under s. 208 of the Procedure Code of 1859 has been refused. The question before us is, whether this order is open to appeal under s. 11 of Act XXIII of 1861, as it has been pointed out by my learned brother. S. 364 of the Code distinctly prohibits an appeal, unless there is an express provision in that Code. The contention of the appellant is, that that express provision is to be found in the section mentioned above, viz., s. 11 of Act XXIII of 1861. The Privy Council, in the case already quoted, have distinctly decided against that contention. They, after referring to the fact that the case before them was not a case in which the Court executing the decree should have entertained an application under s. 208, observe, that "they are further fortified in this view by the consideration that, under s. 364 of this Act, no appeal would lie from any judgment or decision given in a proceeding under s. 208." They have distinctly, therefore, held in that case that no appeal lies from any judgment or decision given in a proceeding under s. 208 of Act VIII of 1859. One of the reasons given by their Lordships for coming to this conclusion is, that in no sense is an applicant who applies to be put upon the record on the ground that he has acquired a title to the decree by transfer a party to the suit unless his application is actually granted. Referring to the position of the applicant in that case, they say, "he was not on the record when judgment was given, nor when the decree was made. He subsequently applied for execution of the decree, but it appears to their Lordships impossible to say that a person by merely applying for execution of the decree thereby constitutes himself a party to the suit." The same observations will apply here. An alleged transferee by merely applying for execution of the decree does not constitute himself a party to the suit.

[375] I am, therefore, of opinion that, in this case, the judgment of the lower Court under s. 208 of Act VIII of 1859, is not open to appeal.

Appeal dismissed.

No appeal from order passed after decree, and relating to the execution thereof except as provided.

*[Sec. 364 :—No appeal shall lie from any order passed after decree and relating to the execution thereof except as is hereinbefore expressly provided. (Amended by Act XXIII of 1861, s. 12.)]

NOTES.

[AUTHORITY OF THE DECISION AFFECTED BY LEGISLATION.—

This decision has lost its value through subsequent legislation.

The Civil Procedure Codes of 1877 and 1882 included representatives, and Amending Act VII of 1888 added to sec. 244 of the C. P. C. 1882 this clause:—

“If a question arises as to who is the representative of a party for the purposes of this section, the Court may either stay execution of the decree until the question has been determined by a separate suit or itself determine the question by an order under this section.”

The C. P. C., 1908, sec. 47 (3) makes the determination by the Court obligatory:—Where a question arises as to whether any person is or is not the representative of a party, such question shall for the purposes of this section be determined by the Court.

A case like this will thus be a determination by the Court under sec. 47 (C. P. C., 1908) and the order will be a decree within *ibid.* sec. 2 and appealable under sec. 96.—see (1894) 16 All. 483; (1900) 27 Cal. 672; (1901) 25 Mad. 545; (1902) 25 Mad. 383; (1902) 26 Mad. 264; (1903) 25 All. 413; (1906) 11 C. W. N. 239.]

[375] APPELLATE CIVIL.

The 17th January, 1877.

PRESENT:

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE CUNNINGHAM.

Boonjad Mathoor and others.....Plaintiffs

versus

Nathoo Shahoo.....Defendant.

[1 C. L. R. 455]

Arbitration, matter referred to—Arbitrators doubting correctness of their decision—Award, validity and finality of—Appeal, right of—Act VIII of 1859, ss. 325, 327.

Matters in dispute were referred to the arbitration of five persons, of whom four made their award on 27th August 1875. On 3rd September, the same arbitrators granted an application for rehearing. Before the matter was reheard one of the four died, and an order striking off the application was made by two of the surviving arbitrators. On 21st February 1876, an application was made to the Court to have the award filed, which was opposed. The Court overruled the objection, and ordering the award to be filed gave a decree to the plaintiffs. *Held*, that the award was not a valid and final award, that the decree passed thereon was not final, and that an appeal would lie. (See also *Gunga Narain Ghose v. Ram Chand Ghose*, 12 B. L. R., 48.)

Sashih Charan Chatterjee v. Taruck Chaudin Chatterjee (8 B. L. R. 315) considered.

THE facts in this case are as follows:

The parties appeared to have referred certain matters in dispute between them to arbitration by five persons named in the plaint. The course of proceedings

* Special Appeal, No. 746 of 1877, against the decree of J. M. Lewis, Esq., Judge of Zilla Bhagalpore, dated the 19th March 1877, reversing the decree of Baboo Barhma Dutt, First Sudder Munsif of Monghyr, dated the 19th April 1876.

before the arbitrators was not very clear, but it would seem that four of them made an award on the 27th August 1875. On the 3rd September, or five [376] days afterwards, the same arbitrators granted an application made by one of the parties for a rehearing of the matter. Before the rehearing had taken place, one of the four died, and finally an order appears to have been made by two of the survivors striking off the application. On the 21st of February, or within one day of the expiration of the six months allowed by law, certain of the parties interested made an application to the Court under s. 327⁺ of the Code of Civil Procedure that the award might be filed, and thereupon Nathoo Shahoo, the other party interested, showed cause against the award being filed. He submitted that the award not being unanimous, an application at the instance of the defendant had been made to the arbitrators for a review. That such application had been admitted, the usual notice issued to the parties interested, and a day fixed, the 15th November 1875, for the hearing of the further evidence. That in consequence of the laches of the arbitrators no final order had been made. He further contended that under such circumstances the agreement between the parties referring the suit to arbitration had become void by the death of one of the arbitrators at a time subsequent to the order admitting the award to review. On this state of facts the Munsif appears to have considered, not that the arbitrators were incompetent to rehear the matters in arbitration, but that a final and conclusive order rejecting the application for rehearing had been made by two of the arbitrators. He also remarked upon the insufficiency of the stamp on which the petition of review was filed before the arbitrators, and thought that, according to the provisions of s. 378[†] of Act VIII of 1859, the order rejecting the review was final. The Munsif further said:—"For rejecting the petition the concurrence of opinion of two arbitrators is sufficient. There is now no bar to the enforcement of the said award." He, therefore, ordered the award to be filed, and gave a decree for the plaintiff as to the said award being valid and correct.

On appeal, the District Judge held that the view taken by the Munsif was erroneous. He considered that the order striking off the case was not the act of the whole of the arbitrators, and that by the very fact of their having admitted

* [Sec. 327 :—When any matter has been referred to arbitration without the intervention

Filing in Court an award when the matter was referred to arbitration without intervention of Court.

of any Court of Justice, and an award has been made, any person interested in the award may within six months from the date of the award make application to the Court having jurisdiction in the matter to which the award relates, that the award be filed in Court. The Court shall direct notice to be given to the parties to the arbitration other than the applicant, requiring such parties to show cause, within a time to be specified, why the award should not be filed. The application shall be written on the stamp paper required for petitions to the Court where a stamp is required for petitions by any law for the time being in force, and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. If no sufficient cause be shown against the award, the award shall be filed and may be enforced as an award made under the provisions of this chapter.]

Enforcement of such award.

of any Court of Justice, and an award has been made, any person interested in the award may within six months from the date of the award make application to the Court having jurisdiction in the matter to which the award relates, that the award be filed in Court. The Court shall direct notice to be given to the parties to the arbitration other than the applicant, requiring such parties to show cause, within a time to be specified, why the award should not be filed. The application shall be written on the stamp paper required for petitions to the Court where a stamp is required for petitions by any law for the time being in force, and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. If no sufficient cause be shown against the award, the award shall be filed and may be enforced as an award made under the provisions of this chapter.]

†[Sec. 378 :—If the Court shall be of opinion that there are not any sufficient grounds for

The order of the Court for granting or refusing the review is final.

whether for rejecting the application

a review it shall reject the application, but if it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review, and its order, in either case, granting the review shall be final. Provided that no review of judgment shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree of which review is solicited.]

Proviso.

the case to be [377] re-heard, they tacitly expressed a doubt as to the justice of their first award, and that until the question was again considered, their first award could not be looked upon as final. The Judge therefore thought it inadvisable to give such an award the force of a decree, and therefore reversed the decision of the Munsif.

The plaintiffs now appealed.

Baboo Mohesh Chandra Chowdhry (Mr. Sandel with him) for the appellants contended that there was no appeal from the decision of the Court of First Instance, inasmuch as the decree passed, in accordance with the award, was final, and referred to *Sreenath Chatterjee v. Kailash Chunder Chatterjee* (21 W. R., 248).

Mr. Gregory (Baboo Amarendra Nath Chatterjee with him) for the respondents, relied on *Sashu Charan Chatterjee v. Taruck Chandra Chatterjee* (8 B. L. R., 315).

Baboo Mohesh Chandra Chowdhry replied.

The Judgment of the Court was delivered by

Jackson, J.—(After stating the facts of the case as mentioned above, proceeded as follows):—The Munsif cursorily remarked upon the insufficiency of the stamp on which the petition of review was filed before the arbitrator. I should have thought that no stamp was required. He also thought that according to the provision of s. 378 of Act VIII of 1859 the order in rejection of the review was final. It seems to me clear that could not possibly be a ground of judgment in this case. (The learned Judge then alluded to the judgment of the lower Appellate Court and continued.)

It has been contended before us in special appeal that the lower Appellate Court had no jurisdiction to make this order, inasmuch as the Munsif having made a decree in accordance with an award of arbitrators, that decree was by law final. And Baboo Mohesh Chunder Chowdhry referred us to *Sreenath [378] Chatterjee v. Kailash Chunder Chatterjee* (21 W. R., 248), in which judgment was given by the late Chief Justice Sir RICHARD COUCH, of which the head-note is to the effect that s. 327 of the old Code of Civil Procedure "incorporates the provision in s. 325" as to the finality of the judgment given according to the award, and puts the award filed, under s. 327 in the same position as the award filed under s. 325; where a Court files an arbitration award and passes a decree, that decree is final." The question to be considered here was very fully considered by the Full Bench in *Sashu Charan Chatterjee v. Taruck Chandra Chatterjee* (8 B. L. R., 315). It is not very easy to ascertain what was the decision of the Full Bench in that case; because separate judgments were given, which did not all agree, but the opinion of the late Mr. Justice NORMAN, who was then acting as the Chief Justice, in which opinion I concurred, was this, that where there has been an award,

*[Sec. 325 :—If the Court shall not see cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and if no application shall have been made to set aside the award or if the Court shall have refused such application, the Court shall proceed to pass judgment according to the award or according to its own opinion on the special case if the award shall have been submitted to it in the form of a special case; and upon the judgment which shall be so given decree shall follow and be carried into execution in the same manner as other decrees of the Court. In every case in which judgment shall be given according to the award the judgment shall be final.]

and the decree passed by the Court below is in accordance with that award, that judgment is final; but where it can be shown that there was not in fact any award on which a judgment could be based, there is no final decree, and an appeal would lie. In this case the defendant had to show cause against the finality of the award, and he did show what appears to me to be a very satisfactory cause. He showed that the arbitrators, after making the award and after an interval of only a very few days, had expressed a doubt as to the correctness of the award by intimating their readiness to reconsider their decision. It may be observed that the award was not one of the whole number of arbitrators, but of four out of five; and even if we assume that in the reference to arbitration provision was made that in case of difference of opinion the decision should rest with the majority, still the fact that one of the number had dissented ought to be taken into account when it is seen that the remaining arbitrators expressed a readiness to reconsider their decision. It may very well be that but for the death of one of those four, and what took place consequently, there might have been a further award by the same arbitrators in which the conclusion would have been different from that arrived at on the 27th August. It was never, [379] I think, the intention of the Act that the Court should bind parties by the result of a private arbitration when the arbitrators themselves plainly showed that they doubted the correctness of their decision. That, it appears to me, was an extremely strong and valid objection to the finality of the award one which tended to show that the award was no valid award, and therefore it was a matter which the lower Appellate Court could consider on appeal. I think, therefore, the Judge of the Court below was not in error in the decision which he arrived at in this case, and that this appeal ought to be dismissed with costs.

Appeal dismissed.

NOTES.

[FINALITY OF DECREES ON PRIVATE AWARDS:—

I. THE PRIVY COUNCIL in the leading case of *Ghulam Khan v. Muhammad Hassan*, (1901) 29 Cal. 167 P. C., completely revolutionised the views till then entertained on the subject.

II. AFTER THIS CASE there have been many conflicting decisions as to when an order in respect of such awards is appealable:—

See (1903) 27 Mad. 255; (1905) 2 C. L. J. 80; (1905) 33 Cal. 11; (1905) 10 C. W. N. 601; (1905) 29 Mad. 301; (1906) 333 Cal. 757; (1908) P. R. I; (1908) 12 O. C. 40.

After classifying under three heads the arbitrations dealt with in the Civil Procedure Code, **their Lordships said:—**

"In cases falling under heads II and III proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer—or the award as the case may be—under the cognizance of the Court. That is or may be a litigious proceeding—cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression as defined in the Civil Procedure Code."

III. THE LEGISLATURE IN THE CIVIL PROCEDURE CODE, 1908, has introduced these provisions in view of the conflict of case law :—

Sec. 104 (1) :—An appeal shall lie from the following orders and save as otherwise expressly provided in the body of the Code or by any law for the time being in force from no other orders.

(f) an order filing or refusing to file an award in an arbitration without the intervention of the Court.

Sch. II, p. 21.—"Where the Court is satisfied that the matter has been referred to arbitration, and that an award has been made thereon and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award."

IV. The following cases in which this case was referred to are not of much assistance now, having been decided before the said Privy Council case :—(1881) 3 All. 127; (1881) 7 Cal. 166, (1882) 4 All. 283; (1882) 6 Mad. 414; (1883) 10 Cal. 74; (1896) 18 All. 422.]

[3 Cal. 379]

APPELLATE CRIMINAL.

The 24th January, 1878.

PRESENT :

MR. JUSTICE AINSLIE AND MR. JUSTICE McDONELL

The Empress on the Prosecution of Michell

versus

Joggeessur Mochi.

Government Currency Note, Theft of - Title of Original Owner—Appealable Order—Criminal Procedure Code (Act X of 1872), ss. 418 & 419—Cashing a Currency Note—Sale—Contract Act, ss. 74, 76, and 106.

A Government currency note was stolen from A, and cashed by B in good faith for C. On the conviction of C for theft, the Magistrate ordered the note to be given to B. A appealed to the Sessions Judge, who was of opinion that he was not competent to interfere as a Court of appeal under s. 419 † of the Criminal Procedure Code; but submitted the case for the orders of the High Court :

Held, that the case could be disposed of by the Judge under s. 419 of the Criminal Procedure Code, and that the words "Court of appeal" in that section are not necessarily limited to a Court before which an appeal is pending.

Held further, that the provisions of s. 76 ‡ of the Contract Act did not apply, as the change of a currency note for money is not a contract of sale, and that as the note came honestly into the hands of B, the order of the Magistrate was right.

* Criminal Reference, No. 223 of 1877, by H. T. Prinsep, Esq., Sessions Judge of the 24-Pergunnahs, dated the 13th of December 1877.

† [Sec. 419 :—Any Court of appeal, reference or revision may direct any such order passed by a Court subordinate thereto to be stayed, and may modify, alter or annul it.]

Stay of such order.

'Goods' defined.

‡ [Sec. 76 :—In this chapter, the word 'goods' means and includes every kind of moveable property.]

[380] THE facts of this case appear sufficiently from the memorandum of reference made by the Sessions Judge, which ran as follows :

" This is an application questioning the propriety of an order passed by the Joint Magistrate under s. 418* of the Code of Criminal Procedure, by which a currency note of Rs. 100, found to have been stolen from Captain Michell, has, on conviction of the thief, been given to Subal Chunder Poddar, with whom it was cashed by the thief, rather than to its original owner. When this application was first made to me, I thought that, having regard to the terms of s. 419, the petitioner had the right of appeal ; but, on reconsideration, I am of opinion that no appeal lies *only* from such an order. There is no express provision of law allowing an appeal only against an order under s. 418, and therefore it would seem that, under s. 286, no appeal can be entertained. The terms of s. 419 would seem to refer to a case in which an appeal has been lawfully made against an order of conviction or acquittal, and an order under s. 418 being a part or consequence of such order, thus comes under consideration by the 'Court of appeal, reference or revision,' who are empowered to order that order to be 'stayed, or may modify, alter or reverse it.' In this view of the law, as the application made to me concerns only the matter dealt with under s. 418, I am of opinion that I am not competent to interfere as a Court of appeal ; but as I am also of opinion that the order of the Joint Magistrate is contrary to law, I submit the case for the orders of the Honourable High Court.

" As far as the evidence goes, there is no reason to doubt the honesty of the Poddar with whom the currency note was cashed by the thief. The question is, whether the Poddar should be allowed to retain it as against its original owner from whom it was stolen. It seems to me that this is a matter which can properly be dealt with by a Magistrate ; but that the order passed by the Joint Magistrate, though it is in accordance with the principles of the law of England, is not in accordance with s. 108† of the Contract Act. Currency notes would seem to be 'goods' within the definition given in s. 76 of that Act, and

Order for disposal of property regarding which offence committed.

* [Sec. 418. — When the trial in any Criminal Court is concluded, the Court may make such order as appears right for the disposal of any property produced before it, regarding which any offence appears to have been committed.]

Title conveyed by seller of goods to buyer.

† [Sec. 108. — No seller can give to the buyer of goods a better title to those goods than he has himself, excepting the following cases —

Exception 1.—When any person is, by the consent of the owner, in possession of any goods or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other document showing title to goods he may transfer the ownership of the goods, of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary ; provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods.

Exception 2.—If one of several joint owners of goods has the sole possession of them by the permission of the co-owners the ownership of the goods is transferred to any person who buys them of such joint owner in good faith and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods has no right to sell them.

Exception 3.—When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred to a third person who, before the contract is rescinded, buys them in good faith of the person in possession ; unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession or those whom he represents.

In this case the original seller is entitled to compensation from the original purchaser for any loss which the seller may have sustained by being prevented from rescinding the contract.]

[381] "therefore this case is similar to that given in illustration (a) to s. 108.

"I think it right, however, to state that the case of the *Collector of Salem* (7 Mad., 233) would seem to lay down different view of our law; but in that case the position of Government was alone under consideration, and the judgment seems to have proceeded on the ground that under the law, the Government treasury officer was bound to cash a currency note, and that therefore the Government was protected against any claim if it should happen that a note so cashed was a stolen note. In the present case there was no such obligation on the *Poddar*; and though the result of an order directing him to give it up to the person from whom it was stolen would seem to be somewhat unreasonable, it is in my opinion in accordance with our law in India, and therefore I feel bound to submit the matter for the orders of the Honourable High Court."

No one appeared upon the hearing of the reference, and the judgment of the Court was delivered by

Ainslie, J.—We think that the Sessions Judge might have disposed of this case under s. 419, Criminal Procedure Code, without a reference to this Court.

The words "Court of Appeal" in that section are not necessarily limited to a Court before which an appeal is at the moment pending. It may very often happen, as in this case, that the question of the propriety of an order under s. 418 for the disposal of any property produced before the Court may in no way concern the convicted person; and we think it unreasonable to put such a construction on s. 419 as shall make the power of the Judge to modify, alter or annul a Magistrate's order affecting one, contingent on the accident whether another person has or has not chosen to appeal.

Section 286, by the words "except in the cases provided for by this Act" must include cases in which the power to alter or annul the order of a Magistrate is expressly given.

We are further of opinion that the case does not call for our interference. It is admitted in the order of reference that the [382] note came honestly into the hands of the *Poddar*, to whom it has been returned by the Magistrate. The Sessions Judge refers to s. 108 of the Indian Contract Act, and to the definition of 'goods' in s. 76⁺ of the same Act, in which, for the purposes of that particular chapter dealing with contracts of sale, the word is defined.

No one has appeared to argue the points raised before us. As at present advised, we are of opinion that the provisions of the Contract Act do not apply to this case. The change of a Government currency note for money is no more a contract of sale than the payment of the same note over the counter of goods is a sale of the note for the goods. In this last case the note is paid as money being "legal tender" for the amount expressed therein under s. 15[†], Act III of 1871. Section 77 of the Contract Act defines 'sale' to be the exchange of property for

* [q. v. *supra* I. L. R., 3 Cal., 379.]

† [Sec. 15 :—Within any of the said Circles of Issue a note issued under this Act from any office of Issue in such Circle, shall be a legal tender to the amount expressed in such note, in payment or on account of—

any revenue or other claim to the amount of five rupees and upwards due to the Government of India, any sum of five rupees and upwards due by the Government of India, or by any body corporate or person in British India:

Provided that no such note shall be deemed to be a legal tender by the Government of India at any office of Issue.]

a price, but this is the exchange of money in one form for money in another form. Either form being legal tender, it is impossible to say that one is the price of the other. If we are to look to s. 76 of the Contract Act, we must read it with s. 77, and this latter section shows that the provisions of that Act do not apply in this case.

NOTES.

[I. CURRENCY NOTES—SALE IN CONTRACT ACT—

1. Where the thing is not legal tender, delivery alone is not sufficient to pass property, and foreign coins (Bareda coins) came within the rule and the stolen coins were returned to the complainant :—(1901) 25 Bom. 702.

2. Currency notes should be returned to the *bona fide* holder, as the property passes by delivery .—3 Cal. 379 ; (1878) P. R., 73 ; (1890) P. R., 83, (1905) P. R., 18.

II. CRIMINAL PROCEDURE.

1. Court of Appeal.

This case was followed in (1886) 9 Mad., 418 ; 1 A. W. N., 150 ; (1879) 2 All., 276.

2. Order on third parties.

Third parties may be called on to produce goods the subject-matter of the charge and the Court can deal with them (1891) 19 Cal., 52.]

[383] APPELLATE CIVIL.

The 9th January, 1878.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRCH.

Birchunder Manickya.....Plaintiff

versus

Hurrish Chunder Dass.....Defendant.*

[1 C. L. R. 385]

Rent Suit—Decree obtained ex parte—Limitation—Time-expired decree, Admissibility of, as evidence.

A decree obtained *ex parte* is, in the absence of fraud or irregularity, as binding for all purposes as a decree in a contested suit.

Such a decree is admissible as evidence even though the period for executing it has expired.

Where the plaintiff sued the defendant for a year's rent at the same rate which had been decreed to him for the previous year in a suit which he had brought against the same defendant for rent of the same property, and relied upon the former decree, which had been obtained *ex parte*, as evidence of the rent due to him from the defendant,—*held* (following *Nobo Doorga Dossee v. Foyz Buksh Chowdhry*, 1 L. R., 1 Cal., 202 ; S.C., 24 W. R., 403) that the decree in the first suit determined the amount of rent due from the defendant to the plaintiff. *Held*, further, that the decree was properly admissible as evidence, though the plaintiff had not taken out execution upon that decree, and his right to take out execution was barred by limitation.

Maharajah Beer Chunder Manick v. Ramkishan Shaw (4 B. L. R., 370; S.C., 23 W. R., 128) explained.

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice AINSLIE, dated the 15th of August 1877, in Special Appeal No. 2936 of 1876.

THIS was a suit for rent for the year 1279 at the same rate as had been decreed to the plaintiff for the year 1278 in a suit brought with respect to the same property against the present defendant. The plaintiff relied on an *ex parte* decree which he had obtained in that suit in showing the amount of rent due to him; that decree had not been executed, and execution was admittedly barred by lapse of time. The Munsif gave the [384] plaintiff a decree for the amount of rent named in the *ex parte* decree. On appeal the Judge reversed that decree, and held that execution of the former decree being barred, it was inadmissible in evidence to show the rate of rent due.

On special appeal (before COCH, C.J., and AINSIE, J.) -

The Court differing from the decision given in *Iam Soonder Tewaree v. Sreenath Dewasi* (14 B. L. R., 371 note; S. C., 10 W. R., 215) cited in support of the judgment given by the lower Appellate Court, referred the point to a Full Bench, who, in an opinion quoted by the Court in the present appeal, remanded the case for re-hearing by the District Court. On remand this Court was of opinion that as the decree sought to be put in evidence was an *ex parte* decree, no value could be assigned to it in proof of the plaintiff's claim, and in turn remanded the case to the Munsif's Court for re-trial, with directions to ignore the said decree as an element of proof in the case. On the re-trial, the Court of First Instance, on evidence taken independently of the decree, held that the plaintiff was not entitled to what it described as the enhanced rate claimed, and granted a decree for Rs. 26-13 annas. The lower Appellate Court in effect upheld the decision of the Court below, increasing, however, the sum named in the decree to 49 rupees. The defendant hereupon appealed to the High Court; the case being heard by a single Judge.

Baboo Bharut Chunder Dutt for the Appellant.

Baboo Kali Mohun Dass and Baboo Doorga Mohun Dass for the Respondent.

AINSIE, J. (after disposing of two other grounds which had been taken and which are immaterial to this report, continued) :-- "It is further said that no notice of enhancement has been served upon the defendant before the institution of this suit. The Judge has, throughout his judgment, spoken of this as an enhancement suit, but it is quite clear that he is in error on this point. There was a decree for the rents of the year 1278, and in this present suit the rents of [385] the year 1279 are claimed at the rates mentioned in that decree. Although that decree was *ex parte*, yet it has never been set aside as fraudulently or dishonestly obtained. The fact that it was not put into execution is immaterial, the only result is that the plaintiff has lost a certain sum of money; but as far as the decree declared what was the amount payable by the defendant to the plaintiff for the year 1278, it, as admitted by the Judge, stands good. The rent for 1278 then being fixed at Rs. 74 odd annas, the claim for the same rent for the year 1279 cannot in any sense be called a suit for enhanced rent, and consequently no notice was required. Then it is said that the enhancement has been made upon wrong grounds; that the Court was bound to take into consideration the rents payable by other talookdars of similar degree in the neighbourhood, and ought not to have proceeded upon evidence as to the increased production of the land. This, however, is entirely a new point raised at the end of 4½ years' litigation, and cannot now be entertained.

"Lastly, the special appellant urges that it is not for him to prove what was the actual income, but for the plaintiff. It appears to me that the answer to that is simple. When one party has in his possession of necessity the means

of proving that which is necessary to establish the affirmative or the negative of a certain issue, the burden of proof is thrown upon him.

"In cross-appeal it was urged that the Court below was wrong in not giving some weight to the decree for the year 1278, and that, if the Judge had done so, the rest of the evidence considered by the light of that decree would have been in favour of the plaintiff. On turning to the remand order in which the Judge considered the weight to be given to the previous decree, it seems to me that he there held that in the present case that decree was really of no value, because it had been given without entering into any discussion of the question now at issue and upon which evidence has been tendered on either side, and that it cannot in any way guide him to a decision on the evidence in this case. The appeal is dismissed with costs."

The plaintiff appealed from this decision under cl. 15 of the Letters Patent. [386] *Baboo Kuli Mohun Dass, Baboo Poorga Mohun Dass, and Baboo Bama Churn Banerjee* for the Appellant.

Baboo Hurro Mohun Chukerbutty for the Respondent.

The Judgment of the Court was delivered by

Garth, C.J.—We think that, in this case, the lower Court is in error, through misconstruing the meaning of the Full Bench decision—*Beer Chunder Manick Bahadoor v. Ramkishen Shaw* (14 B. L. R., 370; s. c., 23 W. R. 128).

The plaintiff sued the defendant for rent due for the year 1279 at the same rate which had been decreed to him for the previous year 1278, in a suit which he had brought against the same defendant for rent of the same property, and the plaintiff relied upon that former decree as almost conclusive evidence of the proper amount due to him from the defendant.

It seems that this decree for the rent of 1278 was obtained by the plaintiff *ex parte*, the defendant not appearing at the trial; and it is admitted that no execution had ever been taken out by the plaintiff upon that decree, and that his right to take out execution had been barred by limitation.

The Court of First Instance held that this former decree was evidence against the defendant in the present suit, and gave judgment for the plaintiff for the same amount, namely, Rs. 74.

The Officiating Judge on appeal reversed the Munsif's judgment, on the ground that as no steps had been taken by the plaintiff to execute the decree for the rent of 1278, and the period of limitation had been allowed to elapse, the decree itself became inoperative, and could not be kept alive for purposes of evidence any more than for purposes of execution. This view was supported by the case of *Ram Soondar Tewaree v. Sreenath Devyasi* (14 B. L. R., 371 note; s. c., 10 W. R., 215); and when this case came up to the High Court on special appeal, the point thus decided by the Judge was referred to a Full Bench; and the Full Bench decision upon it is in the case of *Maharajah Beer Chunder Manick Bahadoor v. Ram* [387] *Kishen Shaw* (14 B. L. R., 370; s. c. 23 W. R., 128), and is in these words:—**COUCH, C.J.**, says:—"We are of opinion that the decree is admissible in evidence. The question of its value when admitted is to be determined by the lower Courts. The defendant has alleged that it was obtained fraudulently. It does not appear that he gave any evidence of this, and it will be for the Court to say whether there is any evidence of that allegation. The decree of the Officiating Judge must be reversed, and the suit remanded to him for re-hearing."

The case then went back to the Officiating Judge, and he found, apparently upon no other grounds than that the decree had been obtained *ex parte*, and that no evidence had been given on the part of the defendant at the former trial; that the decree was of no value, and ought to be disregarded.

The case was then remanded by the Lower Court to the Munsif to try the question of amount *de novo* without reference to the former decree; and this has resulted, after a long litigation, in the plaintiff recovering Rs. 49, being a much smaller sum than was adjudged to him by the former decree.

Now in dealing with the decree in this way, we consider that the Judge was practically ignoring the true meaning of the High Court's judgment.

The High Court were perfectly aware that the former decree was made *ex parte*. They knew that the decree had passed without any evidence on the part of the defendant, and if that fact had been sufficient to invalidate the decree, or to render it of no value for the purposes of evidence in the present suit, they would of course have said so, and would not have remanded the case to the Officiating Judge for re-trial.

What the Full Bench judgment, in our view of the matter, really meant was this: that an *ex parte* decree is *prima facie* for purposes of evidence as good as any other decree, and as binding between the parties upon the matter decided by it. But that if the defendant could show, as he said he was prepared to do, that the former decree was obtained by fraud, or that it was irregular, or contrary to natural justice or the like, the [388] *ex parte* decree, although of force between the parties in the suit in which it was given, might be properly considered as of no value for the purposes of evidence in any other suit.

It seems clear that this was the meaning of the Full Bench, because while they knew that the former decree had been obtained *ex parte*, and therefore evidently considered that fact alone as insufficient to destroy the value of the decree for purposes of evidence, they say that the defendant alleged that the decree had been obtained by fraud, and that it must be for the Court below to say whether that allegation was proved.

But when the case came again before the Officiating Judge, it does not appear that the defendant gave any evidence of fraud, or that he made any attempt to show that the decree in the former suit had been obtained otherwise than honestly and properly. The Judge pronounced the decree to be of no value as evidence, merely because it had not been contested by the defendant.

In this we considered he was quite wrong: a decree obtained *ex parte* is in the absence of fraud or irregularity, as binding, for all purposes, as a decree in a contested suit. If it were not so, a defendant in a rent-suit might always by not appearing, and allowing judgment to pass against him without resistance, prevent the plaintiff from ever obtaining a definitive judgment as to what is the proper amount of rent due from him to his landlord.

If a defendant does not think it worth while to contest the suit, but allows the plaintiff's evidence, and the judgment passed upon it, to go unquestioned, he has no right afterwards to dispute the correctness or the value of the judgment, merely because he chose to absent himself from the trial.

Of course if any fresh circumstances had arisen since the former decree was made, which would justify on the one hand an abatement, or on the other hand an enhancement, of the rent decreed in the former suit, the Court would be bound to take such circumstances into consideration. But no evidence

of this kind was adduced by the defendant in the present case. The only materials which he brought forward, upon which the judgment of the Court below ultimately proceeded, consisted of [389] evidence which the defendant might and could have brought forward, if he had so pleased, in the former suit and which he offered no excuse for not producing on that occasion.

We think, therefore, that the principle upon which we decided the case of *Nobo Doorga Dossee v. Foyz Buksh Chowdhry* (I. L. R., 1 Cal., 202 ; S. C., 24 W. R., 403), and which has been acted upon by this Court in other cases applies with equal force here.

We consider, for the reasons given by the learned Judge in the Court below, that no notice of enhancement was necessary before bringing this suit, and we think that the Munsif was right in the first instance in adjudging to the plaintiff the same rate of rent as was decreed to him in the former suit.

The decree will therefore be altered in that respect ; but, as this long series of litigation has arisen from the misconception of the Full Bench judgment by the Officiating Judge, we think that each of the parties should pay their own costs of the proceedings subsequent to that judgment.

NOTES.

[RES JUDICATA—EX PARTE DECREE :—

A Full Bench of the Calcutta High Court consisting of all the Judges, with reference to this and other cases in conflict with it, gave this opinion :— " Neither a recital in the decree of the rate alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make that matter a *res judicata* assuming of course that no such declarations were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case,"—(1889) 16 Cal 300 F.R. at 306.

See *Chenayappa v. Puttappa*, 11 Bom. 708 ; also (1882) 11 C. L. R. 483 ; (1881) 7 Cal. 22.]

[3 Cal. 389]

APPELLATE CRIMINAL.

The 12th February, 1878.

PRESENT :

• MR. JUSTICE L. S. JACKSON AND MR. JUSTICE CUNNINGHAM.

The Empress on the Prosecution of Johardi Sheik

versus.

Hematulla,

*Criminal Procedure Code (Act X of 1872), s. 215 Evidence for the Prosecution
—Examination of Witnesses.*

A Magistrate is bound, before he discharges an accused person under s. 215† of the Criminal Procedure to examine all the witnesses, and should not refuse to examine witnesses

† Criminal Reference, No. 1114 of 1878, P. W. J Rees, Esq., Officiating Magistrate of Maldah, dated the 5th of February 1878.

*[Sec. 215 :—When the evidence of the complainant and of the witnesses for the prosecution and such examination of the accused person as the Magistrate considers necessary, have been taken, the Magistrate, if he finds that no offence has been proved against the accused person, shall discharge him.

Discharge of accused.

Explanation (1).—The absence of the complaint, except where the offence may be

simply because their evidence will be to the same effect as that already taken for the prosecution.

The complainant Johardi in this case charged another man with forcibly cutting paddy. The Deputy Magistrate to whom the case was referred took evidence as to the possession of the [390] land and crop in dispute. The complainant produced four witnesses, of whom the Deputy Magistrate examined two only, because (as it appeared) the remaining two witnesses were only cognizant of the same facts as the two previously examined. After hearing both sides the Deputy Magistrate discharged the accused under s. 215 of the Code of Criminal Procedure, because the evidence for the prosecution did not clearly establish the sowing of the crop by the complainant.

The Magistrate was of opinion that the other two witnesses ought to have been examined, and referred the case to the High Court under s. 296 of the Criminal Procedure Code.

No one appeared on the hearing of the reference, and the **Judgment** of the Court was delivered by

Jackson, J. --The Deputy Magistrate was bound, under s. 215 of the Criminal Procedure Code, to hear all the witnesses for the prosecution. We direct that he do this, and then pass such order on the case as the evidence appears to him to call for.

NOTES.

[See (1879) 2 All. 447 where the case was followed ; also 4 Mad. 329]

ORIGINAL CIVIL.

The 7th March, 1878.

PRESENT :

MR. JUSTICE PONTIFEX.

Debendronath Mullick and others

versus

Odit Churn Mullick.

Cause of Action - Right to turn of Worship.

A refusal to deliver up an idol, whereby the person demanding it was prevented from performing his turn of worship on a specified date, gives the party aggrieved a right to sue for damages.

THE plaintiffs in this case alleged that they were entitled to perform the worship of a deity, Raneo Thakooranee, on a certain day in the year 1284, B. S. (1877-78), and that they had been prevented from performing such worship on the day in question through the refusal of the defendant to deliver up to them the said deity for such purpose. The plaintiffs further alleged that, lawfully compounded, shall not be deemed sufficient ground for a discharge if there appears other evidence sufficient to substantiate the offence.

Explanation (2) - A discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.

Explanation (3) - An order of discharge cannot be passed until the evidence of the witnesses named for the prosecution has been taken.]

in consequence of such refusal, they had been disgraced in the eyes of the other members of the family, [391] and that they had lost the benefits from a religious point of view and otherwise, which they would have enjoyed if they had performed the worship in their turn. The damages claimed were Rs. 5,000.

The case coming up for settlement of issues Mr. *Phillips* for the Defendant raised the point whether the plaint disclosed any cause of action.

Mr. *Hill* for the Plaintiffs.—A right vested in the plaintiffs to a turn of worship; if there is a right, there must be a remedy; see *Ashby v. White* (1 Smith's L. C., 251, 276). A turn of worship is described as "property" by COUCH C. J., in *Mitta Kunth Audhucarry v. Neerunjun Audhucarry* (14 B. L. R., 166). See also *Anund Moyer Chowdhram v. Boykantnath Roy* (8 W. R., 193) and *Gour Mohan Chowdhry v. Madan Mohan Chowdhry* (6 B. L. R., 352).

Mr. *Phillips* for the Defendant.—The loss (if any) suffered by the plaintiffs is a purely spiritual one. It is impossible to estimate damages on such loss. The rule in *Ashby v. White* (1 Smith's L. C., 251, 276) refers to purely temporal damages. [PONTIFEX, J.—The plaintiffs state that they have been disgraced in the eyes of the family.]

Pontifex, J., was of opinion that the plaint did disclose a cause of action, and allowed other issues in the case to be settled.

Attorneys for the Plaintiff: Messrs. *Beeby and Rutter*.

Attorney for the Defendant: Mr. *Pahlologus*.

NOTES.

[RIGHT OF WORSHIP:—

In (1888) 13 Bom. 548 it was held that a suit would lie for a declaration of the right to officiate in alternate years as priests in a temple and receive the offerings to the idol.

See (1900) 21 M. L. J. 215 as to the right to have the procession of an idol carried through a particular street.

(1893) 21 Cal. 463 was a case where the suit was by expelled members of a society for re-admission to the prayer house, &c.

See also (1878) 4 Cal. 683; (1882) 8 Cal. 807. 10 C. L. R. 439.]

[392] *The 6th and 9th January and 11th February, 1878*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE MARKBY.

Mothoormohun Roy.....Plaintiff

versus

The Bank of Bengal.....Defendants.

[=1. C. L. R. 507]

Bank of Bengal Act (XI of 1876), ss. 17, 21—Registration of Transfer—Right of Bank to refuse to Register.

The Bank of Bengal is entitled to refuse to register a transfer of shares when the appli-

cation is made during the time the transfer books of the Bank are closed under the powers given by s. 21*, Act XI of 1876, and after a public notification in accordance therewith.

Though the Bank may not have given this reason for not registering at the time of the application being made, they are entitled to avail themselves of it subsequently, when a suit is brought to compel them to register the transfer.

Section 17 † of Act XI of 1876, which entitles the Bank of Bengal to refuse to register the transfer of shares until payment of any debts due by the person in whose name the shares stand, refers only to debts which are presently payable; therefore, where *R* was indebted to the Bank, and gave bills as security therefor—*held*, the Bank would not be entitled to refuse under s. 17 to register the transfer during the currency of the bills.

APPEAL from a decision of MACPHERSON, J., dated the 10th of August 1877. The suit was brought by the plaintiff, a merchant in Calcutta, to obtain an order directing the defendants to register the transfer of a stock certificate in the defendants' Bank for Rs. 17,458-8-8, which had been pledged to the plaintiff by one Radha Gobind Shaw to secure certain advances. The plaintiff's case was, that he applied to the Bank to register this transfer about the 14th of June 1876, and he was then told by the Bank officers that, before the certificate could be registered, it must be endorsed by Radha Gobind Shaw, or his duly constituted attorney. Upon this, the plaintiff obtained from Radha Gobind a power-of-attorney, dated the 27th of June, empowering one Oool Behary Dhur to make the transfer of the certificate to him, that the transfer was accordingly made, and that the plaintiff sent it to the Bank to be registered on the 1st of July; but that the officers of the Bank then refused to register it, on the ground that Radha Gobind Shaw was indebted to them in a large amount, and as long as his debt remained unpaid, the transfer could not be registered.

[393] On the third of July, the plaintiff stated, he caused another application to be made to the Bank, to know why the transfer could not be registered; and was informed that so long as Radha Gobind Shaw was indebted to the Bank they could not register it. And again, on the 31st of July he alleged that, having ascertained that Radha Gobind Shaw had made an arrangement with the Bank, by which the payment of his debt to them was postponed to a future day, he again applied to the Bank to have the transfer registered, but was refused upon the same ground as before.

* [Sec. 21.—The directors may from time to time close the register and transfer books of the Bank for any period or periods not exceeding in the whole thirty days in any twelve consecutive months.]

† [Sec. 17:—If any proprietor or shareholder is indebted to the Bank, the Bank may withhold payment of the dividends on the stock or shares of such proprietor or shareholder not being registered as held in trust, or as executor or administrator, and apply them in payment of the debt; and the Bank may refuse to register the transfer of any such stock or shares until payment of such debt; and after demand and default of payment, and notice in that behalf given to such proprietor or shareholder, or his constituted agent, or by public advertisement in the local official Gazette, if the debt remain unpaid for the space of three months after such notice, the Bank may advertise in the local official Gazette such stock or shares for sale on a day not less than fifteen days from the publication of such advertisement;

and may, on such day, sell by public auction, and subject to such conditions, if any, as the Bank thinks fit, such stock or shares, or so much or so many thereof as may be necessary, and apply the proceeds thereof in or towards payment of the said debt, with interest, from the day appointed for the payment of such debt to the time of actual payment, at such rate as may have been agreed upon, or, in the absence of such agreement, at the highest rate current for advances by way of local discounts by the Bank;

and shall pay over the surplus, if any, to such proprietor or shareholder or to his lawful representative.]

The plaintiff's contention was, that the Bank was bound to register the transfer upon the application made on the 1st of July, because, although Radha Gobind Shaw had no doubt given bills to the Bank to a large amount, none of these bills had then arrived at maturity; and he further contended that they were bound to register the transfer on the 31st of July although in the meantime the bills had arrived at maturity, because an agreement had then been made between Radha Gobind Shaw and the Bank, on the 8th of July, by which he pledged property to a large amount to secure the payment of the bills, and that the payment was postponed by that agreement till the 1st of October following, so that on the 31st of July there was no debt due from him to the Bank which they could at that time have enforced.

The case of the defendants was, that with regard to the applications alleged to have been made on the 1st and 3rd of July, the plaintiff's case was entirely untrue. They admitted that, early in July, the plaintiff's son applied for the dividends due upon the stock standing in Radha Gobind's name, and was refused upon the ground that Radha Gobind was indebted to the Bank; but they stated that no application was made to register this transfer till the 31st July, and that although they admit that an arrangement was made with Radha Gobind Shaw on the 8th of July, by which the payment of most of the bills was postponed till the 1st of October 1876, there were two bills which became due on the 22nd and 24th of July for Rs. 5,000 each, which were not included in that arrangement, and that consequently, on the 31st of July, there was a debt of [394] Rs. 10,000 due from Radha Gobind to the Bank, the payment of which the latter might then have enforced.

The defendants further alleged, with reference to the applications said to have been made on the 1st and 3rd of July, that even assuming the plaintiff's case were true, the transfer was not made or tendered to the Bank for registration in such a form as the Bank were bound to recognize; and, moreover, that from the 1st to the 15th of July inclusive, the Bank transfer books were closed in accordance with the provisions of s. 21 of their Act (XI of 1876), and that consequently, the Bank were not bound, and according to their usual course of business, were not in a position to register the transfer during that period.

The case came on for hearing before MACPHERSON, J., who found on the evidence that the plaintiff had failed to prove that any demand for transfer was made until the end of July, and holding that when such demand was made Radha Gobind Shaw was indebted to the Bank, and that the Bank was entitled to refuse to transfer, dismissed the suit with costs on scale 2.

From this decision the plaintiff appealed.

Mr. J. D. Bell, Mr. Branson, and Mr. Bonnerjee for the Appellant.

The Advocate-General (Mr. Paul), Mr. Evans, and Mr. Stokoe for the Respondents.

The following cases were referred to in argument. As to there being a debt to the Bank during the currency of the bills: *In re Stockton Malleable Iron Company* (L. R., 2 Ch. D., 101); *In re The London, Birmingham, and South Staffordshire Banking Company* (34 Beav., 332). As to the right of the Bank to justify its refusal to transfer on the ground of the books being closed, though that objection was not raised by them when the application for transfer was made: *Ousely v. Plouden* (1 Boulnois, 145). As to the mode of transfer: *Hibblewhite v. M'Morine* (6 M. and W., 200).

[395] The judgment of the Court was delivered by

Garth, C. J. who (after stating both the plaintiffs' and defendants' cases as set out above, and the grounds on which the defendants relied as entitling them to refuse to transfer, continued).—The Bank was also at one time under the impression that even during the currency of the bills, when the Bank had no present right to sue Radha Gobind upon them, they could still, under the 17th section of the Act (XI of 1876) refuse to register the transfer. But this is clearly not so. The language and the evident intention of that section points to a *present debt only* as conferring a right upon the Bank to refuse either to register a transfer, or to pay dividends; and this view is strongly fortified by the English case of *In re The Stockton Malleable Iron Company* (L. R., 2 Ch. D., 101), in which it was held that the words 'due' and 'indebted' in the Articles of Association of a trading company, which gave to the company a lien upon shares similar to that given by this Act to the defendants, must be taken to refer to debts presently payable.

With reference, however, to the demand of registration alleged to have been made on the 31st of July, it has been distinctly proved that two bills of Radha Gobind, which matured on the 14th and 22nd of July, were not (for some reason or other) included in the mortgage arrangement which was made between the Bank and Radha Gobind on the 8th, so that the amount of these bills was due to the Bank on the 31st; and the Bank was therefore clearly justified in refusing the transfer on that day.

The plaintiff's case, therefore, wholly depends upon the application which is said to have been made on 1st and 3rd of July.

(After dealing shortly with the case on its merits, the learned Chief Justice continued):—

We think, therefore, in substance that there is no reason to disbelieve the plaintiff as to the applications to register the transfer which were made on the 1st and 3rd of July.

But then arises the formidable objection which was made by the defendants in the Court below, but which it was then not necessary to consider, that the application for the registration of [396] the transfer was made during the period when the books were closed. We consider that this objection must prevail.

In order to entitle the plaintiff to ask the Court for a mandatory order, directing the Bank to register the transfer, it is clear that the plaintiff must show, in the first instance, that he applied for such registration at a time and under circumstances when the Bank was enabled and bound to comply with his request.

It was impossible for the Bank to comply with it at a time when the books were closed, and although that reason for not registering might not have been given by the Bank when the application was made, we think that they have a perfect right to avail themselves of it now, because it is one which, in justice to their other customers and to the public, they could not, by any extraordinary exception in the plaintiff's favour or otherwise, have removed, and it is one too of which the plaintiff, in common with the rest of the public, must be taken to have been aware, because the power under which the closing of the transfer books took place is conferred upon the Bank by Act XI of 1876, s. 21 (a public Act); and the fact that the transfer books would be closed on the 1st and 3rd of July was publicly notified by the Bank in accordance with the statutory direction.

We are of opinion, therefore, for these reasons, that the plaintiff's case must fail; and that this appeal should be dismissed with costs on scale 2.

Appeal dismissed.

Attorneys for the Plaintiff: Messrs. *Swinhoe & Co.*

Attorneys for the Defendants: Messrs. *Chauntrell, Knowles & Roberts.*

NOTES.

[CONTRACT SETTING UP DIFFERENT DEFENCES : -

- With reference to statement in text at 396 see. 26 Cal. — "A person who justifies an alleged breach of contract upon one ground only, which is found insufficient is not for that reason disentitled to rely upon other grounds which his rights under the Contract enable him to rely upon": — (1898) 26 Cal., 142 at 157.]

[397] PRIVY COUNCIL

The 21st and 22nd November, 1877.

PRESENT:

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND SIR
R. P. COLLIER.

Norender Narain Singh.....Plaintiff

versus

Dwarka Lal Mundur and others.....Defendants.

[==5 I. A. 18 . 1 C. L. R. 369]

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Mortgage—Foreclosure—Notification—Regulation XVII of 1806, s. 8.

The condition of foreclosure required by s. 8. Regulation XVII of 1806, is that the mortgagor should be furnished with a copy of the petition referred to in the section, and should have a notification from the Judge in order that he may, within a year from the time of such notice, redeem the property.

In an action brought to recover possession as upon a foreclosure, it is essential for the plaintiff to satisfy the Court that the above condition has been complied with.

In such a case, the service of the notice must be established by evidence. The mere return of the Nazir on the back of the Judge's perwannah to the effect that the mortgagor had been duly served, is not legal evidence of service.

The functions of the Judge under s. 8 are merely ministerial; see *Forbes v. Ameeroonissa Begum* (10 Moore's. L. A., 340, 350).

The year during which the mortgagor may redeem, runs not from the date of the perwannah, or the issuing of it by the Judge, but from the time of service.

Mohush Chunder Sein v. Mussamut Tarnee (10 W. R. F. B., 27) approved.

Where there are several mortgagors, and it is not sought to foreclose the individual shares of each as against each, but to foreclose the whole estate as upon one mortgage, one debt, and one entire right against all, service of the notice upon some only of the mortgagors is insufficient to warrant the foreclosure of the whole estate or of any part of it.

Quere—Whether there may not be cases of mortgages of separate shares, in which by proceedings properly framed foreclosure may take place in respect of some of such shares only?

The mortgagee when he seeks to foreclose must discover and serve notice on those who are the then owners of the estate.

IN the suit in which this appeal arose, the plaintiff was mortgagee of certain lands, under a deed of conditional sale, sought, [398] as against the mortgagors, and against parties who had subsequently purchased portions of the lands from them, to have effect given to proceedings taken by him for foreclosure. The defendants contended that the deed of conditional sale was merely a colourable transaction, and was not intended by the parties executing it to operate as a *bonâ fide* instrument. Some of the defendants further contended that not having had due notice of the proceedings in foreclosure, they could not be affected by these proceedings.

On the 18th April 1873, the Subordinate Judge of Bhagulpore, in whose Court the suit was brought, held that the deed of conditional sale was a valid instrument, and that all the legal requirements for foreclosure had been complied with. He accordingly gave a decree in favour of the plaintiff.

On the 13th April 1874, the case came before a Division Bench of the High Court on regular appeal, when the decision of the Subordinate Judge was reversed, and the suit dismissed.

The **judgment** of the Division Bench (PHEAR and MORRIS, JJ.) was as follows :—

“ The plaintiff in this case says that in November 1858, his ancestor purchased from certain vendors, called the conditional vendors, 5 annas, 3 gundas, 1 cowri, and 1 krant share of Mouzah Mudehpooa, subject to redemption by the vendors on repayment of the consideration money, Rs. 5,000, that he afterwards, between September 1861 and January 1868, purchased out and out from some of the mortgagors or conditional vendors their respective shares in the mortgaged property amounting in the whole to 1 anna, 15 gundas, 2 cowris : these purchases must, of course, have been each subject to the mortgage of November 1858.

The plaintiff then says that in June 1867, he caused due notification of foreclosure to be given to the conditional vendors through the Bhagulpore Civil Court, and that the mortgage money has not since been paid. And upon this title he brings this suit to obtain possession, not of the whole of the mortgaged property, but of the difference between the 5 annas odd, originally mortgaged to his ancestor, and the 1 anna odd, purchased by him subsequently to the mortgage ; that is, of 3 annas, 7 gundas, 3 cowris and 1 krant.

[399] The plaintiff also asks for partition in his plaint, but he does not say what share he wants to have divided from the remainder of the property, or who his co-sharers are. And although he brings this suit as I have mentioned to recover possession of 3 annas, 7 gundas, 3 cowris, 1 krant of the joint property, he does not say who of the defendants, 21 in number, are now enjoying this share or are keeping him from it, or even whether or not any of them are in possession of any portion of it ; nor does he state any facts which would serve to connect any one of the defendants with the particular property or shares of property which is the subject of the mortgage.

Of these 21 defendants, we are only concerned on this appeal with two sets, namely, one set, which may be termed Chooni Mundur's set, and the other Kunhya Lall Mundur's. Both these sets of defendants say that they are in possession of a certain share of this joint property; and they admit that they purchased what they have from some of the alleged mortgagors, a part of it at any rate after the date of the alleged mortgage deed. But they admit nothing more. Both of them object that the conditional sale was not a real transaction, even if it had existence at all which they deny, and that they know nothing about the foreclosure.

Now it is quite plain on this state of facts that the plaintiff must in order to make out a title to recover, first, prove not only that the property was mortgaged to him or to his ancestor as he alleges it was in 1858, but that he caused effective notification to be given to the representatives of the original mortgagors in June, 1867, the date when he says that he caused notification to issue. But we find no proof of service of the notification upon the original vendors or their representatives anywhere in the record. The utmost that we find tending in this direction is a petition which is said to have been filed on the occasion of the foreclosure proceedings as they have been termed. Now this petition can at the most show that the petitioners themselves admit that they had notice of foreclosure. It cannot be evidence of all the original mortgagors other than the petitioners or their representatives, having had notice of the foreclosure. And if any one of the mortgagors or his representative was not [400] duly served with notice, then the plaintiff must fail to establish his title by foreclosure.

In this state of the case it is hardly perhaps necessary for us to mention that one of the original mortgagors who was called as a witness, expressly stated that notice of the foreclosure was not served upon him. It thus seems to be quite clear that the plaintiff has failed to make the very first step which he was obliged to take in order to prove his title to the property and the right to recover as against the appealing defendants.

But we further observe that even if he had proved that the foreclosure had been duly effected, he would still have to prove that the share of this joint property which the appealing defendants admitted that they had got from some of the mortgagors, was in fact a share or a portion of a share of the joint property which was the subject of the original mortgage. But there is no attempt, as far as we can see, made by the plaintiff to prove this. It must be remembered that the property mortgaged was but 5 annas, 3 gundas odd share out of the 16 annas; and the whole of the remaining shareholders have not been brought before the Court,—or rather I should say, that none of them have been. There is in truth a total failure of proof that the plaintiff is entitled to recover the share of the joint property which is in the hands of either of the two appealing defendants. It therefore follows that the plaintiff's suit ought to have been dismissed. We are of opinion that the decree of the Subordinate Judge is wrong and must be reversed—and as against the appealing defendants the suit must be dismissed with costs in both the Courts.

I intended to have mentioned as a most important fact bearing upon the merits of the plaintiff's claim, that in the different transactions of purchase which the plaintiff himself refers to, made by him or on his behalf between 1858 and 1868, there is no mention whatever of the conditional sale upon which the plaintiff now relies; yet, as I have already remarked, these sales must have been effected subject to that mortgage, if that mortgage had existed."

From this decision the plaintiff appealed to Her Majesty in Council.

[401] Mr. *Leith*, Q. C., and Mr. *Doyne* for the Appellant.—The deed of conditional sale was a valid instrument, and there is sufficient evidence of a due compliance with the requirements of s. 8, Regulation XVII of 1806, in regard to proceedings in foreclosure. In the foreclosure proceedings the Zillah Judge had recorded that the necessary notices had been regularly served. This, if not conclusive, was at any rate *prima facie* evidence that such was the case. [Sir R. COLLIER.—In proceedings taken for foreclosure are the functions of the Judge ministerial or judicial? Sir M. SMITH referred to *Meer Abbas Ali v. Nund Coomar Ghose* (7 W. R., 123), in which it was held that so far as the issue and service of notice were concerned the Judge is to enquire and record judicially whether matters have been properly conducted. Mr. Arathoon referred to *Forbes v. Ameeroonissa Begum* (10 Moo. I. A., 340).¹ The respondents had notice, and they appeared upon that notice. Personal service of the notice was not essential—*Musst. Koonjoy Suthhamu v. Sheopursun Singh* (S. D. A., 1854, p. 281). Moreover, the respondents, who were purchasers from the mortgagors, were not entitled to be served with notice since they had not taken possession. Assuming that there had been a failure to serve notice on some of the mortgagors that would not affect the mortgagee's right as against those of the mortgagors who had been served. If the foreclosure was regular, the appellant was entitled to the shares of the mortgagors to the extent to which they purported to mortgage them. If it appeared doubtful what was the exact interest of each mortgagor at the date of the mortgage, further enquiry on that point should have been directed.

Mr. C. W. Arathoon for the Respondents.—The deed of conditional sale was collusive and colourable. If valid, it was not shown to cover the portions of property claimed. Due service of notice as required by s. 8, Regulation XVII of 1806, had not been proved. Such proof must be given—*Syud Eusuf Ali Khan v. Mussamut Azumtoornissa* (W. R., 1864, (Gap. No., p. 49), *Madho Singh v. Mathab Singh* (3 All., H. C. R., 325). The object of notice is to fix the mortgagors [402] with knowledge that the period within which he must redeem has begun to run. That period runs from the date of service of notice, not from the date of its issue—*Mohesh Chunder Sein v. Mussamut Tarinee* (10 W. R., F. B., 27). Notice should have been given to the mortgagors, but also to those who had purchased from them prior to the foreclosure proceedings. Such purchasers are the representatives of the mortgagors within the meaning of s. 8, Regulation XVII of 1806—*Sheo Golam Singh v. Ramroop Singh* (23 W. R., 25), *Bhanoomutty Chowdhrai v. Premchand Neogy* (23 W. R., 96), *Mohun Lall Sapkool v. Goluck Chunder Dutt* (10 Moo. I. A., 1). Under the provisions of s. 8 of Regulation XVII, a demand for payment is a condition precedent to the right to institute foreclosure proceedings—*Forbes v. Ameeroonissa Begum* (10 Moo. I. A., 340). But no such demand had been made.

Mr. *Leith* replied.

At the close of the argument their Lordships' judgment was delivered by

Sir M. E. Smith.—This is an appeal in a suit brought by the heirs of Rajah Tek Narain Singh against certain parties, who may be described as the family of Dass, forming one set of defendants, and persons called Mundur who formed another set, the latter being purchasers of the property in question from the Dasses. The suit was brought for possession and for registration of names (as stated in the plaint), "with respect to 3 annas, 7 gundas, 3 cowries, 1 krant out of 5 annas, 3 gundas, 1 cowrie, 1 krant of Mouzah Dooram Mudehpoora 'usli' with 'dakhili' Pergunnah Nesingpore Koora, the property referred

to in the deed of conditional sale, after deducting 1 anna, 15 gundas, 2 cowries, the right and interest of Sri Narain Dass, Bachee Lal Dass, Rajah Ram Dass, Muhtab Dass *alias* Laljee Dass and Chunchal Kishore Dass, purchased by your petitioner's ancestor, and the right and interest of [403] Shunkur Bhatti purchased at auction on the 10th of January 1868 subsequent to acquiring the deed of conditional purchase, at an execution-sale by your petitioner." The conclusion of the plaint is: "Since the principal and interest of the mortgage was neither deposited nor paid by the vendors pursuant to the terms of the mortgage bond, the foreclosure, in accordance with the Regulation XVII of 1806, was formally effected in the Judge's Court at Bhagulpore by a proceeding dated the 23rd June 1867, and the period of one year fixed by the above law expired on the 27th February 1868, and within that period the amount entered in the bond and interest were not paid, and the conditional sale aforesaid became absolute on the 27th of February 1868, corresponding with the 19th Falgoon, 1275, F. S., and the cause of action for possession and mesne profit arose from the same date."

This action, therefore, is brought after proceedings for foreclosure had been taken upon the deed of conditional sale referred to in the plaint, and to give effect to those proceedings. This deed is dated the 30th of November 1858; it is from numerous members of the family of Dass, in all 19; the deed states that they had "sold and transferred all and every the 5 annas, 3 gundas, 1 cowrie, 1 krant of the entire 16 annas original with dependencies in Mouzah Dooram Mudehpooora," in lieu of Rs. 5,000, which had been advanced by Rajah Tek Narain Singh. The further statement is: "We have received the consideration money in full, in one lump sum, in cash from the said vendee, and brought the same into our possession and enjoyment. We execute this deed of conditional sale for two years in lieu of the said consideration, and delivering it to the vendee, hereby declare and give in writing that the said vendee shall enter into possession and occupancy of the property sold by right of purchase as proprietor. We promise that in the space of two years from the date of this deed of sale we shall pay the consideration money in question, in cash, in one lump sum to the vendee aforesaid, and take this deed of sale back. In case we do not repay the consideration in question, the vendee shall, after the expiration of the time, be at liberty to foreclose and complete the sale under the provisions of Regulation [404] XVII of 1806 A.D., and enter into possession and occupancy of the property sold, and to have his own name registered in the Government records in the column of proprietor."

It seems that the Rajah did not take possession, and no interest appears to have been paid or demanded until proceedings were taken after the Rajah's death by the present plaintiffs to foreclose the property, under the eighth section of Regulation XVII of 1806.

The first question which arises (being the question upon which the High Court have decided the case in favour of the defendants) is whether the directions in that section have been fulfilled. The High Court held that there was no sufficient proof of notification made to the defendants of the petition of the plaintiffs claiming foreclosure, and, that being the question, it will be right to look at the terms of the eighth clause. The enactment is: "Whenever the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding section of this Regulation, may be desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or

his representative) apply for that purpose by a written petition, to be presented by himself or by one of the authorized vakils of the Court to the Judge of the zillah or city in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the mortgagor or his legal representative to be furnished as soon as possible with a copy of it, and shall at the same time notify to him by a perwannah, under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive."

The condition of foreclosure required by that section is that the mortgagor should be furnished with a copy of the petition, and should have a notification from the Judge, in order that he may within a year from the time of such notice redeem the [405] property; and in an action of this kind, which is brought to recover possession as upon a foreclosure, it is essential for the plaintiff to satisfy the Court that this condition has been complied with.

It has been contended on the part of the appellant that it is within the province of the Judge of the Zillah Court to determine whether the notice has been duly served or not, and, although it has not been urged, or only very faintly urged, that his finding would be conclusive on the point, it has been strongly insisted that a finding of the Judge, recorded by him in the proceedings upon the foreclosure petition, would, at the least, be *prima facie* evidence of the fact of service.

The general nature of the proceedings under the above Regulation was succinctly stated in a judgment of this Committee, in which it was pointed out that the functions of the Judge under s. 8 are purely ministerial — *Forbes v. Ameeromissa Begum* (10 Moo. I. A., 340—350).

Their Lordships, considering that the duties of the Zillah Judge in the matter of a foreclosure are of a ministerial nature, considering the vast importance to mortgagors of the notification, and the consequences which follow, if they do not redeem within the prescribed time, are of opinion that the service of it should be established by evidence in a suit like the present, which is brought, in fact, to enforce the foreclosure. The proceedings of the Judge are *ex parte*, and even if the Judge examined the Nazir or person who served the notice, it would be unsatisfactory that the estate of the mortgagor should depend upon his opinion. The argument indeed was not pressed that it would be conclusive, but it would be going far to say that it is of such authority as to be *prima facie* evidence, which should shift the onus of proof upon such an important point, and relieve the mortgagee from giving affirmative proof of the due performance of a condition necessary to be established before the foreclosure can attach upon the estate.

In the present instance, however, the case shows that the Judge had no proof, properly so called, of the service. It is plain from the manner in which the entry of the service is made [406] that nothing more occurred than this, that the Nazir having received the perwannah, made a return, as it is called, on the back of it, stating what he had done with it. The substance of the return is stated in the proceedings of the Judge. After recording that "notices and copies of the petition for foreclosure of mortgage addressed to the opposite party, dated the 27th of February 1866, A. D., were delivered to the Nazir under a perwannah to serve on the opposite party," it goes on, "thereupon the Nazir submitted a return on the back of the perwannah to the effect that he could not meet the opposite party, and that he had stuck up a copy of the notice and of the

petition on the houses of each of the opposite party, along with two receipts in the Hindi character, severally dated 13th and 14th Chyet, 1273 F.S., written by Bunsî Chowkidar and Bochal Chamar 'Poneas,' inhabitants of Mouzah Bhawanipore Ruhta, and Choanni Chowkidar and Numoge Chamar 'Poneas,' inhabitants of Mouzah Khoksisyam, Pergunnah Nesingapore Koorâ, which were annexed to the record." Then it goes on, "To-day the record of the case was brought up, and on a reference to the return submitted by the Nazir it appeared that the notice has been duly served." Therefore we have on the face of this document, what the Judge considered to be proof of the notice, namely, the return of the Nazir, which is a mere statement of that officer, without apparently any verification upon oath, or any examination of the Nazir by the Judge.

Upon the trial, no proof whatever was given by the plaintiffs of the service of the notification. They appear to have relied on the recorded return of the Nazir. But it was contended that the want of proof is immaterial, in consequence of certain admissions contained in two petitions filed on the part of the mortgagors, the Dasses. One is a petition signed by five, and the other by six. They were originally 19 in number, and the remainder do not appear to have petitioned or to have made any admission. The first petition refers in this way, and in this way only, to the service: "The applicants caused a notice under Regulation XVII of 1806, to be issued on the 27th February 1866, clandestinely served without the knowledge and information of your petitioners. Now your petitioners having [407] come to the knowledge of the case from some out-of-the-way sources, offer objections on the following grounds." This petition appears to have been presented a short time only before the end of the year of grace, and contains no admission of the time, or sufficiency of the service. Their Lordships, therefore, consider that it does not amount to an admission that the notice had been properly served upon them at the time at which the mortgagee alleges it to have been, or that they had knowledge of it at a time which would have justified the foreclosure.

The other petition no doubt does contain an admission. There is this statement in it: "The petitioners have under a deed of conditional sale, dated the 9th Aughan 1266 F. S., for Rs. 5,000, had notice under Regulation XVII of 1806, in respect of 5 annas, 3 gundas, 1 cowrie, 1 krant of Mouzah Dooram Mudelpoora, Pergunnah Nesingapore Koorâ, Zillah Bhagulpore, issued to us. Therefore we beg to submit our objections." It is true they do not in terms admit the time at which they had notice, but with regard to those petitioners a Judge would not be wrong in holding that there was an admission by them of due service. But this petition is the petition of six only out of the 19 mortgagors.

The importance of requiring proof of the service of the notice and not trusting to a bare statement that notice had been duly served is enhanced by the consideration that it has been held by a decision of the Full Bench of the High Court of Bengal that the year during which the mortgagor may redeem his property runs, not from the date of the perwannah or the issuing of it by the Judge, but from the time of service—*Mahesh Chundra Sen v. Tarinee* (1 B. L. R., F. B., 14; s. c., 10 W. R., F. B., 27). This decision overruled some cases in the late Sudder Courts, in which it had been held that the year was to run from the date of the notification. Their Lordships are quite prepared to adopt the decision of the High Court. It is obvious that if the year is to run from the date of the perwannah, the negligence of the Nazir, or other circumstances, may prevent its service for a considerable time after its date, and so

the mortgagor would lose the benefit of the full time which it was intended by the Regulation to give him.

[408] The necessity of proving service of the notice has recently been decided by two Courts in India, one a Division Court of the High Court of Bengal, and another a Division Court of the North-Western Provinces. In both it has been held that the service should be proved in the action which is brought to enforce the foreclosure. See *Synd Eusuf Ali Khan v. Mussamat Azumtoonissa* (W. R., 1864, Gap. No. 49) and *Mulho Singh v. Mahtab Singh* (3 All., H. C. R., 323).

What their Lordships have held with regard to the service of the notice would be sufficient to dispose of the case against the appellants, but for the fact, to which allusion has already been made, of the admission by some of the defendants that they had received the notice. This opens the question whether the foreclosure is complete as against all or any of the mortgagors. The High Court has held that the omission to serve any one of the mortgagors would be fatal to the validity of the foreclosure. Their Lordships think that, in the circumstances of this case, service upon those only of the mortgagors whose petition admitted service, would be insufficient to warrant the foreclosure of the whole property or of any [part] of it.

This is a mortgage for one entire sum, and the property, although held in certain shares, was mortgaged as a whole to the extent of five annas and a fraction, and was redeemable only upon payment of the entire sum. Each and every one of the mortgagors was interested in the payment of that money and the redemption of the estate, and each and every one of them had a right by payment of the money to redeem the estate, seeking his contribution from the others. The equity of redemption of those who were not summoned, and who had no notice that the mortgagee was demanding his money, cannot be foreclosed, because those who have been served have omitted to redeem. It is impossible for the mortgagee to obtain a foreclosure of the whole of the estate upon a service on some only of the mortgagors. Then with respect to the mortgagors who have admitted notice, it is to be observed that it was not sought to foreclose the individual shares of each as against each, but to foreclose the whole estate, as upon one mortgage, one debt, and one entire right against all.

[409] Further, the Mundurs, the defendants of the second class, purchased some share of some of the Dasses before the foreclosure proceeding took place. It appears that in February, 1861, two or three years after the conditional sale, and before the notice of foreclosure, two gundas and two cowries were sold to the Mundurs. It is said that they did not take possession, but they had become by this purchase the owners of the equity of redemption of the purchase shares, and notice of foreclosure ought to have been served upon them. Mr. *Doyle* has argued that a purchaser who has not taken possession need not be served. Their Lordships, however, think that that argument cannot be sustained. The mortgagee, when he seeks to foreclose, must discover and serve the persons who are the then owners of the estate.

A question of this sort came before this tribunal in the case of *Mohun Lall Sookool v. Goluck Chunder Dutt* (10 Moo. I. A., 1, p. 14). Their Lordships say upon it: "It is quite clear upon the authorities, that if the sale had taken place before the notice of foreclosure was filed, that notice, to be effectual, must have been served on the purchaser, and in the circumstances above stated their Lordships conceive that it ought to have been served upon the decree-holder. Yet there is no evidence of any attempt to serve it upon any one except the widow and heiress of the original mortgagor."

There are subsequent cases in India which show that the view taken by their Lordships has been followed in practice.

Without saying that there may not be cases of mortgages of separate shares, in which, by proceedings properly framed, foreclosure may take place in respect of some such shares only, their Lordships think the proceedings in this case are not such as will sustain the present action as against any of the defendants.

What their Lordships have said is enough to dispose of this case, but they think it right to advert to the main question which arose upon the merits, whether this conditional sale was intended between the parties to be really operative as a *bona fide* instrument.

It seems that Rajah Tek Narain was a patron of the family of the Dasses. They were involved in debt, and he probably [410] advanced money to them from time to time. But with regard to this particular instrument there is strong evidence, arising from the history of the case and from facts which are beyond dispute, for presuming that it was not intended to be acted upon by Rajah Tek Narain. The deed is dated the 30th November, 1858. In its terms it provides for immediate possession. A question, indeed, was raised whether that was so. It was said that the construction was at the least doubtful, and that it was not intended that the Rajah should have possession until the two years mentioned in the deed for the payment of the money had elapsed. However this may be, possession was not taken. No provision is made in the deed for payment of interest, and none was demanded. The two years given by the deed for the payment of the money expired on the 30th November, 1860. The petition to foreclose was not filed until the 2nd of January, 1866, and up to this date it is plain that the Rajah had not entered into possession, had received no interest, nor apparently had asked for any. He obtained what is called the order of foreclosure on the 11th September, 1867. The note of the Judge that the foreclosure was "sanctioned" cannot indeed be properly regarded in the light of an order. He takes certain proceedings, and makes a record of them, but he can give no judgment in any way binding on the parties. However, the proceedings in his Court were complete on the 24th September, 1867. Again no action is taken; possession is left where it was, no interest apparently is demanded, and this suit is not brought until the 1st of October, 1872, nearly 14 years after the mortgage, and five years after the foreclosure proceedings came to an end.

Then the property is dealt with by the Rajah himself, in a manner which seems quite inconsistent with his having a deed of conditional sale which was intended to be acted upon. In 1861 a lease was granted by the Dasses to the Rajah (in the name of his servant Bijoy Dass) of six annas and certain fractions of annas of the same mouzah. Those annas must have included the whole of the shares which had been mortgaged - it appears to have included more; it is an ordinary lease, and part of the rent was to be deducted on account of a former *zurpeshgi*. [411] Again in 1867, after the Rajah's death, his sons obtained decrees against the Dasses, and the right and interest of the Dasses in this estate were notified for sale under those decrees. It appears that just before the days when the sale was to take place the Dasses sold their shares to the Mundurs, who alone appear here as respondents, obtained a large sum of money from them, and paid over that money in discharge of the judgment debt. Those circumstances are not referred to, to show that the conditional sale did not exist, but they are inconsistent with its existence as a document which

was intended to be acted upon.^f Throughout the above transactions there is no trace that it was referred to, or that any notice was given of it, or that anybody knew anything of it. Again, the Rajah, after the conditional sale, as admitted in the plaint, purchased some of the shares of the Dasses which had been mortgaged. They are sales as if the Dasses had the absolute ownership. The deeds in no way refer to the mortgage, nor was any provision made respecting the mortgage debt.

It is not necessary for their Lordships to go further into these transactions. They have adverted to them because they were desirous of expressing the opinion they entertain of the extreme doubt, to say the least, which rests upon the *bona fides* of the conditional sale. They do not desire to impute fraud to either the Rajah or the Dasses. The Rajah had probably taken this deed from them to act upon it in case he should think it right, but did not think it right to do so; and having kept it for so long a time without acting upon it, there is strong evidence in this and in the other circumstances of the case which have been adverted to, leading to the conclusion that it is not a *bona fide* conveyance as against *bona fide* purchasers, which the defendants, the Mundurs, are.

On the whole case, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the Court below, and to dismiss this appeal with costs.

Agent for the Appellant : Mr. T. L. Wilson.

Agents for the Respondents : Messrs. Barrrow and Barton.

NOTES.

[I. STRICT COMPLIANCE WITH THE TERMS OF THE REGULATION XVII OF 1806 REQUIRED -

This has been reaffirmed in :—(1884) 11 Cal., 111 11 L. A., 186 P. C., (1886) 8 All., 388, (1888) 11 All., 161.

II. STRICT PROOF OF COMPLIANCE THEREWITH REQUIRED—

(1886) 8 All., 388; (1884) 11 Cal., 111 P. C.

III. THE YEAR OF GRACE IS FROM THE ACTUAL SERVICE OF THE NOTICE -

Consequently the right of pre-emption comes into existence on the expiration of the year of grace. —(1892) 11 All., 405 F. B.

IV. PROCEEDINGS OF A MINISTERIAL CHARACTER - EVIDENTIARY VALUE—

Not being evidence, the pre-emptor was held entitled in the absence of proof, only to the property passing under a compromise to the mortgagee by conditional sale in foreclosure proceedings. (1888) 11 All., 161.

V OBJECTION MAY BE RAISED AT ANY STAGE -

See. (1884) 11 Cal., 111.

VI. MORTGAGE INDIVISIBLE—

(a) The Privy Council reaffirmed the general rule in —(1885) 12 Cal., 411.

(b) *The Transfer of Property Act*, (1882) has upon this principle enacted thus—

Sec. 60:- * * * Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees has or have acquired, in whole or in part, the share of a mortgagor.

(c) The rule applies also to the benefit of mortgagors :—(1898) 8 M. L. J., 309; (1884) 8 Bom., 497.

- (d) Partial redemption not permitted :—(1884) 9 Bom., 128; (1886) 10 Bom., 648.
 (e) But the mortgagee may waive the benefit :—(1898) 22 Mad., 209; (1909) 34 Bom., 128; (1894) 17 All., 63.
 (f) The exception as regards share acquired will apply whatever be the mode of acquisition, resulting in merger :—(1909) 31 All., 335.
 (g) In such case the whole cannot be redeemed :—(1905) 28 All., 155; (1906) 29 All., 262.]

[412] APPELLATE CRIMINAL.

The 12th February, 1878.

PRESENT :

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE CUNNINGHAM.

The Empress,
versus
 Amiruddeen. *

[1 C. L. R. 483]

Penal Code ss. 217, 218—Evidence that offence has been committed.

It is sufficient for the purpose of a conviction under s. 217 of the Penal Code, that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he has done this with the intention of saving a person from legal punishment; it is not necessary to show that in point of fact the person so intended to be saved had committed an offence or was justly liable to legal punishment.

THE charges against the prisoner, who was a Police Constable, were that he, when in charge of the Gourruddey Police Station, on the 28th of July, in his capacity of Head Constable of Police, induced one Radha Churn Dhopa, to compromise a complaint, which he came to make against one Adhari Dhopa, of cutting off his ear, and, in further violation of his duty, suppressed the fact that Radha Churn Dhopa came to make a complaint; and in so doing framed an incorrect public record with a view to save one Adhari Dhopa from legal punishment. The prisoner Amiruddeen was committed for trial under ss. 217 † and 218

* Criminal Appeal, No. 34 of 1878, against the order of H. C. Sutherland, Esq., Sessions Judge of Backergunge, dated the 17th November 1877.

† Adhari Dhopa was charged before the Sessions Court with the murder of Radha Churn, who died from the wound in his ear, and was acquitted.

‡ [Sec. 217 :—Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save any person from legal punishment, or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save any property from forfeiture, or any charge, to which it is liable by law, shall be punished with imprisonment of either description

for a term which may extend to two years, or with fine, or with both.

Sec. 218 :—Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that

Public servant framing an incorrect record or writing with intent to save person from punishment or property from forfeiture. record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both.]

of the Penal Code, and, on conviction under these sections, was sentenced to imprisonment and fine. He appealed to the High Court.

Mr. M. M. Ghose for the Appellant.

The judgment of the Court was delivered by

Jackson, J.—It has been pressed upon us in this appeal that the prisoner has not been duly convicted under s. 217 of the Indian Penal Code, because there was not before the Court upon the present trial any evidence to show that in point of [413] fact an offence had been committed, still less that such offence had been committed by the person in respect of whom the wrongful act of the Police Officer, the prisoner, had been done. What appears is, that a person named Adhari Dhopa was charged before the Court of Session, and was tried and acquitted, of an offence, the offence charged being the cutting off somebody's ear; and it appears that the particular act which the prisoner in this case had committed, and which amounted to knowingly disobeying a certain direction of the law as to his conduct as a public servant, had a tendency to save a person, namely, the person charged, as first stated, from legal punishment. It appears to me quite sufficient, for the purpose of a conviction under s. 217 that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he should have done this with the intention of saving a person from legal punishment, and that it is not further necessary to show that in point of fact the person so intended to be saved had committed an offence or was justly liable to legal punishment. It appears to me certain that a public servant charged under that section is equally liable to be punished, although the intention which he had of saving any person from legal punishment was founded upon a mistaken belief as to that person's liability to punishment. We have been pressed with a case in which I myself gave judgment—the case of *Queen v. Joynarain Patro* (20 W. R., Cr. Rul., 66). It is not necessary for us at present to consider whether that judgment was right, because the section on which that case turned was wholly different from the section now under consideration. That is a section under which any member of the community is punishable, and it is one under which the essence of the offence is that the person to be dealt with must know, or have reason to believe, that an offence has been committed. This is an offence applying only to public servants, and an act of a certain kind is made punishable as an offence when such act is done knowingly against the direction of the law and with the intention of saving a person from legal punishment, whether [414] the person so intended to be saved from punishment had committed the offence or not.

I think, therefore, that the conviction in this case was right and that the appeal must be dismissed.

Appeal dismissed.

NOTES.

[Belief as to commission of offence necessary and sufficient :—(1818) Rat. Ur. Cr. Cases 405.]

[3 Cal. 414]

APPELLATE CIVIL

The 16th January, 1878.

PRESENT :

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE CUNNINGHAM.

Nilkunto Dey..... One of the Defendants

versus

Hurro Soonderee Dossee. Plaintiff.

[1 C.L.R. 412]

Mode of Attachment in Execution of Decree—Malikana Rights payable for ever—Act VIII of 1859, ss. 235, 236, 237.

A and *B* were entitled to receive annually and for ever a specified amount by way of malikana rights from the Collector as compensation for their extinguished rights in lakhiraj lands. In execution of a decree, *C*, on 13th September, purported to attach, under s. 237 † of Act VIII of 1859, *A*'s share in such specified amount. Subsequent to this attachment, namely, on 23rd September, 1873, *A* and *B* mortgaged their rights to the plaintiff. In a suit brought by him against *A* and *B* and *C*,—*held*, that attachment under s. 237 was not applicable to a right to receive money for ever; that such an attachment is only good so far as it relates to any specific amount, which may be set forth in the request to the officer in whose hands the moneys are, as being then payable or likely to become payable, and that the attachment in question was therefore invalid.

Semble.—The attaching-creditor should have proceeded under s. 235 or s. 236. In either of such cases the defendant, the person to whom the money was payable, would be entitled to notice that he was not at liberty to alienate his rights.

THIS was a suit brought against three defendants to recover a sum of money due by the defendants Nos. 1 and 2 under a mortgage dated 9th Assin., 1281 (23rd September, 1873). The plaintiff charged defendant No. 3 with having purchased part of the mortgaged property in execution of a money decree obtained by him against defendants Nos. 1 and 2. Defendant No. 3, in i.i. written statement, admitted the attachment of the property

* Special Appeal. No. 690 of 1877, against the decree of L. R. Tottenham, Esq., Judge of Zilla Midnapore, dated the 19th March, 1877, modifying the decree of Babu Debendro Lal Shome, Sudder Munsif of that district, dated 5th January, 1877.

† [Sec. 237 :—Where the property shall consist of money, or of any security, in deposit in any Court of Justice or in the hands of any Officer of Government, which is or may become payable to the defendant or on his behalf, the attachment shall be made by a notice to such Court or officer requesting that the money or security may be held subject to the further order of the Court by which the notice may be issued. Provided that, if such

money or security is in deposit in any Court of Justice, any question of title or priority which may arise between the decree-holder and any other person, not being the defendant, claiming to be interested in such money or security by virtue of any assignment, attachment, or otherwise, shall be determined by the Court in which such money or security is in deposit.]

[416] on 13th September, 1873, in execution of his decree, and subsequent auction-sale at which he himself had purchased the property in dispute, but denied all knowledge of the plaintiff's mortgage, and asserted that this auction-purchased property was in no way liable for it. The property mortgaged would appear to have been certain malikana rights which the defendants Nos. 1 and 2 had to receive annually for ever, in a specified amount, from the Collector as compensation for their extinguished rights in lakhiraj lands. It would also appear that a quarter share of this specified amount payable to defendant No. 1 had been attached by defendant No. 3 in execution of his decree on 13th September, 1873, and prior to the plaintiff's mortgage. The attachment was made under the provisions of s. 237 of Act VIII of 1859, and the Court of First Instance, being of opinion that the specified amount or malikana rights were money in the hands of a Government officer, held the attachment to be good. The Lower Appellate Court reversed this decision, the learned Judge considering that the property attached was a sort of interest on land or immoveable property; that the right to receive it for ever was something more than money in the hands of the Collector; and that a mere notice under s. 237 to the Collector without any further notice to the debtor or the public could not, under s. 240, render any alienation of the right to receive the pension or malikana null and void. He also held that the auction-purchaser bought an encumbered property, and that he must either pay the encumbrance or submit to have it sold.

Defendant No. 3 now appealed to the High Court.

Baboos Srinath Doss and Mohini Mohun Roy for the Appellant.

Baboos Mohesh Chunder Chowdhry, Hem Chunder Bonnerjee, and Purna Kalee Mookerjee for the Respondents.

The judgment of the Court was delivered by

Jackson, J.—The question which we have to determine in this case relates to the sufficiency or insufficiency of an attach-[416]ment which the defendant, special appellant, had effected, and in respect of which he seeks to invalidate a mortgage set up by the plaintiff of certain rights which the other defendants, Nos. 1 and 2, had to receive in a specified amount from the Collector annually as compensation for their extinguished rights to certain lakhiraj land. The attachment was made under s. 237 of the repealed Code of Civil Procedure, and if that attachment was sufficient, then by s. 240 the mortgage made during the attachment was invalid, and the purchaser at the execution-sale would have acquired a right to receive such money free of any such mortgage. It is contended that it is an attachment duly made under s. 237, inasmuch as the property consisted of money in the hands of an officer of Government, which was or might become payable to the defendant or on his behalf, and that in such a case all that need be done for the purpose of attaching the property is to make a request to the officer in whose hands the money is, that the money may be held subject to the further order of the Court. It seems to me clear that an attachment of that kind is only good so far as it relates to any specific amount which may be set forth in the request as being then payable or likely to become payable to the defendant, and that that mode of attachment is not applicable to a right to receive money for ever, such as is in question in the present case. It may be doubtful whether, in the circumstances of this case, the attaching-creditor ought to have proceeded

under s. 235 or under s. 236 of the Code. In either of these cases the defendant, the person to whom the money was payable, would be entitled to a notice, and it seems to me clear that this was a case in which the debtor ought to have had a notice that he was not at liberty to alienate his rights. All that we need decide, however, is whether s. 237 will govern the attachment of a right to receive money for ever. It appears to me that it will not. The decision of the Judge is, therefore, correct, and the special appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[ANNUITY—ATTACHMENT :—

See (1884) 10 Cal., 521 and (1889) 12 Mad., 250 :

1. Annuity by will attachable :—(1906) 10 C. W. N., 1102.
2. Whether future sums of money payable half-yearly from certain funds by trustees, not already accrued, attachable :—*Webb v. Stenton* (1883) 11 Q. B. D., 518.]

[417] ORIGINAL CIVIL.

The 6th, 12th, 13th and 14th February and 12th March, 1878.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MARKBY.

Ralli and another.....Defendants

versus

Fleming and another.....Plaintiffs

[2 C. L. R. 93]

Trade Mark—Right to Injunction to restrain use of Trade-Marks—

Combination of Figures.

The plaintiffs, from 1872, imported and sold an article described as 74 lbs. grey shirtings, and marked as follows :—“ In the centre of each piece of cloth a stamp in blue colour of a turtle in a star, with the words ‘ trade-mark ’, underneath, in a semi-circular form, is the name ‘ Fleming, Gabrath & Co., Manchester,’ and under this the number 39 within a star, and at the bottom of each piece the number 2008 ” In 1877 the plaintiffs discovered that the defendants were importing from the same manufacturers, and selling cloth of a similar quality

* [Se Who the property shall consist of land, houses, or other immoveable property. the attachment shall be made by a written order prohibiting the defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise.

Sec. 236 :—Where the property shall consist of debts not being negotiable in instruments, or of shares in any Railway, Banking, or other public Company or Corporation, the attachment shall be made by a

Attachment of debts not being negotiable instruments, and of shares in public companies, &c., by prohibitory order. written order prohibiting the creditor from receiving the debts, and the debtor from making payment thereof to any person whomsoever, until the further order of the Court, or prohibiting the person in whose name the shares may be standing from

making any transfer of the shares or receiving payment of any dividends thereof, and the Manager, Secretary, or other proper officer of the Company or Corporation from permitting any such transfer or making any such payment until such further order.]

marked as follows : " A stamp in blue colour of a rose in a square ; underneath are the words ' Ralli and Mavrojani ' arranged in a semi-circular form, and under this the number 39 in a star, and at the bottom the number 2008." On the facts of the case the lower Court (MACPHERSON, J.) granted an *interim* injunction to restrain the defendants from so marking their cloth, on the ground that it was a colourable imitation of the plaintiff's mark and calculated to mislead the public ; and on appeal the Court (GARTH, C. J., and MARKBY, J.) upheld that decision so far as to continue the injunction.

Held per (GARTH, C.J.—If the imitation of the plaintiffs' marks generally, or the use of the number 2008 in particular, would be calculated to deceive or mislead the public, the defendants ought to be restrained from such use or imitation. Under the circumstances the use of their marks by the defendants would be calculated to deceive the public into the belief that they were purchasing goods imported by the plaintiffs.

Per MARKBY, J.—The number 2008 was not part of the plaintiffs' trade-mark proper : nor on the evidence was it so associated with the plaintiffs' name as to indicate to the public that the goods bearing that number came only from the plaintiffs' firm as importers ; on the evidence it was merely a quality mark, and therefore not calculated to mislead the public into the belief that they were purchasing the plaintiffs' goods, while in fact they were purchasing those imported by the defendants.

Semble.—There may be a right to exclusive use of a trade-mark by traders who are importers only.

[See the foot-note here on the correctness of this headnote.]*

* [Upon this portion of the headnote BATTY, J., observed as follows in *Hernyer v. Droz*, (1900) 25 Bom., 433 at p. 451 :—

" For the plaintiff in the present case the decision in *Ralli v. Fleming*, 3 Cal. 417, has also been relied on apparently with special reference to the headnote which concludes with the words ' *Semble*,—there may be a right to exclusive use of a trade-mark by traders who are importers only.' Such a headnote is of little use if read without reference to the circumstances of the case, the arguments advanced, and the authorities cited and followed or ignored. The facts of that case were as in *Radde v. Norman* and the *Apollinaris Company v. Norrish* and not as in *Richards v. Butcher*. That is to say, ' the suit was brought for an injunction to restrain the defendants from using the plaintiffs' trade-mark,' not to restrain the defendants from using the trade-mark of a third party, the exporter. The points in issue included the questions whether the plaintiffs were entitled to the exclusive use of the number 2008, and whether such number was ' known or recognized in the Calcutta market as indicating that the goods bearing it were imported by the plaintiffs.' The defendants denied that it was so known or recognized, and asserted that the number 2008 was regarded by buyers as a mark indicating quality and not as indicating the person or firm importing the goods and that the plaintiffs were not manufacturers, but only importers and had no exclusive right to import such goods. The point for decision was, practically, not whether such principles as were laid down in *Richards v. Butcher* were correct but whether the case was one to which the principles laid down in that case, or the principles laid down in *Radde v. Norman* and *Apollinaris v. Norrish* would apply. In other words, the issue was whether the plaintiffs used the number 2008 as their own trade mark as a symbol, and guarantee of their own importation :—whether it represented their reputation as importers or the reputation only of the manufacturing exporters. In the former alternative they could sue to protect their own reputation as importers and secure the advantage thereof as in *Radde v. Norman* and in the *Apollinaris* case, while if it were the manufacturing exporter's mark, attracting custom as such, the plaintiffs, obviously on the principles of *Richards v. Butcher* could have no right to sue. And GARTH, C.J., said (p. 425) ' It must be borne in mind, and it is, in my opinion, a most material feature in the case, that the number 2008 was a symbol used exclusively by the plaintiffs and impressed only upon goods which came from their house. It was not a manufacturer's number, it was a symbol the use and meaning of which was not known to the defendants, and is not now known to the Court. It was known to the plaintiffs only.' And it was manifestly upon this ground that the plaintiffs sought only to protect the custom attracted or secured by a mark indicating only their own position and reputation as importers, that the suit was maintainable. The Court said (p. 426) :—' The use of these marks upon similar cloth by the defendants, would be calculated to deceive the public into the belief that the goods which they were buying were the goods which they had bought for years before imported and sold by the plaintiffs.' The case therefore establishes the very reverse of the inference which the counsel for plaintiff in this case would deduce from it, as it shows that an importer can only protect a trade-mark representing his own reputation and the advantages accruing therefrom, but not the trade-mark of another, a manufacturer or producer."]

APPEAL from an order of MACPHERSON, J., dated the 14th of September, 1877.

[418] The suit was brought for an injunction to restrain the defendants from using the plaintiffs' trade-mark. The plaint stated that, in 1872, the plaintiffs commenced to import a certain description of cloth known in the trade as 7½lbs. grey shirrings and by the number 2008; and, in order particularly to distinguish the said cloth, the plaintiffs, in 1872, adopted a trade-mark described as follows: "In the centre of each piece of cloth is a stamp in blue colour of a turtle in a star, with the words 'trade-mark': immediately underneath is the name 'Fleming, Galbraith, & Co, Manchester': and under this is the number 39 (meaning 39 yards in length) within a star, and at the bottom of each piece is the number '2008': " that this combination of symbols, words, and figures was so well known and recognized in the market as the trade-mark of the plaintiffs that until the defendants did so, no persons other than the plaintiffs had, so far as the plaintiffs were aware, ever impressed on cloth any mark resembling that of the plaintiffs', and that the plaintiffs had become entitled to the exclusive use of the said trade-mark for the purpose of distinguishing the cloth sold by them: that the cloth bearing the said trade-mark was known in the market as No. '2008,' and by the native dealers as '*do hazar át*,' and had acquired celebrity, and was recognized and known as cloth imported by the plaintiffs and to be of a superior quality; that from 1875 to 1876, one Bholanath Khettry was in the plaintiffs' employ as a piece goods broker, who acted also for the defendants' firm as broker, and the plaintiffs alleged that when he left them he remained in the employ of the defendants, and induced them to imitate the trade-mark of the plaintiffs and cloth known as '2008,' which Bholanath Khettry knew would find a ready sale; that, in July, 1877, the plaintiffs learnt for the first time that the defendants were importing and selling cloth known as 7½lbs. grey shirrings impressed with the following words, symbols, and numbers, which the plaintiffs alleged differed only colourably from their trade-mark: "A stamp in blue colour of a rose in a square: immediately underneath are the words 'Ralli and Mavrojani' arranged in the same semi-circular form as the words 'Fleming, Galbraith, & Co., Manchester,' are arranged in the plaintiffs' trade-mark; under [419] these words is the number 39 in a star similar to that used in the plaintiffs' trade-mark, and at the bottom is the number '2008': " that up to a very recent period the defendants had been selling similar cloth but with a different number,—namely, '177' instead of '2008,' and the character of the figures was dissimilar, and the words 'Ralli, Mavrojani' were there printed in a different style of lettering to that now adopted, which was the same as the plaintiffs'. The plaintiffs alleged, by the use of the said mark impressed on the goods imported by the defendants, the defendants were enabled to pass off such goods to retail purchasers as goods imported by the plaintiffs, and that the use of the said mark was calculated to deceive, and had deceived, the purchasers of the goods imported by the defendants into the belief that such goods were in fact goods imported by the plaintiffs.

The defendants in their written statement denied that the plaintiffs were in any way entitled to the exclusive use of the number '2008' either alone or in combination with the marks or symbols described in the plaint; and also denied that such number was known or recognized in the Calcutta market as indicating that the goods bearing it were imported by the plaintiffs; and they stated that, from the establishment of their business in 1851, they had adopted, and used as their trade-mark on goods imported by them a ticket and stamp,

the ticket of rectangular and oblong form, green in colour, and bearing the device of a rose with the name of the defendants' firm in English and Greek characters, and the words '39 yards, Manchester'; and the stamp rectangular in form of a blue colour, and bearing the same device as the ticket, but on a larger scale and containing the name of the defendants' firm in English, Greek, Bengali, Nagri, and Devanagri characters, and that their trade-mark was well known to the native buyers of piecegoods in Calcutta as the 'puther mark' or Ralli, Mavrojani's 2008, while that of the plaintiffs' was known as the 'cuckooa mark,' or Nicol, Fleming's 2008; that the number 2008 was regarded by buyers as a mark indicating quality, and not as indicating the person or firm importing the goods; that the plaintiffs were not the manufacturers of the grey shirtings, but only importers, and had no [421] exclusive right to import such goods; that they were informed by Bholanath Khettry that he had been applied to by dealers for shirtings of the same manufacture as those sold by the plaintiffs under their 'cuckooa mark' and bearing the number 2008, and thereupon ordered through their Manchester firm a quantity of such cloth, and their Manchester firm purchased it from the same manufacturers in Manchester from whom the plaintiffs purchased their cloth and sent it out to Calcutta; it was of precisely the same quality and texture as that imported by the plaintiffs, and in order to distinguish it, the defendants affixed their own trade-mark and name together with the number 2008, and it was known in the market as 'Ralli, Mavrojani's 2008.' The defendants further stated that they had not sold the same cloth with a different number as alleged in the plaint; nor had they imitated the plaintiffs' trade-mark, or by the marks they did use had they deceived purchasers as alleged.

Macpherson, J.—It seems to me that the order ought to be granted, and the rule made absolute on the affidavits. It is clear on the face of the defendants' own affidavit that the 2008 is used to induce native dealers to believe that they are receiving the identical articles sold by Nicol, Fleming & Co. So far as any desire to show it is of the same quality, that can be effected by using the '2008' in different figures; but the figures are copied in every particular. I have no doubt the object is to induce the dealers to believe that they are buying the very same cloth, and that the object is to deceive. The rule will, therefore, be made absolute, and the injunction will go.

The injunction was one in terms of the prayer of the plaint, restraining the defendants, their servants and agents, until the further order of this Court, from importing and selling the description of cloth known as 7½lbs. grey shirtings, or any other cloth or goods impressed with a stamp in blue colour of a rose in a square with the words 'Ralli and Mavrojani, Manchester,' underneath, arranged as the words 'Fleming, Galbraith & Co., Manchester,' are arranged in the plaintiffs' trade-mark, and having underneath these words the number '39' within a star, and at [421] the bottom the number '2008,' and from importing and selling such cloth impressed with any mark being an imitation of a similar or only colourably different from the plaintiffs' trade-mark.

The defendants appealed, on the grounds that no sufficient evidence of their exclusive right to use the number 2008 had been given by the plaintiffs; that they had failed to prove that the use by the defendants of the number 2008 with their own trade-mark had deceived, or was calculated to deceive, persons into the belief that, in purchasing the goods imported by the defendants, and bearing the defendants' trade-mark and the number 2008, that they were purchasing the goods imported by the plaintiffs; but, on the contrary, the

evidence given on behalf of the defendants showed it was not calculated so to deceive purchasers; that the injunction, if granted at all, ought to have been limited to restraining the defendants from using the number 2008 on 7½ lbs. grey shirtings; and that it ought not to have been granted without putting the plaintiffs, on terms of undertaking to make good to the defendants the amount of any damages which the issuing of the injunction might cause them in the event of the plaintiffs' suit being dismissed.

The Advocate-General (Mr. Paul), Mr. J. D. Bell and Mr. Bonnerjee for the Appellants.

Mr. Jackson, Mr. Phillips and Mr. Evans for the Respondents.

The following cases and authorities were cited :

For the Appellants: *Farina v. Silverlock* (6 De Gex. M. & G., 214), *Blackwell v. Crabb* (36 L. J., Ch., 504), *Woolam v. Ratcliff* (1 Hem. & M. 259), *Wheeler & Wilson Manufacturing Co. v. Shakespear* (39 L. J., Ch., 36), *Adams on Trade-Marks*, p. 17, *Perry v. Truett* (6 Beav., 66, 418), *Braham v. Bustard* (1 Hem. & M., 447), *Kinahan v. Botton* (15 Ir. Ch., 75), *In re Mitchell's Trade-Mark* (46 L. J., Ch., 876), *Ford v. Foster* (L. R., 7 Ch. Ap., 611), *Ainsworth v. Walmesley* (L. R., 1 Eq., 518), *Burgess v. Burgess* (22 L. J., Ch., 675), *Blanchard* [422] v. *Hill* (2 Atk., 484), *Ragget v. Findlater* (L. R., 17 Eq., 29), *Motley v. Downman* (3 Myl. & Cr., 1), *Baron v. Jones* (4 Myl. & Cr., 433), *Welch v. Knott* (4 Kay. & J., 747), *Batty v. Hill* (1 Hem. & M., 264), *Singer Manufacturing Co. v. Wilson* (L. R., 2 Ch. D., 434), and *Chearn v. Walker* (L. R., 5 Ch. D., 850).

For the Respondents: *McAndrew v. Basset* (33 L. J., Ch., 561), *Seizo v. Provezende* (L. R., 1 Ch., 192), *Ainsworth v. Walmesley* (L. R., 1 Eq., 518), *Ragget v. Findlater* (L. R., 17 Eq., 29), *Singer Manufacturing Co. v. Wilson* (L. R., 2 Ch. D., 434), *Witherspoon v. Currie* (L. R., 5 H. L., 508), *The Leather Cloth Company v. The American Leather Cloth Company* (33 L. J., Ch., 199, S. C., 11 H. L. C., 523, at p. 538), *Hall v. Barrers* (33 L. J., Ch., 204), *Chappell v. Davidson* (2 Kay. & J., 123), *Sykes v. Sykes* (3 B. & C., 541), *Ford v. Foster* (L. R., 7 Ch. Ap., 611), *Croft v. Day* (7 Beav. 85), *Franks v. Weaver* (10 Beav., 297), and *In re Barrow's Trade-Marks* (L. R., 5 Ch. D., 353).

In reply:—*Colonial Life Assurance Co. v. Home and Colonial Life Assurance Co.* (30 Beav., 548), *Lee v. Haley* (39 L. J., Ch., 284), *Cory v. Yarmouth and Norwich Railway Co.* (3 Hare, 593), and *Harrison v. Taylor* (11 Jur., N. S., 498).

The following judgments were delivered:—

Garth, C. J.—I am of opinion that this injunction was properly granted; but in order to make its meaning more clear, I think the form of it should be slightly modified.

There is no doubt, I conceive, as to the law of the case; and there is but little difference between the parties as to the actual facts. The difficulty, if there be any, is to ascertain the fair and reasonable inference which we ought to draw from those facts. I propose dealing with the matter at this stage as shortly as I can, in order to avoid prejudicing the defendants' case at the hearing [423] of the cause, when the Court may probably be supplied with fuller materials than it has at present for ascertaining the truth.

For the present purpose it appears to me sufficiently established that the plaintiffs, Messrs. Nicol, Fleming & Co., have, for several years past, been

selling a particular cloth in the market, which has obtained celebrity there, and become readily saleable; that this cloth is known to the public by certain marks which are described conspicuously upon it, and especially by the number '2008,' which is printed upon each piece in large figures, and in a particular position and combination; and that the defendants, Messrs. Ralli and Mavrojani, having imported similar cloth obtained from the same manufactory, have had marks impressed upon their cloth in a combination generally resembling that used by the plaintiffs, and especially introducing in a similar position and in figures of the same size and character the number '2008,' avowedly for the purpose of giving their cloth a saleable quality in the market, which it would not otherwise possess. Thus far there is no difference between the parties as to the facts.

The defendants say that the plaintiffs are entitled to no monopoly of the sale of cloth in question; that they are not manufacturers of it; and that they, the defendants, have as much right to obtain it from the manufacturers, and sell any quantity of it in the market as the plaintiffs have. This is, of course, perfectly true. But the question is, whether, for the purpose of giving the cloth a saleable quality, the defendants have a right to use these marks which undoubtedly are in some essential particulars an imitation of marks which have hitherto been used exclusively by the plaintiffs? The defendants say that they have not adopted either the plaintiffs' name or their trade-mark proper, which is a turtle; that they describe on the cloth their own name and trade-mark, which is a rose. They admit that they use the number '39' in the same configuration, and for the same purpose as the plaintiffs use it, viz., to denote that each piece of cloth is 39 yards in length; and they claim a right to use the number '2008' as merely conveying to the public that the cloth which they sell is of the same quality as the plaintiffs'.

[424] The plaintiffs, on the other hand, say, that this combination of marks, although differing from theirs in some respects, is undoubtedly a close imitation of it; and that by using this combination, and more especially by the use of the number '2008,' which is admitted to be the main descriptive feature which renders the cloth saleable, the defendants would lead the public to believe that the goods which they are selling are goods imported or sold by the plaintiffs' house. This is the real pith of the case; and here it is that the Court is called upon to draw a fair and reasonable inference from the facts. If the defendants' combination is so different from the plaintiffs', that the public could not reasonably be deceived by the use of it, or if the number '2008' was merely a manufacturer's number, or was used generally by the trade to designate a particular kind or quality of cloth, no doubt the defendants would have as much right to use either the combination or the number as the plaintiffs.

But, on the other hand, if the object of the defendants in using this number and in imitating the plaintiffs' combination is, or if the natural consequence of their doing so would be, to induce the public to believe that the goods which they sell were imported by, or came from the plaintiffs' house, then I consider that, in point of law, *the defendants would not be justified in thus deceiving the public to the plaintiffs' prejudice.*

Now, in determining this question, I think we ought to consider in the first place, how it was that the defendants came to use these marks at all; and in the next place, who and what the buyers of these goods are, and how and by what considerations they are likely to be influenced.

First, then, the evidence in the case explains very clearly to my mind how it was that the defendants came to use these marks. From the 7th paragraph

of the affidavit of Mr. Westerhout, the plaintiffs' assistant, and the affidavit of Bholanath Khettry, the broker, which he made on behalf of the defendants, it appears that, in the years 1875 and 1876, Bholanath was employed by the plaintiffs to sell this cloth for their house. He well knew the estimation in which it was held in the market; he knew that it was saleable only by marks used by the plaintiffs; and when [426] he left the plaintiffs, and began to act as broker to the defendants, he was asked in the market for these same goods which he had been selling previously for the plaintiffs and *as their goods*; and he then advised the defendants to buy similar cloth from the manufacturers, and to have it marked in their own way. It is clear to me that it was through this man's advice, though he does not actually say so, that the defendants had the number '2008' printed on their goods and that their combination of symbols was made in such a form as to imitate that of the plaintiffs'.

It must here be borne in mind, and it is, in my opinion, a most material feature in the case, that the number '2008' was a symbol *used exclusively by the plaintiffs and impressed only upon goods which came from their house*. It was not a manufacturer's number: it was a symbol, the use and meaning of which was not known to the defendants, and is not now known to the Court. It was known to the plaintiffs only. The defendants chose to say that they understood it to notify the quality of the cloth, and they say this because other cloths of different qualities sold by the plaintiffs are marked '2006' and '2007': but this is a mere conjecture on their part; and they do not profess to understand, nor can they in fact know, the true origin or meaning of that symbol. If they had used the words,—'1st quality' or '2nd quality,' or such an expression as 'superior' or 'superfine' or 'super-durable,' they would have used terms which are intelligible to all the world, and the use of which could not be calculated to deceive. But the number '2008' is a peculiar symbol which, like a 'lion' or a 'tree' or a 'flower,' would convey a particular meaning to the plaintiffs themselves, but to no one else, and which could only have been used by the defendants, *because it had been used by the plaintiffs in the sale of this cloth*. Now then, let us see, secondly, who were the buyers of these goods in the market, and what considerations influenced, or were likely to influence, them in making their purchases? The buyers and consumers of this class of goods, would be, for the most part, the native public—people who, as a rule, cannot read or write English; who would scarcely distinguish the name of 'Nicol, Fleming & Co.' from that of 'Ralli and Mavrojani,' and who certainly could not understand, even if they could read the [426] word 'trade-mark.' They might possibly, if they examined the print carefully, distinguish between a rose and turtle; but what they would naturally most be guided by is the general appearance of the combination described on the cloth: and it is admitted, according to the evidence on both sides, that the most distinctive mark in that combination was the conspicuous number 2008 by which name '*do hazar át*,' the cloth itself was known in the market.

From these considerations it appears to me that the fair and almost necessary inference to be drawn is this:—that as the plaintiffs, for a period of five years, had been the only persons selling this cloth in the market by these distinctive marks, and as, during that time, the cloth had obtained peculiar value and celebrity in the eyes of the public, who had learnt to place faith in the goods so marked and sold by the plaintiffs, the use of these marks upon similar cloth by the defendants would be calculated to deceive the public into the belief that the goods which they were buying were the goods which they

had bought for years before *imported and sold by the plaintiffs* ; or, in other words, would naturally lead them to suppose that they were buying goods which came from the plaintiffs' house.

In coming to this conclusion I do not think it necessary in this particular case to go narrowly into the question, whether the whole, or any, and if so what, particular part of the plaintiffs' combination is to be considered as their '*trade-mark proper*' I think that, considering who and what the buyers of these goods are, they would understand very little of what was a '*trade-mark proper*.' I only say that if the imitation of the plaintiffs' marks generally, or of the use of the number '2008' in particular, would be calculated to deceive or mislead the public, the defendants ought to be restrained from such use or imitation.

It was urged upon us in argument by the defendants' counsel, that, by confirming the judgment of the Court below, we should be imputing direct fraud to a firm of respectable merchants, and exposing them to obloquy and odium in the commercial world, before the cause itself had been finally determined; and we were, therefore, much pressed to dissolve the injunction, and merely to [427] require the defendants to keep an account of their sales until the hearing. But I confess it seems to me that, in using this argument, the learned counsel have done their clients an injustice. I have no reason to suppose that, in using these marks, the defendants knew that they were committing a fraud, or doing the plaintiffs any actionable wrong. I dare say these gentlemen may have carefully considered—nay, I think it not impossible that they may have taken advice,—as to how far they might use these marks without infringing in any way upon the rights of other people. But they have done what many honest and good men have, under similar circumstances, done before them,—*they have made a mistake* without any evil intention; and this Court is bound to prevent them until the rights of the parties have been finally ascertained at the hearing from repeating it.

In this particular case I do not think that their keeping an account of sales would be a sufficient protection to the plaintiffs, because if the defendants were allowed to use these marks in the market for several months in order to sell their cloth, they would become as well known in the market as importers and sellers of the cloth as the plaintiffs, and so the very mischief which the injunction is intended to guard against would have been effected.

I think, therefore, that this appeal should be dismissed, and with costs on scale 2, but that the form of the injunction should be varied thus:—

Order, that the defendants be restrained from selling any cloth impressed with the combination of marks described in Exhibit D, annexed to the affidavit of Alexander Westerhout, or any other combination resembling that used by the plaintiffs, and especially from using the number '2008' in any such combination.

Markby, J.—In this case I have had some doubt whether it is desirable to express my views at length, but upon the whole I have come to the conclusion that I ought to do so.

The plaintiffs and defendants are both merchants in Calcutta, and both are in the habit of importing largely goods known by the name of grey shirtings from Manchester, which they sell chiefly to native dealers in the bazar. These grey shirtings are delivered by the manufacturers to the correspondents of the

[428] parties at Manchester unmarked, and the outside fold of each piece is there marked by the correspondents of the firms here. There has been for some time a general similarity between the marks in use by the plaintiffs and those in use by the defendants. The general character of the marks in use by both the firms is as follows:—at the top is a green paper ticket pasted on the cloth with a device thereon, and the name of the Manchester firm in English, and two or three native languages, well known in the bazar; beneath this is a device similar to the device on the ticket impressed by a stamp upon the cloth itself; beneath this again the name of the Manchester firm in large English letters (which, in the case of the defendants, is the same as the name of their firm here); lower down the figures 39, being the number of yards in each piece, and lowest of all a number which generally signifies the quality of the cloth. About five years ago the plaintiffs began to sell grey shirtings, each piece of which was marked at the bottom with the number 2008. Some time in the year 1876 the defendants commenced selling grey shirtings bearing the same number. The plaintiffs thereupon complained that the defendants were infringing their trade-mark, and required them to desist. The defendants signified their willingness to make some alterations in the marking of their cloth, but insisted on retaining the number '2008.' The plaintiffs were not satisfied with this, and the present suit was accordingly brought. When the plaint was filed, the plaintiffs applied for, and obtained an interlocutory injunction, restraining the defendants from using their trade-mark, and it is against the order granting this injunction that the present appeal is brought.

I am not aware of any previous case relating to trade-marks as used by the traders who are importers only: but I see no reason why there should not be such a trade-mark. If the law declares, as it clearly does, that no man has a right to put off his goods as the goods of a rival manufacturer, it seems to me to follow, that no man has a right to put off his goods as the goods of a rival importer. The confidence reposed in the skill, care, and honesty of a particular firm may give a special value to goods imported by them. The question is, did the defendants put off goods imported by themselves as goods imported by the plaintiffs?

[429] There is no question here as to the quality of the goods sold by the defendants under this number, being the same in quality as the goods sold by the plaintiffs under that number. Nor is there any question of the right of the defendants to sell goods of this particular quality, which may be bought at Manchester by any one who chooses to pay for them.

The plaintiffs claim the whole of that which is impressed upon the outside of each piece of cloth as their trade-mark. How far they can do this I shall have to consider in dealing with another part of the case. Conceding for a moment that it would be possible for the plaintiffs to make out this claim, it seems to me to be clear upon the evidence that the only infringement of which they can complain is the use of the number '2008.' They have themselves produced a piece of cloth, with respect to which one of their own witnesses makes the following statement:—"That I am informed, and verily believe, that, up to a very recent date, the defendants have been selling similar cloth, but with a different number, namely '177' instead of the number '2008' now adopted by them, the character of the figures being in themselves dissimilar; and that the words 'Ralli and Mavrojani' were then printed in a different style of lettering to what they have now adopted." A piece of cloth bearing the above-mentioned number '177' and sold by the defendants *before they imitated the plaintiffs' trade-mark as hereinbefore mentioned*, is *herrunto* annexed and marked with the

letter B. (see p. 10 of Mr. Westerhout's affidavit). If the piece of cloth here referred to be looked at, and the mark on it compared with that now in use by the plaintiffs, it will be seen that this statement really reduces this infringement to the substitution of the '2008' for No. 177.

The meaning which the plaintiffs attach to the figures '2008' has not been disclosed by them, but it is clear to me from these affidavits that, whatever meaning the plaintiffs may attach to these figures, they are treated by the public as a quality mark - whether as a quality mark of importation, or as a quality mark of manufacture only, I shall consider hereafter. It is also clear that considerable value is attached to this mark as a mark of quality by buyers of this description of cloth. It is, more-[430]over, not shown that any other firm in Calcutta imports cloth bearing this number except the plaintiffs, and (recently) the defendants, but the plaintiffs themselves import grey shirtings of a slightly different description bearing the Nos. 2007 and 2009.

As I understand the law upon this subject, no trader can complain against a rival trader in regard to any announcement he makes concerning the goods which he sells, so long as no statement is made which is untrue, or calculated to mislead. But besides making use of ordinary language and their own names, in order to announce to the public what they wish to make known with respect to their goods, traders are in the habit of resorting to a variety of devices in order to catch the eye of the public, and to represent to them in a striking manner what they wish to announce. Sometimes they wrap their goods in a fanciful cover, sometimes they impress upon their goods a fanciful name, at other times a fanciful plant or animal; and when a trader specially selects and appropriates to himself for the purpose of distinguishing his goods a device of this kind, that device becomes his trade-mark proper, and no one else is allowed to use it. But if, without any such special selection and appropriation, the goods of the trader do in fact happen to bear some particular mark, and this mark has come to be associated by the public with this trader's name, so that all goods bearing that mark are supposed to come from him, then also the law will not allow any person to use a mark of this latter description any more than it will allow him to use a rival trader's trade-mark proper, and for this reason, because in either case there is made, or there is assumed to be made, a representation to the public which is false, namely, that the goods which are the goods of one trader are the goods of another. But this distinction has been drawn between these two cases. If it be shown that a trader has infringed a rival trader's trade-mark proper,—that is to say, the mark which another trader has specially selected and appropriated for the purpose of distinguishing his goods,—the Court will, without further evidence, at once interfere, taking it for granted that such a proceeding is calculated to deceive the public; whereas, if the mark be one which has not been specially selected and appropriated by the trader [431] for this purpose, evidence must be given to show that the mark was so understood by the public as to make it clear that the proceeding had either deceived, or was at least calculated to deceive, the public. Marks of both these kinds are usually called trade-marks, and the distinction between the two cases is not one of principle, but it is one which is convenient when examining the evidence by which it is sought to prove the infringement. •

Now dealing with the question whether the figures '2008' were part of the plaintiffs' trade-mark proper, I think upon this evidence it appears that they were not. The plaintiffs themselves have, as I consider, told the public with sufficient accuracy what their trade-mark is, to enable us to say with certainty that these figures were no part of that device, which they themselves had

specially selected and appropriated for the purpose of distinguishing their own goods from those of other traders.

It is, as is well known, a very common custom amongst traders, when they adopt a particular device in order to distinguish their goods, to announce to the world that they have done so by attaching to the impression of this device upon their goods the word 'trade-mark.' This is a notice to the public of what their trade-mark proper consists, and to other traders not to use it. Such a notice greatly assists the trader, who has adopted the device in the appropriation of it to himself. But a trader who gives such a notice must, I think, be understood to confine his trade-mark proper to what is reasonably covered by the words. Now it appears that the plaintiffs have, in conformity with this custom, made an announcement to the world of what their trade-mark consists. Upon the piece of cloth produced by them and marked according to their present fashion, the word 'trade-mark' appears twice—once upon the stamp impressed upon the green paper pasted on to the cloth, and once upon the stamp impressed upon the cloth itself. In both cases the words are attached to the figure of a turtle in the centre of a star. I think it is quite clear, therefore, that what the plaintiffs have represented to the world as the device by which they designate their goods is this turtle in a star. What I think is the reasonable construction of the plaintiffs' own announcement, at any rate, I cannot, by any construction of these words, extend so as to cover the figures '2008'.

[432] The figures '2008' therefore not being any part of the plaintiffs' trade-mark proper, we have then to consider whether these figures have been so associated with the plaintiffs' name as to indicate, in the understanding of the public, that goods of this description bearing this number came from their firm, and whether the use of these figures by the defendants is calculated to deceive buyers of ordinary intelligence. This is the most favourable way of putting the question for the plaintiffs. I am not sure that it is not a little too favourable: but let that pass. Now, if I had to decide this case finally upon the evidence now before me, I feel bound to say that I can see no evidence that these figures have been so associated with the plaintiffs' name. It may perhaps be known in the bazar that the plaintiffs are in the habit of importing and selling this particular kind of grey shirtings. There is also ample evidence that they have preference for this particular kind of grey shirtings, but there is, as far as I can see, no evidence that they like them any the better because the plaintiffs import them, or that the figures '2008' are understood by any one to signify that the plaintiffs had in fact imported them. It seems to me that all the evidence in the case, particularly that of the plaintiffs' own native witnesses, goes to show that these figures are understood by buyers to indicate the quality of the manufacture, and that only, and that they are not supposed to have anything whatever to do with the importation. As to any deception of the public, of course, no one acquainted with all that is marked upon these goods by the defendants could ever suppose that the cloth sold by the defendants was imported by the plaintiffs. The name of the defendants' firm is stamped upon the goods several times in a variety of languages, European and oriental; and all the native brokers, who have given evidence in the case, state themselves to be acquainted with the whole of the marks. They could not, therefore, have been deceived as to who were the importers, and they do not pretend to say that they were so. But it is said that these goods are sold by the brokers to persons of less intelligence who would not read or would not understand the whole of the marks, and whose eyes would be caught by the figures '2008' only. This is quite reasonable, and may be assumed; still what do the witnesses say; they say that native [433] purchasers buy the cloth by the number '2008', and not

from any examination of the nature or quality of the cloth. That, however, as I understand the law, is not sufficient. The plaintiffs, I will assume, first adopted the combination of figures '2008', and attached to them some meaning, which is a secret. The public have attached to these words the same or another meaning, namely, that they indicate that the cloth so marked is of a particular quality. Where is the false representation, which is an essential element of the plaintiffs' case, in the defendants' use of these figures? If the meaning to the public of these figures, when expressed in full, is no more than this, "it is hereby represented to the public that this piece of cloth is of a certain quality," then every trader in Calcutta has a right to make this representation, and make it by any words or symbols that he likes. There can be no exclusive right to make such a representation, or to make it in any particular manner. If, indeed, the meaning of the figures as understood by the public is this—"it is hereby represented that these goods were imported by Messrs. Nicol, Fleming, & Co.," that would be quite another matter. But that is what I do not see anywhere stated in the evidence.

If, therefore, this suit were now before me for final determination, I should feel compelled to say that, in my opinion, the plaintiffs had not made out even a *prima facie* case. But it will be a manifest inconvenience if, upon this interlocutory application, there should be a difference of opinion, giving the parties a right to a second appeal before the suit is heard. That is clearly not desirable. I think, therefore, that upon this interlocutory application, I am justified in yielding my opinion to that of the Chief Justice and Mr. Justice MACPHERSON, and not expressing any formal dissent from the judgment of the Chief Justice, which substantially dismisses the appeal.

Appeal dismissed.

Attorneys for the Appellants: Messrs. Sanderson & Co.

Attorneys for the Respondents: Messrs. Chauntrell, Knowles, & Roberts.

NOTES.

[TRADE-MARK.

I. THE HEADNOTE.—

See the remarks of BATTY, J., in *Henniger v. Droz*, (1900) 25 Bom., 433, upon the head-note. Extracts have been given in the footnote at p. 463.

II. TRADE-MARK NEED NOT NECESSARILY BE INDICATIVE OF ACTUAL MANUFACTURER.—

"I am not aware of any previous case relating to trade-marks as used by the traders who are importers only; but I see no reason why there should not be such a trade-mark. If the law declares, as it clearly does, that no man has a right to put off his goods as the goods of a rival manufacturer, it seems to me to follow, that no man has a right to put off his goods as the goods of a rival importer."—*Per* MARKBY, J., at 428.

It is now settled law, that a trade-mark may appertain to the goods of persons other than the actual Manufacturer:—

Taylor v. Virasami, (1882) 6 Mad., 108; *In re Apollinaris Co.* (1891) 2 Ch., 186 at 226, 230; *Robinson v. Finlay*, 9 Ch. D. 487; *In re Sykes*, (bleacher), 43 L. T. N. S., 626.

It may indicate some other person who has imparted some portion of its value to the finished goods.

III. IMPORTER'S MARKS, WHEN PROTECTED, WHETHER HE CAN OBTAIN PROTECTION FOR THE MANUFACTURER'S MARKS—

See *Ralli v. Fleming*, (1878) 3 Cal., 417 (the headnote on this point is misleading); *Taylor v. Virasami*, (1882) 6 Mad., 108; (1900) 25 Bom., 453; 3 Bom. L. R., 1.

IV. THOUGH USED FOR MARKING GRADATIONS OF QUALITY, IF THE MARKS SERVE TO INDICATE THE PRODUCTION OF A PARTICULAR PERSON, PROTECTION IS GIVEN—

Ralli v. Fleming, 3 Cal., 417; *Hirst v. Denham*, L. R., 14 Eq. 542; *Ransome v. Graham*, 51 L. J. ch., 897; *Wood v. Lambert*, 32 Ch. D. 247; *Taylor v. Virasami* (1882) 6 Mad., 108; (1904) 6 Bom. L. R., 407.

V. NUMERALS, WHETHER, BY THEMSELVES, CAN BE TRADE-MARK—

Ralli v. Fleming (1878) 3 Cal., 417; *Barlow v. Gobindram* (1897) 24 Cal., 361.

VI. INFRINGEMENT—

Should be of essential part or of combination; colourable differences do not matter:— (1878) 3 Cal., 417; (1893) 17 Bom., 584; (1907) 34 Cal., 495, (1902) P. R. No. 55; (1904) 15 M. L. J., 45.

VII. TEST OF INFRINGEMENT—

(a) The test is the likelihood of ordinary purchasers purchasing with ordinary caution being likely to be misled:—

Singer Manufacturing Co. v. Looy (1882) L. R., 8 A. C., 15; *Powell v. Birmingham Vinegar Brewery Co., Ltd.* (1897) A. C., 308; *Payton v. Snelling* (1901) A. C., 308.

(b) The adoption of any mark which will cause his goods to bear the same name in the market:—

Or-Ewing & Co. v. Johnston & Co. (1882) 7 A. C., 219; *Reddaway v. Banham* (1896) A. C., 179 at 201.

(c) The Court has regard to the class of customers who would be likely to buy the goods in respect of which the infringement is alleged:—

(1878) 3 Cal., 417; (1904) 15 M. L. J., 45; (1907) 34 Cal., 495.]

[434] *The 4th, 5th, 6th and 11th February, 1878.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR JUSTICE MARKBY.

In the matter of Umbica Nundun Biswas (an Insolvent).

[1 C. L. R. 561]

Insolvent Act (11 and 12 Vict., c. 21), s. 26—(Question of disputed Title — Voluntary Conveyance—13 Elz., c. 5.

Where an order had been made under s. 26 of the Insolvent Act calling on a certain person to show cause why she should not hand over to the Official Assignee money which it was alleged the insolvent had paid to her shortly before his insolvency, under circumstances which might make the transaction void against the creditors. *Held*, in the Court below, that the transaction was a gift, and under the circumstances, void as against the creditors within the Statute 13 Elz., c. 5. *Held* also, that the word 'property' in s. 26 of the Insolvent Act includes money.

Held on appeal, that the matter was not one which could properly be dealt with under the 26th section of the Insolvent Act, as it involved difficult questions of title.

APPEAL from an order of KENNEDY, J., sitting as Commissioner of the Insolvent Court, dated the 8th of September 1877. The order was one made

under s. 26 of the Insolvent Act, directing one Surno Bhye to pay and deliver forthwith to the Official Assignee the sum of Rs. 11,033 and certain jewellery, which it was alleged formed part of the assets of the estate of the insolvent Umbica Nundun Biswas, and which he had shortly before his insolvency made over to Surno Bhye.

Umbica Nundun was adjudicated insolvent on the 14th of March, 1876, and filed his schedule on the 13th February, 1877, when it appeared that his liabilities amounted to Rs. 75,800 and the assets about Rs. 4,000 only; that a sum of Rs. 41,000 in addition to jewellery of large value had been given to Surno Bhye, as to which it was objected that they were made over under such circumstances and for such expenses as would be void as against the creditors. Among the items was one of Rs. 11,000 for the repairs of Surno Bhye's house. It was found also that a release had been executed between the insolvent and Surno Bhye on the 26th of January, 1876, less than two months before he was adjudicated insolvent. The insolvent and Surno Bhye and other witnesses were examined *visa voce* in the matter, and on the 3rd of May, 1877, at the instance of the opposing [435] creditors, Messrs. Handford and Crew, it was ordered that Surno Bhye should hold and retain, subject to the further order of the Court, Rs. 22,033, being a portion of the sum received by her from the insolvent, and the jewellery received by her from the insolvent; and it was further ordered that Surno Bhye should attend before the Court to show cause why she should not make over to the Official Assignee the said sum of Rs. 22,033 and the said jewellery as being assets belonging to the estate of the insolvent.

Cause was accordingly shown and the order now appealed from was made. KENNEDY, J., sitting as Commissioner of the Insolvent Court, delivered the following **judgment**, from which the further material facts fully appear:—

Mr. Piffard and Mr. Jackson for Surno Bhye.

Mr. Bonnerjee for Messrs. Handford and Crew.

Kennedy, J.—In this case, which comes before the Court under the peculiar powers conferred by the Insolvent Act, s. 26, I am unable to see how, consistently with well-established principles of law, I could permit Surno Bhye to retain the entire sum of money which has come into her hands: and although there is not, so far as I am aware, any case to be found in the books precisely similar in its circumstances, I think that the principles of the two cases mentioned by Mr. JACKSON accurately define my duty.

Surno Bhye is, so far as I can discover, one of the principal, if not the principal, Hindu dancing girl in Calcutta, and though past her first youth, retains considerable attractions of appearance and manner. The insolvent, who seems to have succeeded to considerable property within the last few years, took her into his protection three or four years ago, and would appear to have become completely subdued by her fascinations. Apparently, the last fragment of property which he possessed was a zemindari, which, on the 31st May, 1875, he sold to Gobindo and Kistonath Coondoo for Rs. 50,000, out of which he paid to Chunumull and Kallychurn Johurry Rs. 5,000 on account of a [436] debt probably for jewellery: Rs. 4,000 he paid for the expense of the sale: and the remainder Rs. 41,000, he, on the 3rd June, 1875, handed to Surno Bhye. In January, 1876, a document, called a release, was executed between them. In February the insolvent was arrested, and in March, 1876, adjudicated an insolvent on a creditor's petition. He did not file his schedule till February, 1877, and it then appeared that he had absolutely denuded himself of all property whatever; that his

debts amounted to Rs. 75,000, and that at the time of this gift to Surno Bhye, he was absolutely without further property, all or almost all of this large debt then existing.

Surno Bhye was examined under the provisions of the Insolvent Act, and the important parts of her statement are as follows:—"My name is Surno Bhye. I know Umbica Nund Biswas. I have known him for the last 10 or 15 years. I can't say how old he is. He kept me for two years. He left me after I was in his keeping about two years. He and I have signed a writing. It related to Rs. 41,000, a gift to me: the particulars of my claim are all truly written in the paper signed. I first suggested the writing between us. I had received information at this time that he had become involved in debt. He never himself told me that he was heavily involved; in fact I had no means of knowing his circumstances from any one but him. I heard he was in debt from him. He brought the money and said, 'Here I give you the money.' We were in the best terms at this time. He did not tell me at the time where he got the money, but afterwards said he had sold a zemindari. I asked him where he got the money, and he said he had sold a zemindari." Now if there were nothing more in this case, I think it would be quite impossible for this lady to retain a pice of the money, for it was clearly a gift at a time when the donor was in circumstances wholly insolvent, and must be taken to have been made with the intention to defeat and delay creditors; as I am bound to presume that the insolvent intended that which he must have known to be the necessary and inevitable consequence of his act.

As difficulties, however, thickened about the insolvent, this lady, apparently acting under the advice of Baboo Aushootosh [437] Dhur, one of the most astute attorneys of this Court, obtained from Umbica Nundun the release mentioned in her evidence.

The instrument recites that Surno had been under his keeping, and had to receive from him divers sums of money; that, being unable to pay the same from time to time as they accrued due, he promised to pay all her dues at once in a lump sum; that at his special request she had pulled down portions of her house and re-built and repaired the same at a very heavy cost; that on the 3rd June he paid to Surno the sum of Rs. 41,000 on the distinct understanding that out of the same she was first to pay herself the sum due to her. It will be observed that this recital distinctly contradicts Surno's own statement, but she alleges this to have been a free gift, and she says that she was not aware of what her attorney wrote. The deed then recites certain payments alleged to have been made by Surno for Umbica, and an agreement that the account should be settled between them: and on their settling an account as in the schedule, it brings in Surno as indebted to the insolvent in Rs. 133-9-0, which was alleged then to be paid to him, but which, so far as I can discover, never got actually into his hands; probably it was the remuneration of Baboo Aushootosh Dhur for his professional services. On examination of the account, I found items purely of gifts and benefits to Surno and payments of salary as mistress: all of which I thought so clearly voluntary, that as against the creditors they were absolutely void. I do not say that as to the rest of the case, I was satisfied that Surno had made out a good or valid claim. I do not say that her liability to the estate may not be considerably greater, but that for the purposes of the procedure under the 26th section of the Insolvent Act, I think, according to the decree of the Appellate Court in *In re Dwarkanath Mitter* (4 B. L. R., O. C., 63), the case must be a simple one, and so far as to the

gifts and salary for prostitution, I think this case is absolutely simple; that in spite of Mr. *Jackson's* very ingenious argument, there is nothing to be said in support of these gifts. Mr. *Jackson* relies chiefly on the case of *Ayerst v. Jenkins* (16 L. R., Eq., 275), where Lord SELBORNE sitting for the Master of the Rolls refused to set aside [438] a deed of trust entered into on the eve of, and apparently with reference to, the celebration of a marriage, incestuous and void by English law; but his entire ground of decision was, that this was an attempt at the suit of the representative of the settlor to set aside a transaction which had been completed and carried out, not for the benefit of creditors, because the case shows expressly that all creditors had been paid off, but for the benefit of those who claimed as volunteers. The case was one of active attempt to set aside a completed transaction, as being based on an illegal transaction for the benefit of a *particeps criminis*, not to get rid of a transaction for which there was no consideration, for the benefit of creditors. He sets forth the doctrines most clearly in page 282 as follows:—Most of the older authorities on the subject of contracts founded on an immoral consideration are collected in the note to *Benyon v. Nettelford* (M. & Gord., 94). Their results may be thus stated:—(i) Bonds or covenants founded on past cohabitation, whether adulterous, incestuous, or simply immoral, are valid in law, and not liable, unless there are other elements in the case, to be set aside in equity. (ii) Such bonds or covenants if given in consideration of future cohabitation are void in law, and therefore of course also void in equity. (iii) Relief cannot be given against any such bonds or covenants in equity if the illegal consideration appears on the face of the instrument. (iv) If an illegal consideration does not appear on the face of the instrument, the objection of *particeps criminis* will not prevail against a bill of discovery in equity in aid of the defence to an action at law. (v) Under some, but not under all, circumstances, when the consideration is unlawful and does not appear on the face of the instrument, relief may be given to a *particeps criminis* in equity, and in page 284 he refers to *Rider v. Kidder* (10 Ves. 360); apparently fully accepting Lord ELDON'S doctrine with respect to such transactions being only void as against creditors.

Mr. *Jackson* tried to show that the latter words of Lord SELBORNE'S judgment were adverse to that view, but on examination it is clearly not so. Lord ELDON first said, "I doubt whether there is any instance of taking the property out of her [439] hands, except as against creditors." He then goes on to show the grounds he had for suspicion that there was not a complete transfer of such a character as to exclude the resulting trust. Then the property not being of a class which as the law then stood was attachable, he seems to have had some difficulty as to whether it was a fraud on creditors, but his decree directs inquiries which could only have been material, if it could have been held to be so. His reference to *Dundas v. Dutens* (1 Ves., 196) clearly shows his meaning. But the intervention of bankruptcy always was held to get rid of the difficulty as to non-liability of the property even where the powers of creditors against debtor's property had not been so much extended by statute as they now are. *Gilham v. Locke* (9 Ves., 612) puts the case for Surro as high as it can be put; that is, that a bond without consideration creates a personal liability on the part of the obligor which may be sufficient to take the case out of the statute of fraudulent conveyances in respect of any transaction really and *bon fide* entered into in satisfaction of liability on such a bond, but nothing of that kind is the case here. I am bound to hold that the transaction here was wholly without consideration which the law can recognise, and that, therefore, it comes within the purport of the Statute of Elizabeth, which avoids such transactions when they affect creditors.

I assume all through this that there was a gift for the benefit of Surno, not merely *benami* for the insolvent. I think it not improbable that this young man was so infatuated as to be willing to denude himself of everything in her favour, probably not unaffected by some delusive idea that she truly loved him, and that by the gift he had secured for himself an earthly paradise; but looking at the recitals in the release, there is much which may suggest a different view of the case, and I by no means decide that this may not be the true view.

As to the repairs of the house, however, they may possibly stand on a different footing. I feel myself quite incapable of affording complete belief to the statements of the witness produced by Surno, and her own statement is strongly against her [440] right, still I do not feel myself justified in exercising this peculiar jurisdiction except when the case is perfectly clear. I therefore make the rule absolute only as to the other portions of the sum comprised in it, omitting the sum claimed for re-building and repairs. I give liberty to the Official Assignee to take such proceedings as he may think proper with respect to the residue of the sum of Rs. 11,000, as I have grave doubts as to some of the alleged payments, and also to sue for the sums included in this rule if he be so advised.

I think that the word 'property' in the 26th section is quite sufficient to include money. In s. 24 there is an enumeration including money and closing with the general words property, goods, and effects; in s. 25, stock and shares are placed under a particular provision; in s. 26, all property, save the stock and shares mentioned in s. 25, is made subject to this peculiar power. I think it hard to give to property any meaning except that of the enumeration in s. 24, excluding the stock and shares.

From this order Surno Bhye appealed on the grounds that no order should have been made under s. 26 of the Insolvent Act, that section not being applicable to a case of this kind, that even if s. 26 applied, the rule should, on the evidence and on the finding of the Commissioner that the property was a gift for the benefit of Surno Bhye, have been discharged with costs.

Mr. Jackson, Mr. Phillips, and Mr. Evans for the Appellant.

Mr. Bonnerjee for Messrs. Handford and Crew, the Opposing Creditors.

Mr. Jackson.—There is no case which shows that in a case like this, where money was actually paid and the transaction completed, it can be set aside. It is not like the case of a bond or deed; the inference to be drawn from the cases is that a transaction like this cannot be set aside. The learned Counsel proceeded to contend, —1st, that under s. 26 of the Insolvent Act, the question of the validity of the gift as against creditors could not be tried; 2nd, that the Statute of Elizabeth did not apply in such a case [441] as this so as to render the gift void; 3rd, that even if it did apply, a gift actually completed could not be set aside.

On the first proposition he contended that money was not included in the word 'property' in s. 26: that if it was included, it must be money ear-marked, specified, and set apart, and inasmuch as in this case the insolvent could not have recovered the money in an action of trover, it was not so ear-marked as to form part of his property; that if it were included in the term 'property' the words of s. 26 showed that it was only property subject to the control of the insolvent which could be dealt with, and that this question was not one for trial and disposal under s. 26.

On the 2nd point the learned Counsel contended that the money could not have been taken in execution, and therefore the Statute of Eliz. (13 Eliz., c. 5)

did not apply, and referred to Statute 1 & 2 Vict., c. 110, which makes money liable to attachment in execution in England, but which does not apply in this country. The following cases and authorities were cited :—*Sims v. Thomas* (12 A. & E., 536, at p. 553), *Barrack v. McCulloch* (3 Kay. & J., 110), *Duffin v. Furness* (Cases temp., King., 77), *Wood v. Wood* (4 Q. B., 397), *Collingridge v. Paxton* (11 C. B., 683), *In re Dwarkanath Mitter* (4 B. L. R., O. C., 63), *In re Ajudhia Prasad* (7 B. L. R., 74), *May's Fraudulent Conveyances*, 426, 377, *Ayerst v. Jenkins* (L. R., 16 Eq., 275), *Rider v. Kidder* (10 Ves., 360), *Reese River Silver Mining Co. v. Atwell* (L. R., 7 Eq., 347), *Robinson v. Peace* (7 Dowl., 93), *Lott v. Melville* (9 Dowl., 882).

Mr. *Bonnerjee* for the Opposing Creditors contended that the case was one which could be dealt with under s. 26, and referred to the case of *In re Fulchand Johurri* (unreported), in which such a question had been gone into. He also contended that this money was part of the property of the insolvent; that on the evidence there was not a gift within the cases cited on the other [442] side; that if there were a gift, it was void by Hindu Law, 2 Colebrooke's Digest, 181, v. 53; and that under the circumstances it was in any case void as against creditors under s. 24 of the Insolvent Act.

Mr. *Evans*, in reply, cited *Poley v. Hill* (1 Phillips, 399), *Deraynes v. Noble* (1 Mer., 529), *Pennell v. Deffell* (1 De Gex. M. & G., 372), *Great Eastern Railway v. Turner* (L. R., 8 Ch. Ap., 149).

The judgment of the Court was delivered by

Garth, C. J.—We allowed the case to proceed in the hope that, as the parties have already incurred so much expense and trouble, we might have arrived at some satisfactory solution of it, which might obviate the probability of any further litigation. But the further we proceeded the more difficult and complicated the matters in dispute became, and we could no longer doubt that both as regards the facts and the law, some very serious questions of title and otherwise are at issue between the parties.

Under these circumstances, we felt that in the exercise of our discretion, we should be wrong in attempting to settle so serious a dispute in a summary proceeding under s. 26 of the Insolvent Act.

We believe that it has always been the practice of this Court to abstain from deciding difficult questions of title under that section and to leave the parties to settle such questions by a regular suit, and we entirely approve of that practice; see the case of *In re Dwarkanath Mitter* (4 B. L. R., O. C., 63).

The procedure under s. 26 is not calculated to effect satisfactorily the trial of difficult questions of title. And our judgment, even if we thought it right to decide the matter, would not be conclusive. Either party might, if they chose, raise the same question again in a regular suit.

We think, therefore, that this appeal should be allowed, but we think that under the circumstances the rule obtained, as [443] we consider it was, at the instance of Mr. *Bonnerjee's* client) should be discharged without costs on either side, it being quite understood that we give no opinion as to the merits of the dispute.

Appeal allowed.

Attorneys for Surno Bhye: Messrs. *Ghose and Bose*.

Attorneys for the Opposing Creditors: Messrs. *Orr and Harriss*.

[3 Cal. 443]

The 4th and 7th January and 11th February, 1878.

PRESENT :

SIR RICHARD GARTH KT., CHIEF JUSTICE, AND MR. JUSTICE MARKBY.

Manick Chunder Dutt.....Plaintiff

versus

Bhuggobutty Dossoo..... Defendant.

Hindu Law ---Adoption of only son---Sudras.

The adoption of an only son is invalid according to the Bengal school of Hindu law, and the prohibition applies as well to Sudras as to the higher castes.

APPEAL from a decision of KENNEDY, J., dated the 14th of August 1877.

The suit was brought to establish the adoption of the plaintiff, and for a declaration that as such adopted son he was entitled to certain property. The plaint stated that, in April-May, 1865, the plaintiff, who was then of the age of eight months or thereabouts, and known by the name of Hari Doss Dey, was given by his father Nocoor Doss Dey, of Bow Bazar in Calcutta, a Hindu inhabitant of the Sudra caste, to Rajkrishna Dutt, of Sunkar Haldar's Lane in Calcutta, a Hindu of the same caste, and to his first wife Kalimoney Dossoo (both since deceased), for the purpose of being adopted by them as their son, they having no issue of their own : and the said Rajkrishna Dutt and Kalimoney Dossoo then took the plaintiff for the purpose of adopting him, and in due form did adopt him as their son according to the manners, usages, customs, and laws applicable to the Hindus of Lower Bengal, and gave him the name of Manick Chunder Dutt.

The plaintiff was admitted to be at the time of the adoption the only living son of his parents, but it was argued for the [444] plaintiff that, being of the Sudra caste, and the adoption having been completed, the adoption was valid.

KENNEDY, J., referring to the decision in the case of *Raja Upendra Lal Roy v. Rani Prasannamayee* (1 B. L. R., A. C., 221) decided by L. S. JACKSON and D. MITTER, JJ., gave judgment as follows :—

I do not think I should be justified in dissenting from the decision of Mr. Justice MITTER on a question of this kind, even if I were not in fact bound by the case as being the decision of the Appellate Court. Even if I were satisfied on the facts, I should certainly not decide in favour of the plaintiff in the teeth of a judgment of the Appellate Court, to which Mr. Justice MITTER was a party.

The learned Judge also held that the adoption was not proved.

Mr. Bonnerjee and Mr. T. A. Apcar for the Appellant.

Mr. J. D. Bell and Mr. Hill for the Respondent.

Mr. Bonnerjee contended that the adoption was not invalid. There is no authority that the adoption of an only son among Sudras is illegal. In *Jankee Debea v. Gopaul Acharjee* (1. L. R., 2 Cal., 365) the parties were Brahmins. In *Raja Upendra Lal Roy v. Rani Prasannamayee* (1 B. L. R., A.C., 221), it does not appear whether the parties were Sudras or not. There is no direct authority that such an adoption, when made, is absolutely void.

From the texts of Hindu law on the subject it would appear it was not invalid ; see Shamachurn's Vyavastha Darpana, v. 654,—“The adoption of an only son, if made by the performance of the rites ordained in the Vedas, cannot be invalidated or set aside, although it be deemed not to be a good one : ” to the same effect is the note to v. 273, Colebrooke's Digest, Vol. III. In *Joymony Dossee v. Sibosondry Dossee* (Fulton, 75), it was held that an only son might be adopted : there the parties were Sudras, and a distinction was drawn between Brahmins and Sudras, though that was only as to the performance of the ceremonies of adoption. [445] The cases of *Veerapermall Pillay v. Narain Pillay* (1 Str. Notes of Madras Cases, see p. 106), *The Rajah of Tanjore* (1 Str. Notes of Madras Cases, see p. 107), and *Nundram v. Kashsee Pandey* (4 Sol. Rep., 70) show that the adoption of an only son, though illegal and even sinful, is not invalid when once it has taken place. to the same effect are the cases of *Chinna Gaundam v. Kumara Gaundam* (1 Mad. H. C., 51), *Singamma v. Vinjamuri Venkatacharlu* (4 Mad. H. C., 165, at p. 171), *Mussamat Tikday v. Lalla Hurcelall* (W. R., 1864, Gap. No. 133), *Vyankatray Anandray Nimbalkar v. Jayawantray* (4 Bom. H. C., A. C., 191), Morley's Digest, Vol. I, pp. 16 and 17, cases 37, 38, 39, 41, 43 ; and p. 24, cases 103 --107 ; and Macnaghten's Hindu Law, 67 note. In *Nilmadub Doss v. Bushumbhur Doss* (13 Moore's I. A., 85), the point was referred to but not decided, the adoption being found not to have taken place. That there is a distinction between Sudras and Brahmins in respect of adoption is shown by the cases of *Behari Lal Mullick v. Indramani Chowdhram* (13 B. L. R., 401), *Chinna Nayayya v. Pedda Nayayya* (1 L. R., 1 Mad., 62) and *Singamma v. Vinjamuri Venkatacharlu* (4 Mad. H. C., 165). The only direct decision against the appellant's contention is that of *Raja Upendra Lal Roy v. Rani Prasannamayi* (1 B. L. R., A. C., 221), but it is submitted that the texts which are given as authority for the decision are not those which ought to govern the case. The Dattaka Chandrika and the Dattaka Mimansa are the chief authorities on adoption, it being the rule that when they differ, the former is followed in the Bengal school ; see the Preface to Shamachurn's Vyavastha Darpana, p. 19 ; Macnaghten's Hindu Law, preliminary remarks, p. 23. The learned counsel referred to the Dattaka Mimansa, s. 4, v. 1 : Dattaka Chandrika, s. 1, v. 29. Manu, ch. ix. v. 168 ; Shamachurn's Vyavastha, v. 570, and contended that there was no absolute prohibition of the adoption of an only son : such an adoption, though blamable, might be made. the sin of making it is not sufficient to make the act wholly void when it has been [446] done : the sin is in the giver and receiver, and the adopted son should not suffer for it. Shamachurn says (Vyavastha Darpana, v. 570), that the more modern Hindu lawyers say that such an adoption, though immoral, is valid. The strict rules of the old Hindu law-givers are not to be adhered to in every case ; see the Full Bench case of *Kery Kolitany v. Monceram Kolita* (13 B. L. R., 1), in which MITTER, J., was in a minority. In *Gocoolanund Doss v. Wooma Doss* (15 B. L. R., 405), MACPHERSON, J., upheld the adoption and cited a passage from 1 Strange's Hindu Law, p. 85, which lays down that the selection is a matter of discretion and not of absolute law.

Mr. Hill for the Respondent. -- Adoption is an improper act in itself in any case, and is only allowed by the Hindu law in certain cases. The object of it is to perpetuate lineage : in such a case as this the very object of it would be defeated. There is no difference in any of the authorities as to the prohibition, which is in express and strong language, and creates an absolute incapacity to adopt an only son ; see Dattaka Mimansa, s. 4, v. 1 : Dattaka Chandrika, s. 1, vv. 29, 30 ; Colebrooke's Digest, Vol. III, v. 273. The prohibition against

a woman adopting a son without consent has always been absolute; why not the prohibition against adoption of only son, which is just before it and expressed in the same way. A father is incapable of giving an only son. It would be an illegal gift, and void; see Colebrooke's Digest, Vol. II, vv. 62, 65—Dattaka Mimansa, s. 4, v. 5, which show a want of dominion in the father over an only son: by giving him in adoption the father would be defeating the rights of his ancestor. Verse 67 of 2 Colebrooke seems also to make the adoptive father incapable of receiving him in adoption; see also Dattaka Mimansa, s. 4, v. 8. The forms and ceremonies necessary for giving in adoption show that an only son cannot be given: Dattaka Mimansa, s. 5, vv. 11, 13, 14, "Capacity to give" is there stated to "consist in having a plurality of sons." In the case of *Janoker Debea v. Gopaul Acharjea* (1. L. R. 2 Cal., 365) the adoption of an eldest son was upheld; but the adoption of only son creates an absolute extinction of lineage [447] and of the power of conferring benefit on ancestors, and that is the distinction. The adoption of an only son is taken to be an interference with the rights of others, and illegal. Almost all the cases where such an adoption has been upheld are cases where the relation of the only son has not been completely changed by the adoption, but he remains the son of both the natural and adoptive fathers. The English commentators, with the exception of Sir F. Macnaghten, assert that the adoption of an only son although improper is not invalid—1 Macnaghten's Hindu Law, p. 67; Strange's Hindu Law, pp. 84, 87; but the cases collected and published by them give no support to this opinion,—2 Macnaghten's Hindu Law, p. 178, Case 3, p. 179, Case 4, and p. 195, Case 15; 2 Strange's Hindu Law, pp. 106, 107. As to Sir F. Macnaghten's opinion, see his Considerations, p. 147, rule 8, and p. 148, where he says that Jagannatha's Commentary is entitled to no great weight. At p. 205 he says that the point did not really arise in the case of *Veerapermall Pillay v. Narain Pillay* (1 Str. Notes of Madras Cases, 78, see p. 106). As to the rights of a son whose adoption is held to be invalid, see per SCOTLAND, C.J., in *Baucau Sankara Pandit v. Ambabay Ammal* (1 Mad. H. C. Rep., 363), *Shumshere Mull v. Dilraj Koureur* (2 Sel. Rep., 169, at p. 171), *Nundram v. Kashee Pandey* (3 Sel. Rep., 232), and in another stage (4 Sel. Rep., 70). The case of *Joymonj Dossee v. Sibosondry Dossee* (Fulton, 75) was a case of *dwayamushyayana* adoption, the adopted son retained both names. *Chinna Gaundani v. Kumara Gaundani* (1 Mad. H. C., 54) only follows former cases, and apparently without looking closely to see what they decided, as is the case with *Vyankatray Anandray Nimbalkar v. Jayavantray* (4 Bom. H. C., A. C., 191). In *Mussamat Tikday v. Lalla Hureelall* (W. R., 1864, Gap. No. 133) the cases do not appear to have been before the Court: there is no argument. In *Gocoolanund Doss v. Wooma Dace* (15 B. L. R., 405) the point does not appear to have arisen directly: the opinion of MACPHERSON, J., as to the adoption of an only son is in my favour. The case of *Raja Upendra Lal* [448] *Roy v. Rani Prasannamay* (1 B. L. R., A. C., 221) is a direct authority in my favour, and is a general ruling applying as much to Sudras as to other castes. In *Nilmadub Doss v. Bissumbhur Doss* (13 Moore's L. A., 85) the opinion of the Privy Council was that the adoption of an only son was invalid. In other cases Sudras are expressly excepted, where it is intended to exempt them: therefore the inference is, that the prohibition was intended to apply to them.

Mr. T. A. Apcar in reply.

Cur. adv. vult.

The following judgments were delivered :---

Markby, J.—In this case the plaintiff, appellant, claims to have been adopted by the late Rajkrishna Dutt in his life-time, and he brings this suit to have it declared that this adoption is valid, and that as such adopted son he is sole heir to his adoptive father. Mr. Justice KENNEDY held upon the authority of the case of *Upendra Lal Roy v. Rani Prasannamayi* (1 B. L. R., A. C., 221), (i) that the adoption, if made, was invalid, because the plaintiff, at the date of the alleged adoption, was the only son of his father, and (ii) that no adoption had in fact taken place.

The case comes before us upon appeal from this decision, and the first question for consideration is, whether the adoption of an only son is invalid under the Hindu law. If this question is answered in the affirmative, there will be no necessity for deciding the second, which is one of fact.

I have gone carefully through all the authorities that we were referred to and that I have discovered, and I am surprised to find, how much less decisive authority there is upon the point than would appear from some of the modern text-writers. Many of the decisions commonly referred to have no bearing at all upon the question : in others the point is referred to, but it is extremely difficult to ascertain whether it was really considered.

The earliest decision of the late Sudder Dewany Adawlut usually quoted on this point is that of *Ranee Bhudorun v. [449] Hemuchul Sing* (2 Sel. Rep., 59), which was decided in 1813, but no question of adoption was really decided in that case at all. The respondent, in a suit brought against him to account for the profits of certain property, only alleged that he had been "merely" adopted by a previous owner, and what he really relied on was a temporary settlement made by Government with himself. The appellant, no doubt, objected that the respondent as an only son could not be adopted ; and from a statement made in another case reported in the same volume, to which I am next about to refer, it is probable that the opinion of the pundits was taken upon this point, and that they thought such an adoption invalid (see p. 221). But no opinion whatever was expressed upon this point either by the Provincial Court or by the Sudder Dewany Adawlut ; the suit being decided in favour of the respondent upon the other ground.

In *Rajah Shamshere Mull v. Rane Dilraj Konwar* (2 Sel. Rep., 169) there was, when the suit was brought, only one adoption in dispute, that of the plaintiff's father by a widow of Rajah Bheem Mull. But on the death of the original defendant, his widow, Dilraj Konwar, adopted Tej Mull, the grandson of her husband's uncle, and continued the suit. The Zillah Court held that the adoption of the plaintiff's father was bad, not because he was an only son, which he was not, but because Rajah Bheem Mull had not authorized it ; that consequently the plaintiff had no claim to be heir of Rajah Bheem Mull, and on this account the Zillah Judge dismissed the suit. On appeal to the Provincial Court of Benares, this decree was affirmed. On further appeal to the Sudder Dewany Adawlut, the pundits were asked as to the validity of both adoptions. They considered the adoption of the plaintiff's father illegal for the reason assigned ; and the adoption of Tej Mull they also declared to be illegal he being the only son of his father, unless it could be supported as a *dwayamushyayana* adoption. But ultimately nothing was decided upon this point, because the Court agreed in the view that the adoption of the plaintiff's father was bad, and that therefore the plaintiff had failed to make out his title.

[450] The next case is that of *Nundram v. Kashee Pandey* (3 Sel. Rep., 232), which is dated June 30th, 1824, but was really decided on June 30th, 1823. In that case the plaintiff claimed property which had belonged to Pullut Pandey by two titles, (i) as his heir by adoption, (ii) under a deed of gift. The adoption was disputed on the ground that the plaintiff was an only son; and the gift was disputed on the ground that the property was inalienable. The Zillah Court held that both the adoption and gift were valid. This judgment was reversed, on appeal, by the Provincial Court, where it was held that both the adoption and the deed of gift were invalid: the adoption upon the ground that the plaintiff was the only son, and the gift upon the ground that the property was inalienable. A special appeal was then admitted by the Sudder Court, and the pundits were asked whether it is allowable, according to the law current in Tirhoot, to adopt an only son. A question was asked also as to the validity of the gift. The pundits declared both the adoption and the gift to be invalid, and after perusing this opinion the Court (LEYCESTER and DORIN) dismissed the appeal.

This, it will be observed, is the earliest judicial authority upon the question in Bengal. It was necessary to determine the point, because the two titles, that by gift and that by adoption, were wholly independent, and the determination was against the validity of both titles. But the litigation in this suit was subsequently re-opened by an application for review, applied for on the ground that the *vyavastha*, upon the strength of which the appeal was dismissed by the Sudder Dewany Adawlut, had been obtained by bribery. The further report of the case is in 4 Sel. Rep., p. 89 (edn. 1870). The review was admitted, and fresh pundits were consulted by the Sudder Court upon the same two points as before. The same answers were given. Upon this Mr. SMITH expressed the opinion that the plaintiff ought to get a decree. He considered that he was at liberty, on the re-hearing, to go into entirely new facts; and he thought it proved that the plaintiff was not an only son; he also thought that the gift was valid and he further said that "probably" the adoption even [451] of an only son was valid. But Mr. J. H. HARRINGTON and Mr. MARTIN held otherwise. They thought that the question as to whether plaintiff was an only son could not be re-opened, and taking him to be so, they held that his adoption was illegal: that the gift was also illegal: and they confirmed the decision originally passed by the Sudder Court.

It appears, therefore, that, in this case, which was twice heard, and in which the point expressly arose, four Judges, against the doubtful opinion of one, held that the adoption of an only son was invalid. There could not be a stronger authority against the validity of the adoption. How it is possible that Mr. Morley could have so far misunderstood this case as to represent it as a decision that the adoption of an only son once made could not be set aside, I cannot understand. This mis-statement of this important decision has no doubt led to considerable misconception.

In *Debee Deal v. Hur Hursing* (4 Sel. Rep., 320) the question was as to the validity of the adoption of the defendant. The defendant was the grandaon of the paternal uncle of his adoptive father, and only son of his natural father. The adoption was established in the City Court of Benares, the objection that the defendant was the only son apparently not having been taken. On appeal to the Provincial Court it was objected that the plaintiff was the only son of his father, and the Court pundits signified their opinion that the adoption of an only son was invalid. But the respondent filed an opinion to the effect that a mother might give her son upon the special condition that he

should be the son of two fathers (*dwaymushayana*). The Court pundits were thereupon again consulted, and they agreed that the adoption as stated by the defendants was legal. The Judge of the Provincial Court, evidently proceeding upon this view, assumed the adoption to have been in this form, and dismissed the appeal. The plaintiff then appealed to the Sudder Court. Mr. SMITH (who, had apparently therefore seen reason to doubt his former opinion) admitted the appeal, and the pundits were again consulted. They thought that the adoption could [452] not be supported, even as a *dwaymushayana* one, because the natural father had not consented to it. On the authority of this opinion, Mr. SEALY and Mr. LEYCESTER concurred in holding the adoption to be invalid, and they reversed the decree of both the lower Courts. There is no judgment given in the report, and we cannot, therefore, be quite sure what the opinion of the Judges was. It is most probable that they entirely agreed with the pundits; but it is also just possible that they may have considered the adoption invalid, simply on the ground that the natural father's consent had not been given. I do not, therefore, reckon this as a decisive authority on the question.

In the case of *Dullabhi De v. Mann Bibi* (5 Sel. Rep., 50), the statement of the plaintiff was, that she and her husband were asked by the defendant to give their only son to her to be adopted, but they refused. The plaintiff was, however, then pregnant, and she and her husband promised that, if she were delivered of a male child, they would give that child to the defendant. A son was born to the plaintiff, and was accordingly given to the defendant, but owing to its tender age the child was returned to its natural mother. Some years afterwards, and after the child's elder brother had died, the defendant with due solemnities, including a sacrifice for male issue, "publicly constituted him her adopted son." The Judge of the Provincial Court of Dacca, after consulting the pundit of that Court, held the adoption valid. One of the Judges of the Sudder Court (RATTRAY) thought an appeal ought to be admitted, upon the ground that the suit was improperly framed, but two other Judges (ROSS and TURNBULL) thought otherwise; and "concurring in the facts and law as found and laid down by the lower Court," dismissed the appeal.

If it was intended in this case to lay down, as a general rule, that the adoption of an only son is valid, it is certainly very remarkable that no reference was made to the pundits of the Sudder Court, or to the previous decisions, one at least of which is a very strong one and distinctly contrary. But Mr. Morley (Digest, p. 18) does not understand this case as deciding anything more than that "where the gift and acceptance [453] of a second son preceded the death of an elder son given in adoption, then the full completion (*i.e.*, after the death of the elder son) is legal." Possibly it may be so. It may have been thought that the gift, at the time there was an elder son living, being valid, the completion of the adoption by a performance of ceremonies was not illegal. Whether or no this would be a correct opinion I do not say. I am disposed to think it would not; but it seems to me more reasonable to suppose that this case was somehow distinguished than to suppose that the previous decision in *Nandram v. Kushee Pandey* (4 Sel. Rep., 70), which was so fully and carefully considered, was overruled.

No case bearing upon this subject in the Sudder Adawlut was produced, nor have I found any between this, which was decided in 1830, and 1859. In the latter year a suit came up on appeal from Cuttack, in which one of the plaintiffs made title as an adopted son. Both this Court and the Court below held that the plaintiff had failed to prove his adoption,

and this is expressly made the ground of the judgment in the Sudder Court. But the Court (TREVOR, SAMUELLS and BAYLEY) thought fit also to express the opinion that the plaintiff as the eldest, not the only son of the adoptive father's brother, could not be adopted. If this were good law, of course, *a fortiori*, an only son could not be adopted. But it is, I believe, the first and only time that it has been held by any Court of Justice that an eldest son cannot be adopted; and the contrary has been laid down in two succeeding cases—*Sheetaram v. Dhunnook Dhurer Sahye* (1 Hay, 260) and *Janokee Debea v. Gopaul Acharjea* (1. L. R., 2 Cal., 365). I think, therefore, that this case also ought not to be accepted as an authority.

These are all the cases I am aware of in the late Sudder Court. In the late Supreme Court, there is one case only—*Joymony Dassee v. Sibosoondry Dassee* (Fulton, 75) -decided in 1837. There the adoption of an only son was held valid; but the report, which is exceedingly brief, leaves it very doubtful whether the ground of the decision was not that the adoption was a *dway-mushyayana*, and if so, it is, of course, not in point.

[454] There are two cases in this Court. The first is that of *Mussamat Tikday v. Hurrech Lall* (W. R., 1861, Gap. No. 133). I shall have to discuss that case very fully upon another point which arises in this case. It is sufficient to say now that there the adoption was in the *kurta* or *kritima* form. But a son adopted in the *kritima* form does not cease to belong to the family of his natural father (see Sutherland in Stokes' Hindu Law, pp. 668, 669, 676, 677, and 678). The cardinal reason, therefore, why an only son cannot be adopted,—namely, that the lineage of his family is thereby extinguished, and the ceremonies can no longer be performed which are necessary for the salvation of his ancestors,—does not apply. There cannot be a more complete case for the application of the maxim *cessante ratione cessat et ipsa lex*. It is, I think, clear that no decision as to the validity of an adoption, where there is no extinction of lineage, can be used as an authority to support an adoption where such extinction takes place.

The other decision of this Court is that of Mr. Justice L. S. JACKSON and Mr. Justice D. N. MITTER in the case of *Raja Upendra Lal Roy v. Rani Prasannamayee* (1 B. L. R., A. C., 221). Most of the authorities were considered in that case, and it was expressly held that the adoption of an only son was invalid. The suit was dismissed upon that ground; and a decision of the Madras Court to the contrary, which I am about to notice, was expressly dissented from.

In the Madras Courts there are two decisions. In *Pillay v. Pillay* (1 Str. Notes of Mad. Cases, 78, decided by Sir THOMAS STRANGE whilst he was Recorder), the complainant, whose adoption was disputed, had an elder brother by a former marriage living at the time of the adoption (p. 106). No question therefore arose in this case as to the validity of the adoption of an only son. But Sir THOMAS STRANGE thought fit, nevertheless, to express an opinion that the adoption of an only son was valid. But, as the learned Judge has elsewhere told us (Strange's Hindu Law, Vol. I, p. 102), he based this decision "upon comparatively imperfect materials," and the decision has been criticised by Sir Francis Macnaghten (see [455] Considerations of Hindu Law, pp. 147, 187). Its chief importance depends on the relation it contains of the case of the *Raja of Tanjore* (see p. 107 of the Report), from which it would appear that the pundits of Bengal (including Benares) and Madras had given an opinion that the adoption of an only son was valid. But it does not

appear that these opinions were ever submitted to any Court, nor is it said upon what texts they are based, and I believe it to be a clear principle, understood and acted upon ever since, our Courts have been established, not to accept as authority the opinions of pundits unconfirmed by judicial decision and unsupported by texts. Nor can I account for this unanimity of the Bengal pundits in favour of the adoption of an only son. They were very frequently consulted upon this point by the Sudder Dewany Adawlut and the Provincial Courts, and so far as appears from the Sudder Dewany Adawlut Reports, their opinions were unanimous the other way, except in one solitary instance, that of the Court pundit of Dacca, *Musst. Dullooh De v. Manu Bibi* (5 Sel. Rep., 52), and this pundit gives no authorities.

The other case in Madras is a decision of the late Chief Justice Sir COLLEY SCOTLAND and FRERE in *Chinna Gaundan v. Kumara Gaundan* (1 Mad. H. C., 54). There the adoption of an only son was distinctly held to be valid. The Chief Justice relies on the case of *Pillay v. Pillay* (3 Sel. Rep., 232) just referred to; another case of *Pillay v. Pillay*, which I have not been able to see, *Nundram v. Kushee Pandey* (4 Sel. Rep., 70), and *Jaymoy Dassie v. Shibsoondry Dassie* (Fulton, 75) all of which he takes to be in favour of the validity of the adoption of an only son. I have already pointed out to what extent three of these cases are really authorities for that proposition. It is clear that the Chief Justice was misled by Morley as to the true result of the case of *Nundram v. Kushee Pandey* (4 Sel. Rep., 70), which, as I have shown, was directly contrary to what the learned Chief Justice supposed.

Only one case has been quoted from Bombay. It would be possible to make some observations upon that decision as it appears in the report, which is not a satisfactory one, but it is [456] impossible to deny that the two Judges who decided it (WARDEN and GIBBS, J.J.) thought that the adoption, which was of an only son, was legal.

It was stated in the argument that it had been held that in the Punjab generally an adoption of an only son was legal, but we have not been shown any authority upon which that statement could be made. The only case to which we were referred to does not bear out that statement. In *Ajoodhia Prshaud v. Mussanul Dewan* (5 Punjab Record, p. 56), SIMSON, J., held in special appeal, that the adoption of an only son was valid; it having been found by the lower Court on the evidence "that by the usage in Delhi generally, and in respect of the caste of the litigants in particular, the custom is to receive an only son in adoption." A former decision was referred to, which was also a case from Delhi, in which the adoption of an only son had been upheld. LINDSAY, J., differed from SIMSON, J., but I confess I do not understand upon what grounds, for the adoption was clearly a legal one in Delhi. But the case is no authority as to the general law either of the Punjab or of any other part of India.

I now pass to the text-books by English writers.

Sir Thomas Strange, at Vol. I, p. 87 of his treatise on Hindu Law (London, 1800), says, "so with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply, they are directory only: and an adoption of either, however blameable in the giver, would, nevertheless, to every legal purpose, be good, according to the maxim of the civil law prevailing perhaps in no Code more than in that of the Hindus, *factum valet quod fieri non debuit*." But in the Appendix, p. 107, he quotes the high authority

of Mr. Colebrooke to the contrary. A pundit had given his opinion that "if a man have no male issue of his own, it is stated in many books that he may, under the pressure of distress, adopt the only son of a brother." Upon this opinion, Mr. Colebrooke made the following observations: "If a brother's only son be adopted, he need not be taken away from the family of his natural father, but may continue to perform the offices of a son, both to him and to his adoptive father. See notes to [457] Mitakshara on Inheritance, ch. i, sec. x, 1, and sec. xi, 32. A valid adoption of an only son cannot otherwise be made, the absolute gift being forbidden."

The conclusions of Sir F. Macnaghten's *Considerations of Hindu Law*, p. 147 (Serampore, 1824), are thus stated: "The gift of an only son in adoption is absolutely prohibited; an only son cannot be given or received in adoption. The gift of an only son is considered to be an inexpiable *maele*. It is indeed said that an only son may be so given; but it might be said in the same sense, that a man may perpetrate any wickedness if he be content to forego all hopes of salvation and be condemned to everlasting punishment."

"By the gift of an only son, the very deficiency which the power of adoption is intended to prevent must necessarily be occasioned. Nothing in the Hindu law is more peremptorily interdicted than the gift of an only son in adoption. Even the gift of an *eldest* son is forbidden as sinful. The crime of giving an *eldest* has never been considered so heinous, as that of giving an only son. In the one case a Hindu retains, in the other he casts away, the means of salvation. Considering the precepts and injunctions, both positive and negative, upon this subject, we must be convinced that he who gives his only son in adoption is little less than apostate from the Hindu religion."

Sir W. H. Macnaghten, in his *Principles and Precedents of Hindu Law*, speaking of the prohibition against adopting an only son, says, at p. 67 of Vol. I (Calcutta, 1829) in a note: "But this is an injunction rather against the giving than the receiving an only or elder son in adoption, and the transfer having been once made, it cannot be annulled. This seems but reasonable, considering that the adoption having once been made, the boy *ipso facto* loses all claim to the property of his natural family." There is no doubt *sometimes hardship* upon the adopted son, if the adoption be held to be invalid; but he does not, as here stated, in that case lose all claim to the property of his natural father: *Bawani Sankara Pandit v. Ambabay Ammal* (1 Mad. H. C. Rep., 363). However, in Vol. II, p. 179, the same [458] author expresses a contrary and, what I think must be considered, his final opinion. He quotes an opinion of the pundits at p. 178 of Vol. II, that a gift of the survivor of two sons is invalid. Upon this he observes in a note: "It will be observed that the answer is not directly in point. The question was, is it legal to adopt a son under such circumstances? and the reply states that it is illegal, under such circumstances, to give away a son in adoption; but in fact the prohibitory injunction applies as well to the giving as to the receiving, the giver of an only son being considered as parting not only with the sole means of evading eternal torment himself, but as placing his ancestors in the same predicament, and as infringing, therefore, the interests of others whom the law will interpose its authority to protect."

Mr. Justice STRANGE, in his *Manual of Hindu Law*, pp. 18 and 19, contests the position that the adoption of an only son can be held valid. The passage is quoted at length in *Chinna Gaundan v. Kumara Gaundan* (1 Mad. H. C. Rep., 54). It is of little value, as it puts on a par the objection to the adoption of an eldest and an only son, which shows, to say the least, a want of discrimination.

Mr. Sutherland, in his Synopsis (Stokes' Collection of Hindu Law Books, p. 665), says: "An only son cannot become an absolutely adopted son (sudha dattaka), but he may be affiliated as a *dwayamushyayana* or son of two fathers. In this case, the reason of the prohibition,—viz., extinction of lineage to the natural father—would not apply."

It remains to notice the Hindu text-writers. The earlier Hindu text-writers are of course the source from which we ought ultimately to derive the law, and are, therefore, the most important authorities of all. But the difficulty is in ascertaining what rule it was intended to lay down. There would indeed be less difficulty if the view of Mr. Justice DWARKANATH MITTER in *Upendra Lal Roy v. Rani Prasannamayee* (1 B. L. R., A. C., 221—224) could be accepted, that in the matter of adoption all distinctions between religious and legal injunctions are inapplicable. That distinction, however, is in my opinion too well established to be entirely put aside. Nor do I see any [459] substantial ground why that distinction should not be applied in cases of adoption as well as in other matters of Hindu law, all of which are in a sense matters of religion. After full consideration Mr. Justice ROMESH CHUNDER MITTER thought it right to apply that distinction in the case of an adoption of an eldest son—*Janakee Deben v. Gopaul Acharjee* (1. L. R., 2 Cal., 365), and I concurred in that view. No one disputes, however, that the authoritative text-books of Hindu law do, in fact, contain a prohibition against the adoption of an only son, and in order to arrive at a conclusion whether this prohibition invalidates an adoption actually made, I think we ought to consider at one view (1) the language of the prohibition itself, (2) the authoritative commentaries upon it, and (3) the decided cases; and that we ought to see whether, upon the whole, the adoption is, according to modern usage, to be considered as invalid. It was indeed argued that the language of the text-books themselves countenanced the view that the adoption of an only son, though blameable, was not invalid, because whilst the giving of an only son is forbidden, the receiving him is not; whereas if the adoption were illegal, both would have been forbidden. But this is not so as far as I have seen. It is certainly not so in the Dattaka Mimamsa, the Dattaka Chandrika, or the Mitakshara. The authors of these treatises all quote the same text of the sage Vashishtha, which is the foundation of the whole doctrine. This text is quoted at length in Colebrooke's Digest, Vol. III, Book 5, v. 273, and I need not therefore repeat it here. It clearly prohibits both the giving and the receiving of an only son in adoption, and I do not find the slightest attempt to qualify this prohibition in any passage of these three writers. The first and, as far as I am aware, the only Hindu text-writer of authority who has suggested that this prohibition should be qualified is a much more modern one, namely Jagannatha, the author of the work popularly known as Colebrooke's Digest. He says in his note on the passage of Vashishtha above referred to (Colebrooke's Digest *ubi supra*) "As an only son should not be given, so he should not be sold or deserted. Sale is a great offence, even though made in a season of calamity, when a maintenance cannot be [460] provided; desertion is a great offence, because the family becomes thereby extinct. Thus the *Pracasa*—Let no man accept an only son, because he should not do that whereby the family of the natural father becomes extinct; but this does not invalidate the adoption of such a son actually given to him." Opinions differ as to the precise value of Jagannatha's authority, but though of course it is far inferior to that of the authors of the three more ancient treatises above referred to, it is certainly entitled to considerable weight.

Some attempt was made to show that Srinatha Bhatta, the author of the *Dattaka Nirnaya*, recognized the adoption of an only son as valid, and there

is perhaps some countenance for this in the way this author is quoted by Sir F. Macnaghten at p. 126, but I should be very unwilling to draw any inference as to the opinion of any writer whose language I had not myself seen.

If this recapitulation of the authorities be carefully considered, I think it will be seen that there are only four cases in which it is clear that the point properly arose, and was decided: the case of *Nundram v. Kashee Pandey* in the Sudder Dewany Adawlut; the case of *Raja Upendra Lal Roy v. Rani Prasannamayee* in this Court; the case of *Gaundian v. Gaundian* in the High Court of Madras; and the case of *Nimballer v. Ramadim* in the High Court of Bombay. Of these, the two Bengal decisions are against the adoption; the decisions of Madras and Bombay support it. Of the English text-writers, Colebrooke, the two Macnaghtens, Sutherland, and Mr. Justice STRANGE, all think the adoption illegal; there is only one English text-writer, Sir Thomas Strange, on the other side, backed no doubt by the important but solitary opinion of Jagannatha amongst the Hindu text-writers.

It appears to me, therefore, that the vast preponderance of authority, if not the entire authority in Bengal, is against the validity of the adoption of an only son; and if we were to hold the adoption of the plaintiff in this case to be valid, it would be necessary to overrule both the carefully-considered decision of JACKSON and DWARKANATH MITTER, J.J., and the equally careful decision of four Judges of the Sudder Court. [461] This of course could only be done by a Full Bench. But we could only refer the case to a Full Bench if there is a conflict of authority, or if we ourselves differ from these decisions. Having gone through all the cases with great care, I do not think it can be said that there is any such conflict of authority in Bengal as to justify us in referring the case to a Full Bench on that ground; and I am not prepared to refer the case to a Full Bench upon the ground that I myself think the adoption of an only son valid. On the contrary, on the best consideration I have been able to give to the authorities, I think such an adoption ought, in Bengal, to be held to be invalid, wherever the effect of holding such adoption to be valid would be to extinguish the lineage of the natural father, and so to deprive the ancestors of the adopted son of the means of salvation.

Of course the question whether this particular case can be taken out of the general rule is a wholly different one; and the appellant before us has contended that, even if, as a general rule, the adoption of an only son be invalid, still the rule does not apply to Sudras. No reason was given for excepting Sudras from the rule, and the principle upon which the rule is based,—namely, that a man shall not be allowed to extinguish his lineage to the detriment, not only of himself, but of his ancestors, apparently applies just as strongly to Sudras as to other Hindus. The only decided case which lends any colour to a distinction in the case of Sudras is that of *Mussamut Tikday v. Hurree Lall* (W. R., 1864, Gap. No. 133) above referred to. But upon an examination of that case, I have come to the conclusion that it is no authority for drawing a distinction between Sudras and other classes of Hindus upon this point. No doubt, the parties in that case were Sudras; and no doubt also this fact is noticed in the judgment, but, in my opinion, for another purpose. The case came up upon appeal from the Zillah Court of Patna. It appeared that one Nowrunghee Lall had two wives. By the first, whose name is not given, he had a daughter, Nuseebun but no son. The second wife, Mussamut Tikday, was childless. Mussamut Tikday survived her [462] husband; the other wife died in his lifetime. During his lifetime Nowrunghee adopted his grandson, Hurree Lall, the only son of his daughter

Nuseebun as a "*kurta*" or "*kritima*" son. After Nowrunghree's death, Mussamut Tikday brought a suit against Nuseebun and Hurree Lall to recover, as heiress to her husband, certain property which had belonged to him; and it was in this suit that the question arose whether the adoption of Hurree Lall was valid. In the judgment of this Court, the Zillah Judge is stated to have held that, as the family were "Sudras, no exception could be taken to the selection of an only son as a *kurta putro*." I have referred to the judgment of the Zillah Judge, and I do not find that he said this. What he did say was, that a Sudra can adopt his sister's son or daughter's son, and for this there is good authority in the Dattaka Chandrika, Stokes's Hindu Law, 632, where Sudras are specially exempted from the rule which prohibits members of the other classes from adopting a daughter's or a sister's son. But the rule as to *kritima* adoptions is the same, as far as I am aware, for all the classes. It is a peculiar form of adoption which prevails in Mithila, whereby the adopted child does not cease to belong to the family of his natural father (see Sutherland in Stokes' Hindu Law in the passages already cited), and is not confined to any particular class. In point of fact, the Zillah Judge appears to have overlooked entirely that this was not a regular adoption, but a *kritima* one, and relying solely upon the first opinion of Sir. W. H. Macnaghten as quoted above, held that, as a general rule, the adoption of an only son could not be impeached. It was not until the case arrived in this Court that it was discovered that the adoption was in the *kritima* form, and I have no doubt that that was the substantial reason why in this case the adoption of an only son was held to be valid.

It cannot be denied that there is some ground for saying that the rules of adoption are not strictly applied to Sudras as to the other classes of the community: one instance of relaxation has been just now mentioned; but I think we ought to be careful how we extend the list of such exceptions, and draw distinctions between the classes, for which there is no [463] direct authority in the Hindu law. I do not find the slightest authority in any text-book for saying that there is any distinction in this respect between Sudras and the other classes. If, therefore, the distinction exists at all, it rests solely upon the language used by the Judges in the case of *Mussamut Tikday v. Hurree Lall* (W. R., 1864, Gap. No., 133). But as I have just now stated, I do not think that that decision, so far as it relates to the adoption of an only son, really proceeded upon any distinction between Sudras and other classes, and therefore, upon the ground that this is a general rule from which it is not shown that Sudras are excepted, I think we ought to hold that for all classes, of Hindus in Bengal an adoption is invalid wherever the effect of the adoption, if valid, would be to extinguish the lineage of the natural father, and to deprive the ancestors of the natural son of the means of salvation.

Garth, C.J.—I quite agree in the conclusions arrived at in the very learned judgment of my brother MARKBY. I think the weight of authority in Bengal is decidedly in favour of the invalidity of the adoption of an only son; and I see no sufficient ground for making any distinction in this respect in the case of Sudras.

The appeal will be dismissed with costs on scale 2.

Appeal dismissed.

Attorney for the Appellant: Baboo P. C. Mookerjee.

Attorneys for the Respondent: Messrs. Remfry and Rogers.

NOTES.

[ADOPTION OF AN ONLY SON—

The Privy Council declared that the adoption of an only son is valid in all the schools of Mitakshara, and this case is therefore no longer law:—*Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmananna* (1899) 22 Mad., 333 P. C. ; 21 All., 460 affirming (1892) 14 All., 67 F.B.

Valid also in the Mayukha school:—(1899) 24 Bom., 367 overruling (1889) 14 Bom., 249.

Adoption of an *eldest son* is valid:—2 Cal., 365 ; (1883) 7 Bom., 221.]

[464] APPELLATE CIVIL.

The 7th January, 1874.

PRESENT.

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE KENNEDY.

Chunder Sekhur Mookerjee and others.....Plaintiffs

versus

The Collector of Midnapore on the part of the Government.....Defendant *

[1 C.L.R. 384]

Kabooleut—Specific Performance of Conditions of—Specific Relief.

One of the terms of a Kabooleut, equally binding on the Government and a zemindar, the parties concerned, was as follows: "The construction of *bheries* (small embankments), the excavation of the suit of khals, the closing (the mouths) of the khals, the construction of *gangura* (large embankments), etc. in connection with the salt and sweet (*i.e.*, not saline) lands of the said parganna, shall be made by the Government of the Honourable Company." In a suit brought by the zemindar to obtain an order upon the Government to re-excavate and clear the water-passage of a particular khal situate within the parganna, the subject of the kabooleut, *held*, that the case was not one in which the Court would decree specific performance.

THIS was a suit instituted for the purpose of compelling the defendant to re-excavate and clear the water-passage of a certain khal known as the Protabhali Khal. The plaint alleged, that the khal in question, which formed the connecting link between two rivers, had, from the time of the decennial settlement, at which period the plaintiff's zemindari had been created, been used as the outlet for all the water which accumulated on the plaintiffs' lands, and that the defendant had hitherto excavated the said khal when necessary, in order to keep free the water-passage for such purpose. That, owing to the neglect of the defendant, the khal had become choked with silt, and the flow of water being thereby interrupted, considerable injury had accrued to several mauzas on the plaintiffs' zemindari. The plaint further stated, that the defendant had let out in *ijara* the khal, together with the lands bordering its banks; that the *ijaradar* had completely stopped the khal and had grown crops thereon. Failing [465] to obtain redress from the Settlement Officer, who, on the 16th October, 1873, disallowed the objections made by the plaintiffs and confirmed the *ijara*, the present suit was instituted on the terms of an agreement entered into between

* Regular Appeal, No. 100 of 1876, against the decree of Babdo Jodu Nath Roy, Subordinate Judge of Zilla Midnapore, dated the 21st of December 1875.

the predecessors of the plaintiffs and the defendant, and embodied in the potta and kabooleut exchanged between the parties. The plaintiffs did not produce the potta, but obtained the kabooleut from the defendant, which was put in as evidence on behalf of the plaintiffs. The material parts of this kabooleut, which was dated the 15th July, 1795, are as follows:—"The construction of *bheries* (small embankments), the excavation of the silt of khals, the closing (the mouths) of the khals, the construction of *gangura* (large embankments), etc., in connection with the salt and sweet (*i. e.*, not saline) lands of the said parganna, shall be made by Government of the Honourable Company."

The defendant contended that, under the provisions of Bengal Act VI of 1873, the Government are only bound to maintain those embankments which are included in Schedule D of the Act, and in seeking for a remedy, the only procedure open to the plaintiffs was that afforded in cl. 7, s. 4 of that Act. The Protabhkhal Khal, the subject of the suit, was not mentioned specifically in the kabooleut, nor was there anything in the terms of the kabooleut itself to prevent the operation of the above-mentioned Act in respect of the plaintiffs' zemindari. The defendant further alleged in his written statement that long before the permanent settlement, the Protabhkhal Khal was used as a canal for the purpose of conveying salt, and salt golas stood on both banks of the khal. When the Government gave up the salt manufacture in the said parganna, the question whether it was necessary to re-excavate the khal aforesaid was taken into consideration by the Department of Public Works, and the Lieutenant-Governor in his letter, dated 15th December, 1863, held that the khal should be left to silt up. In the face of this finding, the defendant contended that the plaintiffs had no cause of action. The defendant also pleaded limitation.

The Court of First Instance found on the evidence that the Protabhkhal Khal had been in existence for a long time, and was main-[466] tained by the Government for the passage of boats carrying salt which was made at their salt manufactory. The plaintiffs admitted that they did not base their present suit on any prescriptive right, and even if this contention had been raised, it was barred by limitation, two years having elapsed from the date of the first encroachment made on such right by the defendant. After careful consideration of the clause of the kabooleut already quoted, the Court was of opinion that the terms of such clause were too general to be construed strictly against the defendant. Part of the judgment was as follows:—"Government, as the paramount power responsible for the life and property of its subjects, can at any time determine whether the construction of any khals and embankments is conducive to their interests, and they have this general power extending all over the country, and I believe the general power was accorded to Government by the terms of the kabooleut. I do not think that under the terms of the kabooleut every embankment or khal for the drainage of this zemindari must be constructed or maintained by the Government. It was no doubt intended that Government will determine which khal to maintain, or which not to maintain, on consideration of the existing state of the country and all the circumstances which may be brought to its notice; but if the Government chose, on consideration of all matters and the then state of the country, not to maintain the khal, I do not think it can be compelled by a Court of Justice to re-excavate it, merely because it has now turned out a fact, that it would have been more beneficial to the zemindari and its subjects if it were not closed. To my mind it appears that with the determination of Government, who acted with the advice and opinion of its responsible officers with regard to this khal, the Court ought not to interfere; the Court should only see whether there was an agreement between the plaintiffs

and defendant, binding the latter to maintain this khal or to excavate it ; but I do not see any such agreement. The general terms relied upon by the plaintiffs do not, I think, give them any right which may be awarded to them, for compelling Government to re-excavate the khal which was hitherto maintained by it only for its own purposes. The evidence of the plaintiffs' witnesses, [467] which remains un rebutted, proves, it is true, that since the bed of the khal has silted up, the ryots have suffered much both in their health and their property : if that be the fact, which I dare say it is, the plaintiffs ought to move the Government through the proper channel to make necessary arrangements for the drainage of the surplus water of the zemindari, and their application, if made, must receive due and proper consideration at its hands ; but their present suit to compel Government to excavate this khal in the absence of any agreement must fail."

The plaintiffs appealed to the High Court.

Baboo Gopal Lall Mitter and Baboo Sham Lall Mitter for the Appellants

Baboo Unnoda Persaud Banerjee for the Respondent was not called upon by the Court.

The judgment of the Court was delivered by

Jackson, J.—We do not think it necessary to call upon the Government vakeel in this case, because we are of opinion that the judgment of the Court below is substantially correct. The terms of the kahoolcut, which were read to us from page 7 of the paper-book, and which, it may be admitted, are binding on the Government as well as the zemindar, are extremely vague, and it would be dangerous to impose upon the Government, on the strength of such terms as "the excavation of the silt of Khals, the closing of the mouth of Khalsai," so extremely onerous an obligation as the plaintiffs seek to impose in the present case. But in addition to that there is an objection on principle, to requiring the Government, or any person whom it is sought to bind by such words, not to do that which may, upon a proper consideration of the whole subject, carry out the purpose obviously intended, but to do a particular thing, because that particular thing was once done in view of that same object. The Government, no doubt, undertook in this agreement between it and the zemindar to retain in its own hands the construction of certain khals and other things, and partly in consideration of that agreement, and partly in consideration of its duty as paramount [468] power, the Government would, no doubt, be desirous of taking all steps that may be necessary for the object with a view to the comfort and health of the population. But it is a very different thing to seek to compel Government by a plaint filed in Court to maintain a particular khal in a certain position. Nor has the Court before it, as it seems to me, any materials upon which it could make any specific order such as it would have to make in order to be of use to the plaintiffs, because the Court has no means of ascertaining at what depth and width it would be necessary to maintain this khal for the purpose of effectual drainage of the plaintiffs' estate. These are general observations which appear to me necessary to be made ; but it also seems to me, that the policy of the law, even before the Specific Relief Act, was against the enforcement of specific performance of contracts of this nature. It is not necessary for us to say what relief, if any, the plaintiffs would be entitled to. Under the circumstances, I think it quite clear that they could not succeed in the present suit, and that the suit was properly dismissed by the Court below. The appeal is dismissed with costs.

• *Appeal dismissed.*

NOTES.

[NO SPECIFIC PERFORMANCE WHEN UNCERTAINTY AS TO TERMS--

See (1882) 5 All., 44; (1908) 25 All., 618 affirmed (1909) 31 All., 68.

Where the indefiniteness can be removed, as "proper rate" being ascertainable, the rule does not apply :—(1878) 5 Cal., 175 P.C.]

[3 Cal. 469]

ORIGINAL CIVIL.

The 30th and 31st January, 1878.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MARKBY.

Chunder Caunt Mookerjee.....Defendant

versus

Jodoonath Khan and another.....Plaintiffs.

[1 C. L. R 470]

Costs—Tender—Difference between a tender made on account of separable claims and one made on reference to part of a single inseparable claim—What is not an unconditional tender.

In a suit to recover Rs. 1,323-15-6, the balance of the price of goods sold, on which an account had been come to between the parties, it appeared that the defendant had tendered before suit a sum of Rs. 1,043-5, stating in the letter of tender that the sum so tendered was the only sum due. At the trial, the plaintiff obtained a decree for the full amount claimed by him. *Held*, both in the Court below and on appeal that the tender was bad, and therefore the plaintiffs were entitled to their costs.

Held per KENNEDY, J.—That the tender was bad, being a tender of part of an entire debt.

[469] *Held per* GARTH, C.J. (MARKBY, J., concurring), that the tender was also bad, as the plaintiffs could not have accepted the sum tendered without giving up the remainder of their claim.

THE plaintiffs in this case sued the defendant to recover a balance of Rs. 1,323-15-6 due to them in respect of 2,000 packets of ginger sold and delivered to the defendant in the course of the months of December, 1876, and January, 1877.

The plaintiffs alleged that of the 2,000 packets of ginger, one thousand were to be paid for at the rate of Rs. 7-8-6 per maund, and the other thousand at the rate of Rs. 8-8-6 per maund.

The defendant, on the other hand, contended that the whole 2,000 packets were to be paid for at the uniform rate of Rs. 7-8-6 per maund. Certain payments on account and deductions that had been agreed to, were admitted on both sides. Before the institution of the suit, the defendant tendered to the plaintiffs the sum of Rs. 1,043-5 by a letter, which was as follows :—

7½, Hastings Street, Calcutta, 30th January, 1877.

MESSRS. GHOSE AND BOSE,

Re Ginger sold.

DEAR SIRS,

WITH reference to your letter of the 29th instant (demanding payment of Rs. 1,923-15-6), which I referred to my client; and in reply he instructs me to state that there is only due to your clients in respect of the ginger sold by them to him the sum of Rs. 1,043-5, which amount I hereby tender to you.

Yours faithfully,

A. ST. JOHN CARRUTHERS.

The plaintiffs having refused this offer and instituted this suit, the defendant pleaded that he had already tendered the amount due to the plaintiffs, and paid Rs. 1,043-5 into Court.

The only issue of fact between the parties was, whether the sum due to the plaintiffs was Rs. 1,323-15-6 or Rs. 1,043-5; and the Court (KENNEDY, J.) having found this in favour of the plaintiffs, Mr. J. D. Bell (with him Mr. Allen) for the defendant, contended, that the plaintiffs were not entitled to any costs, as when the [470] tender of Rs. 1,043-5 was made to them, they should have accepted it and sued for any further sum claimed by them in the Calcutta Small Cause Court. Mr. Bell further contended that the defendant was entitled to have awarded to him the extra costs to which he had been put by reason of the action having been brought in the High Court, and cited *James v. Vane* (29 L. J., Q. B., 169).

Mr. Bonnerjee (with him Mr. Palit), for the plaintiffs, contended that Mr. Carruthers' letter of 30th January, 1877, was not an unconditional tender which the plaintiffs could have accepted without waiving any further claim on their part, and further that a tender of part of an entire claim was bad — *Dixon v. Clark* (5 C. B., 365).

Kennedy, J.—I do not think that, looking at the terms of the Small Cause Court Acts, this is a case in which this Court should exercise its discretion. The provisions in Act XXVI of 1864, s. 9. are very peculiar, and only give a right to certify that the action was a fit one to be brought in the Supreme Court “by reason of the difficulty, novelty, or general importance of the case, or of some erroneous course of decision in like cases in the Court of Small Causes.”

Now, I cannot say that this case is a novel one, nor is it one in which there is any difficulty or general importance. It seemed to me a tolerably plain case on the evidence. I must therefore consider whether the case cited by Mr. Bell—of *James v. Vane* (29 L. J., Q. B., 169)—governs the present case. Now that case was very much determined, as far as I can see, on the construction of rules of that Court, which are not applicable here. But COCKBURN, C.J., expressly rested his decision on this, that there was a distinction between a case where one inseparable claim was made and a case where the amount was made up of several separable items, and held that the case came under the latter class of cases. He says,—“Where a plaintiff claims an amount which is the result of one demand, and which cannot be separated, he may say to the defendant, when a smaller sum is tendered to him, I will not take less than the whole sum which I claim; but where the whole demand is made up of an aggregate of items, [471] and the defendant comes and says—I acknowledge that I owe you so much, and there is your money for you, the plaintiff is wrong if he refuses to take it, and *quoad* that amount he ought not to be allowed to keep the claim alive in its entirety for the purpose of suing the defendant upon it in the superior Court so as to get costs upon the higher scale.” In that case one demand was for £24-8-10 and the other for £4-10-6, and the tender was £26-10-6, a sum more than sufficient to cover the larger of the two demands. In this case there was nothing of that kind. The payments and tender were made in respect of a liability, which, upon a due appropriation of the payments, left a claim above the amount of Rs. 1,000; and therefore I think that, according to the principle on which COCKBURN, C.J., goes, this case is not applicable. I may also mention the case of *Crosse v. Seaman* (11 C. B., 524), in which the Court of Common Pleas decided that a tender and payment into Court which reduced

the claims to a sum less than £20 did not bring it within the County Courts Act so as to preclude the plaintiff from getting his costs. I may further observe that, in the case of *Dixon v. Clark* (5 C. B., 365), which was cited in the case of *James v. Vane* (29 L. J., Q. B., 169), it is expressly ruled, and the principle is adopted by COCKBURN, C.J., in *James v. Vane* (29 L. J., Q. B., 169), that a tender of part of an entire debt is bad. I think, therefore, in this case that the tender of part of the claim cannot enable the defendant to throw on the plaintiffs the certainty of losing his costs if he proceeds in the tribunal where he thinks he is most likely to succeed. The plaintiffs will have their costs on scale 2.

From this decision the defendant appealed. The only ground of appeal material to this report was, that the learned Judge of the Court below ought not to have allowed the plaintiffs' costs on scale No. 2, but ought to have held that the plaintiffs should have sued in the Small Cause Court.

Mr. *J. D. Bell* and Mr. *R. Allen* for the Appellant.

Mr. *Bonnerjee* and Mr. *Palit* for the Respondents.

[472] The cases of *James v. Vane* (29 L. J., Q. B., 169) and *Dixon v. Walker* (7 M. & W., 214) were cited on behalf of the appellant.

The Counsel for the respondents were not called upon on this point.

The judgment of the Court was delivered by

Garth, C. J. (who, after holding that on the evidence the appeal should be dismissed, continued).—As regards the last point urged upon us, which only affects the question of costs, we think that the tender of the Rs. 1,043-5 was made in such a way, that the plaintiffs could not accept the sum tendered without giving up the remainder of their claim.

An offer of that kind to pay a portion of the debt in discharge of the whole is not a legal tender of the part only; and this case, therefore, does not come within the principle of the authorities which have been cited to us by Mr. *Bell*.

If the money had been tendered unconditionally, it might have been otherwise.

Appeal dismissed.

Attorney for the Appellant: Mr. *Carruthers*.

Attorneys for the Respondents. Messrs. *Ghose and Bose*.

NOTES.

[TENDER OF PART OF WHAT IS DUE -

See our NOTES to 3 Cal., 6. See also (1909) 10 C. L. J. 91 at 98 as to the consequences of a consent decree in mortgage suit for partial sum.]

[473] ORIGINAL CIVIL.

The 29th and 30th January and 12th March, 1878.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE MARKBY.

Monohur Doss.....Defendant

versus

Romanauth Law.....Plaintiff.

Attorney and Client—Fiduciary Relationship—Compound Interest—Rate of Interest—Taxation of Bills of Costs—Interest on Costs.

The plaintiff, an attorney of the High Court, made advances to the defendant, a banker and merchant, for whom he had been, and was then acting, in certain litigation, in which the defendant was engaged in the High Court. At the time of the first loan in 1869, the defendant was considerably indebted and one creditor had issued execution against his property, and he also owed the plaintiff a large sum for costs, for which, however, up to that time, no bills of costs had been delivered. Before the first loan the plaintiff delivered bills for all his costs then due, of which some were incurred in completed, and others in pending, suits, and offered to have them taxed; but the defendant then said there was no need for taxation, which would only increase his expenses. The advances were made on the security of mortgages executed by the defendant. The first was executed in August 1869, and the principal was repayable in February 1871. Interest was to be payable at 12 per cent. per annum, and compound interest at the same rate was also to be charged on all interest in arrear. In September 1870, a further advance on the same terms was made; and a further mortgage executed, which included the original sum, with the interest then due, and the further advance. Further advances were made in the same way in October 1871 and March 1876. In all these transactions the defendant had no independent professional advice, and the mortgages were prepared in the plaintiff's office, but not charged for. In a suit to recover the sum due on the mortgages by sale of the mortgaged property, the plaintiff abandoned any accumulation of interest since the date of the third mortgage. *Held*, that the defendant, notwithstanding he had declined the offer of the plaintiff in 1869 to tax the bills, and notwithstanding the delay that had taken place, was entitled (having regard to the relation between the parties, and to the fact that a portion of the costs was incurred in suits then pending) to have the bills taxed and to re-open the account. Under the circumstances, the Court would not infer acquiescence from the delay on the part of the defendant, nor did the plaintiff's offer to tax, and the defendant's refusal of that offer, debar the defendant of his right to have the bills taxed in the usual way. *Held* also, that there is no rule which prevents an attorney from taking security or otherwise arranging with his client for the payment of costs which have actually become due, and that the plaintiff was entitled to sale of the property, to accumulations of interest prior to the date of the third mortgage calculated by allowing annual rests, to interest at 10 per cent. as being a fair rate for the client to have undertaken to pay when the mortgages were executed, and to interest on his costs.

[474] APPEAL from a decision of **KENNEDY, J.**, dated the 20th of August 1877.

In this case it appeared that, about the year 1864, the plaintiff, a member of a firm of attorneys practising in Calcutta, began to act as the attorney of the defendant, who was engaged in considerable litigation in the High Court, chiefly relating to family matters. The defendant was a native banker and merchant in the bazar. In the year 1868, the plaintiff obtained for the defendant a loan of Rs. 12,000, or thereabouts, on mortgage, at the rate of 12 per cent., from two persons of the name of Gangooly. This loan was repayable at the

end of a year. About the time that this mortgage was falling due, the defendant expressed his desire to obtain a larger loan upon the same property. The defendant at this time was in some difficulties about money; he had debts to a considerable amount, and one creditor had issued execution against his property. The plaintiff's firm had also an unsettled claim against him for upwards of Rs. 23,000 for costs, which they had called upon him to settle. The plaintiff applied to the Gangoolys, but they refused to make any further advance, and the plaintiff then agreed to advance the money himself. The plaintiff had not up to that time delivered any bills of costs. But he made out and delivered at that time bills for all his costs due up to that date, in all forty-six bills of costs. He also delivered a general account showing all that was then due for costs. And the plaintiff offered to tax such of the bills as were taxable, but the defendant said there was no necessity for it, as the costs of taxation would only increase his expenses. The sum of Rs. 34,000 was then advanced in mortgage by the plaintiff to the defendant, out of which defendant discharged a number of his liabilities, including the plaintiff's costs. The larger portion of these costs had been incurred in suits then completed, but some portion were costs incurred in suits still pending.

The mortgage to the plaintiff was executed on the 17th August 1869. The rate of interest was 12 per cent. per annum, payable quarterly; and the principal was repayable on the 17th February 1871. Compound interest was also to be charged upon all interest in arrear at the rate of 12 per cent.

[473] In September 1870, the defendant required a further sum of Rs. 2,546 to pay off some claims upon him; and Rs. 4,454 was then due to the plaintiff for arrears of interest, exclusive of compound interest, on the first mortgage.

Thereupon the plaintiff made the defendant the further advance which he required, and the defendant executed a fresh mortgage in favour of the plaintiff, dated 28th September 1870, for Rs. 41,000,—that is, the original Rs. 34,000, the interest, and the further advance,—upon the same terms as to interest as were contained in the first mortgage. The debt thus secured fell due on the 28th September 1871.

On the 13th October 1871, the defendant executed a third mortgage for Rs. 48,138, of which Rs. 2,000 was a further advance, Rs. 5,138 for interest (exclusive of compound interest), which had accrued under the second mortgage and Rs. 41,000 the previous debt; the terms as to interest being the same in the third mortgage as in the two previous mortgages.

On this mortgage a sum of Rs. 239 was paid by the defendant to the plaintiff for interest, but at what date is not stated. In 1875, the plaintiff made the defendant further advances amounting to Rs. 3,600 and in March 1876 an instrument of further charge upon the same property, and upon the same terms as to interest, to secure this Rs. 3,600, was executed by the defendant.

The present suit was brought, asking for a sale of the mortgaged property to satisfy these claims. The mortgaged property was stated by the plaintiff to be of the value of Rs. 90,000, and the amount of the defendant's debts to the plaintiff under the two mortgages to be about Rs. 95,000.

All these mortgages were prepared in the plaintiff's office, but they were not charged for. It was admitted that the defendant in these transactions had no independent professional advice. The plaintiff was the general professional adviser of the defendant, until the time when the present suit was brought.

The defendant, in his written statement filed in this suit, objected to the rate of interest as too high, and also stated that, since the institution of the suit, he had had the bills of costs [476] examined, and had discovered that a great number of the charges were improper; and in particular, that one bill, which had been taxed, and had been reduced in taxation by Rs. 71-6-0 was, nevertheless, put into the account of costs made out by the plaintiff in August 1869, at the amount at which it originally stood before taxation.

The plaintiff gave no evidence to explain how it was that this sum of Rs. 71-6-0, which had been clearly taxed off the bill, was included in the account.

Mr. *J. D. Bell* and Mr. *Bonnerjee* for the Plaintiff.

Mr. *Jackson* and Mr. *Stokoe* for the Defendant.

Kennedy, J.—I do not feel much difficulty in this case. It is not like the case of a sale, for there are so many elements to be considered, that a solicitor who purchases from his client stands no doubt in a very different position; and if there is any doubt as to the propriety or wisdom of the transaction in those cases, the client will be entitled to get back his property, and the attorney his money with interest, and will have to account for rents. This is something quite different. Here the attorney is only lending money, and all he wants is to get it back again. He has clearly a right to get it back with interest, and the only question here is, how much interest.

Now we have the best possible evidence in this case as to the reasonable rate of interest; not speculative statements like those of *Shamole Dhone Dutt*. We have evidence of what within a year before was actually paid by the defendant, a native banker, a man whose dealings were in money, and who was not without friends, and was aided by the advice of *Baboo Romanauth Law*, who is not easily to be imposed on, or without zeal, for his clients. And when we find that *Monohur Doss*, advised by *Romanauth Law*, within a year before actually took a very much smaller sum on the same security at 12 per cent., I think I must take this to be the best evidence we can have of the proper rate to be paid for the money to be lent, as there is no change of circumstances alleged or proved. I think it is conclusive to show that if *Romanauth Law* had been advising [477] his client *Monohur Doss* in his dealing with an adverse lender, he could have advised him to accept the terms of this mortgage copied as they are from the prior one. I could understand the defendant making the case he does if he were prepared to allege and prove that *Romanauth Law* had, with a view of making a loan at a future period, and with the intention of manufacturing evidence, which would then be useful to him, while professedly advising *Monohur Doss* as his solicitor, permitted the money to be lent at too high a rate, and on too onerous stipulations: but the defendant has not even suggested such a case, much less proved it, and unless I am prepared without proof, and without pleading, to fix a most respectable attorney of this Court, *Romanauth Law*, with such manufacture of evidence, which of course would be an atrocious fraud, and would probably render it necessary to take proceedings against him as an officer of the Court, I cannot resist the evidence given by the fact that the defendant, a banker, with a most able attorney concurring, had within a year raised a loan at that rate. With respect to the provision for the accumulation of interest, the plaintiff does not seek to enforce it; and I think he is therein acting wisely and generously, but I am not by any means sure whether, having regard to the fact that the previous mortgage contained this provision, I ought not to have permitted it if the plaintiff had insisted on it; but of course the plaintiff is at liberty to waive if he thinks fit.

We have in the prior mortgage in this respect also the best evidence that Romanauth Law was, in dealing with his client, performing the duty which the authorities lay down as the measure of the duty of an attorney who does not throw his client into other hands. It is the best possible evidence, that he took the same precautions when lender, as he would have done when his client was dealing with another.

With respect to the account stated, I think the cases do go far enough for me to say that there having been no taxation and independent examination, the bills are not absolutely binding on the defendant. But he has lain by for six or seven years; and under these circumstances I think that the true principle is to permit the bills to be taxed in the ordinary way; but [478] the items are to be taken as representing money paid and work done, and if in any case it appears the charges are unreasonable or improper, to that extent they must be disallowed.

Then we have the new mortgages. Now one of the strongest reasons occurring to me for saying that a provision for compound interest is one which if not absolutely illegal, ought to be discouraged, is that by a self-acting machinery it silently piles up a load of debt on the unfortunate borrower without calling his attention to the increasing difficulties of his position; so that if he be not an active and careful man, and such men as a rule are rather lenders than borrowers, he finds the whole value of his property absorbed by the silent increase of his debt. But because such a provision ought to be discouraged it does not follow that parties ought invariably to lose accruing interest on sums due. It seems the fairest transaction in the world that at reasonable times a mortgagee should call on his mortgagor to pay him his interest, or if he will not or cannot do this, to turn it into principal; and this specially applies when the mortgagor is getting a fresh advance. The dicta in *Lawless v. Mansfield* (1 Dru. & War., 557), on which Mr. Jackson so much relied, do not seem to have decided anything, for there was no decision on the point and further, one cannot fail to see that *Lawless v. Mansfield* (1 Dru. & War., 557) does not commend itself to the highest judicial authorities. In *Blagrove v. Routh* (8 De Gex. M. & G., 620; s. C., 2 Kay & J., 509), *Lawless v. Mansfield* (1 Dru. & War., 557) was pointed out to be in the matter decided perfectly correct, but it was evident that the Court disapproved of some of the observations made by Lord ST. LEONARDS, and the actual decision there does not touch this case. So far as the subsequent instrument, the plaintiff is entitled to have the interest calculated on the consolidated sums, with rests at the times when the deeds were respectively executed. I understand Mr. Bell to express his willingness to waive accumulation of interest on the amounts due for the balance of costs; that can be ascertained, and so much must be reduced. I think the proper decree will be for a sale. As to a receiver, it being stated that there is danger of the property being deficient, there must be a receiver; but [479] I understand the plaintiff is not unwilling that the rents, subject to any necessary expenditure for repairs, should be paid over to the defendant. The proper order will be to reserve leave to the defendant to apply for payment to him of any sums received. If I were now to give any direction as to the payment, the receiver might be placed in some difficulty by having to determine what repairs are necessary. Costs on scale 2 to be added to the amount found due on taking the accounts.

From this decision the defendant appealed, on the grounds that the plaintiff was only entitled to the amount of his bill of costs, when duly taxed, plus the amount actually advanced by him; that the amount of his bill of costs

should, in no case, carry compound interest; that the plaintiff was not entitled, by the plan of striking balances and taking securities on such balances, to charge, what really was, interest on interest; and that the rate of interest, 12 per cent., charged, was an improper one on the evidence before him, having regard to the position in which the plaintiff stood towards the defendant.

Mr. Jackson for the Appellant.

Mr. J. D. Bell and Mr. Bonnerjee for the Respondent.

The following cases and authorities were referred to:—*Lawless v. Mansfield* (1 Dru. & War., 557), *B'grave v. Routh* (2 Kay & J., 509; s. c. on appeal, 8 De Gex. M. & G., 620), *Waters v. Taylor* (2 Myl. & Cr., 526), *In re Foster, Ex parte Walker* (2 De Gex. F. & J., 105), *Howell v. Edmunds* (4 Russ., 67), *Crossley v. Parker* (1 Jac. & W., 460), *Walmsley v. Booth* (2 Atk., 25), *Draper's Company v. Davis* (2 Atk., 295), *Gibson v. Jeyes* (6 Ves., 266), *Rhodes v. Bate* (L. R., 1 Ch. Ap., 252), *Lyddon v. Moss* (4 De Gex. & J., 104, at p. 130; s. c., 5 Jur., N. S., 637), *The Land Mortgage Bank of India v. Baboo Soorjo Prokash Singh* (25 W. R., 323) and *Moss v. Barnbridge* (18 Beavan, 478).

Cur. adv. vult.

[480] The judgment of the Court (GARTH, C.J., and MARKBY, J.) was delivered by

Garth, C.J. (who, after stating the facts as above, continued):—The defendant does not deny the plaintiff's general right to an account of what is due under the mortgages, and to have the property sold; but he maintains (1) that he ought not to pay compound interest, (2) that the bills of costs delivered in 1869 ought to be taxed, and (3) that the rate of interest was too high, and ought to be reduced.

Before proceeding to deal with these particular questions, we may say generally, that there is no reason whatever to suppose that the plaintiff intended to act dishonestly towards his client. The plaintiff had no doubt satisfied himself in his own mind, that if his client went elsewhere to borrow the money, he would not, on the whole, be so well off. We are quite willing to presume this in favour of an attorney of long standing and high character, such as the plaintiff is here. But, for the purposes of this suit, the question is, whether, having regard to the fiduciary relation between the parties, and the rule which the Court always observes in transactions between attorney and client, the plaintiff's contention here is well founded.

First, then, as to the interest. The plaintiff abandoned in the lower Court the claim to any accumulation of interest since the date of the third mortgage. but he maintains that he is entitled to the prior accumulation of interest included in the mortgages of 1870 and 1871. The defendant desires to get rid of all accumulations of interest, and to have the whole account taken from the date of the first mortgage at simple interest. The learned Judge in the Court below has given the plaintiff the accumulations of interest prior to the third mortgage; and, subject to the question of the rate of interest which we shall consider hereafter, we think rightly so. If the debt be really due, and the rate of interest be a fair one (which are wholly separate questions), it would be quite unreasonable that the debtor should pay no interest for many years, and that the creditor should be kept all that time out of his interest without any compensation.

[481] We do not for a moment doubt the power of the Court to consider this part of the agreement, and to see whether, as between attorney and client, the

client ought to be bound by it. But the plaintiff is entitled to a reasonable compensation for the default of the defendant in not paying interest regularly, and, upon the whole, we do not consider, now that he has abandoned the compound interest, that in insisting upon annual rests up to the date of the third mortgage, he is claiming more than a reasonable compensation, if the rate of interest be fair. It was contended that under no circumstances could an attorney be allowed interest on costs. But the authorities which were relied upon in support of that contention do not apply to a case like the present. There is no rule which prevents an attorney from taking security or otherwise arranging with his client for the payments of costs which have actually become due, or from agreeing for any fair amount of interest in making such an arrangement. *Lyddon v. Moss* (4 De Gex. & J., 104, at p. 130; s. c., 5 Jur., N. S., 637), cited by Mr. Jackson, is certainly no authority in his favour; there the stipulation to which Lord Justice TURNER'S remarks are applicable, was a stipulation for interest on future costs, which stands on a wholly different footing.

We now proceed to consider the question as to the rate of interest. It was admitted in the course of the argument—at any rate it appears to us to be beyond dispute—that the attorney, who has lent money to his client upon mortgage, can only recover what would have been a fair rate of interest for his client to have undertaken to pay. We have, therefore, to consider whether 12 per cent. was a fair rate in 1869, 1870, and 1871, when the three mortgages were executed. The case is, no doubt, very bare of evidence upon that point. The plaintiff called no witnesses upon it; he was cross-examined as to it by the defendant's counsel, but no information which can assist us in coming to a conclusion was elicited from him. One of the plaintiff's witnesses, however, Baboo Shamole Dhone Dutt, an attorney of this Court, and who states that he had considerable experience in lending money upon mortgage, gave evidence, the [482] result of which appears to be, that the security being admittedly ample, and the property favourably situated, the defendant could have got the money at 10 per cent. at the outside. Now this evidence, it must be borne in mind, comes from the plaintiff's own witness. It is affirmative evidence, given by a person of unimpeachable credit upon a matter within his experience. It was tested by the plaintiff's counsel on re-examination, and was not modified in any material particular. It is, therefore, such evidence as in the absence of good evidence to the contrary, we are bound to accept as credible. It was suggested that as the defendant was himself a banker, he probably knew the rate of interest as well as the plaintiff, but this is not the case. The defendant is an up-country banker and merchant, accustomed, no doubt, to advance money on goods, but not likely to be acquainted with the customary rate of interest upon mortgages of immoveable property in Calcutta, with which, in the ordinary course of business, he would have but little to do.

The learned Judge in the Court below thought that this evidence of Baboo Shamole Dhone Dutt as to the rate of interest was completely answered by the transaction between the defendant and the Gangoolys, which he considered to be conclusive to show that 12 per cent. was a fair rate. Possibly, under one or other of the very general provisions of the evidence Act, evidence of this transaction would have been admissible evidence for this purpose, at any rate it was not objected to, and we must take it for what it is worth. But we are bound to say, that we are very far from thinking it conclusive to show that the rate charged in another and subsequent transaction was the current rate. An isolated transaction can never, as it seems to us, be conclusive as to current

rates : it certainly does not, in our opinion, displace the evidence of a man of experience and unimpeachable credit, such as the plaintiff's own witness, Shamole Dhone Dutt.

The remaining question, and the most difficult one, is as to the re-opening the bills of costs. The learned Judge in the Court below was of opinion, that, notwithstanding the settlement of accounts in 1869, the bills ought to be examined by the taxing officer ; but, considering the long time that had elapsed since [483] they had been delivered, he thought that the plaintiff ought not to be put to any proof that the work was done. He thought that the taxing officer should only disallow those charges which appear to him unreasonable and improper.

The first question here is, whether the defendant had any right to have these bills taxed at all after the mortgage of 1869, and what passed upon the negotiations for the mortgage executed in that year. The plaintiff's counsel contends, that when the plaintiff had offered to have the bills taxed, and the defendant refused that offer, the defendant was debarred from any further right to have the bills taxed. Further he contends, that the defendant has lain by so long since the bills were delivered, that any right he may have had to re-open the account made up in 1869 has been lost by delay and acquiescence.

We think that, having regard to the relation between the parties, there is no sufficient ground for the plaintiff's contention in this respect. When the account of 1869 was made up, the plaintiff was the defendant's attorney, and a portion of the bills of costs which he was then called upon to pay, though only the smaller portion, related to suits then pending. Subsequent to that account being then made up, the plaintiff, besides being the defendant's attorney, became his arbitrator in a very heavy reference, made in a suit wherein the defendant was a party. During all the time, therefore, that has elapsed since the bills were delivered, the defendant has stood in such a relation to the plaintiff, that he can scarcely have been called a free agent. Of course also during all that time the plaintiff enjoyed the full confidence of the defendant ; and the defendant was under the impression, that the only effect of having the bills of costs taxed would be to increase his own indebtedness. Practically, he could not, since 1869, have taken any step at all in the matter without quarrelling with his own attorney, and we do not think that, under such circumstances, we ought to infer acquiescence from the delay.

Nor are we satisfied that by the bare offer to have the bills taxed, and the rejection by the defendant of that offer, the defendant has lost that right, which he originally had, to have [484] the bills taxed. We cannot now say what the result of a taxation would have been. Possibly it might have been advantageous to the defendant, possibly not. But we think it would be dangerous if we were to sanction the notion that an attorney, by making such an offer as this to his client at a time when the client was in difficulties, and he was just about to lend the client money, put himself in any better position. We think that, as between attorney and client, such an offer ought to carry very little weight. We do not at all intend to say, that the offer was not in this case made *bona fide* ; but, under all the circumstances, we do not think the refusal of it ought to deprive the defendant of his right to tax.

It was suggested that if we sent these bills to be taxed in the ordinary way, the defendant might be put in a much better position than he would have been if he had had them taxed in 1869, some of the bills being for work done in 1864 and 1865 in suits long ago concluded ; so that it might be extremely

difficult for the plaintiff now to prove every item in these bills. We do not apprehend any real difficulty upon this point, having regard to the practice which we understand to prevail in the Taxing Master's office.

The lapse of time is a circumstance which, like any other circumstance, the Registrar would take into consideration, and if his decision should not be satisfactory in any particular case, the parties will be at liberty to object to it, and the matter will then be referred to the opinion of the Court.

The decree of Mr. Justice KENNEDY will, therefore, be varied by directing that, in taking the account upon the mortgages, interest be calculated at 10 per cent. in lieu of the rate mentioned in the mortgages; the account up to 13th October 1871 being made up with annual rests, and that the plaintiff's bills of costs be taxed in the usual way. In all other respects the decree will be affirmed.

As regards costs, we think the defendant is entitled to have the costs of this appeal on scale 2. If the defendant had been challenging these transactions as plaintiff, he would have got his costs, as having substantially succeeded; and we do not see how his position is practically altered because he happens to be [485] a defendant. He has also succeeded in the appeal. The costs subsequent to the decree, other than the costs of taxation, will be added to the amount found to be due in the usual way. The costs of taxation will follow the result of the taxation according to the rule.

Six months' time will be allowed from the date of the decree for taxing the accounts.

Decree varied.

Attorneys for the Appellant: Messrs. Mitter and Bhunjo.

The Respondent in person.

NOTES.

[ATTORNEY AND CLIENT—RE-OPENING OF SETTLED ACCOUNTS—

In *Shamaldhune Dutt v. Lakshminani*, (1908) 36 Cal., 493, a somewhat similar case, this case was distinguished (see 502--507) on the ground among others of the client having had independent legal advice and the attorney having more than made an offer to get the bills taxed:—The case of 3 Cal. 473 "indeed proceeded on the special circumstances of the case rather than laid down any general principle of law."]

[3 Cal. 485]

The 8th and 9th January and 11th February, 1878.

PRESENT :

SIR RICHARD GARTH, Kt., CHIEF JUSTICE, AND MR. JUSTICE MARKBY.

Wood

versus

Wood.

[=1 C. L. R. 552.]

*Divorce Act (Act IV of 1869)—Suit for Dissolution of Marriage—
Adultery—Desertion.*

In a suit by a wife for a dissolution of her marriage on the ground of her husband's adultery and desertion, the adultery was proved, and it was found that the wife, notwithstanding the gross misconduct of her husband, continued to live with him for some years,

during which time she supported her husband and herself by her own earnings, he contributing nothing to her support; that eventually, under the pressure of pecuniary difficulties brought about by her husband's extravagance and dissolute habits, they came to an arrangement, by which she went to live with her friends and he resided at his mother's house, until they could again find means to provide a common house; that for two years previously to the separation, though they had lived together, no conjugal intercourse owing to the husband's misconduct had taken place between them; that he left his mother's house without telling his wife where he was going, and subsequently went to Madras, where he had since resided. Held in the Court below following the case of *Fitzgerald v. Fitzgerald* (L. R., 1 P. & D., 694), that the separation having originally been by mutual consent, desertion could not take place until cohabitation had been resumed; desertion not being proved, the wife was only entitled to a decree for judicial separation. Held in appeal that the separation not being brought about by the act of the wife, but by the husband's misconduct, distinguished the case from that of *Fitzgerald v. Fitzgerald* (L. R., 1 P. & D., 694.), and that, under the circumstances, the desertion was [486] proved, and the petitioner was entitled to a decree for a dissolution of marriage.

APPEAL from a decree of KENNEDY, J., dated the 15th August 1877.

This was a suit brought by a wife for a dissolution of marriage on the ground of her husband's adultery and desertion. The suit was heard as an undefended case, and at the hearing, the adultery, which was alleged to have been committed in 1864 and 1869 in Calcutta, and in 1875 at Madras, was fully proved; but the learned Judge did not consider the desertion to be established, and gave a decree only for a judicial separation.

The parties were married in 1856, and lived together until 1871; but since 1869, the respondent had not contributed to his wife's support, and she had maintained herself and him by keeping pupils; she and her husband residing in Joratallao Street until 1870, when a distress having been put in for rent, they left and went to live in Circular Road; but pecuniary pressure forced them to give up that house, and by arrangement between them, she went to live with her family in Calcutta, and he to his mother's in Calcutta. The petitioner stated that for two years previously to February 1871, the respondent had ceased to have conjugal intercourse with her. The alleged desertion was stated to have taken place in March 1872, when he left Calcutta without seeing or having any communication with his wife, or making any provision for her support. The suit was brought in 1877. The evidence of the petitioner as to the desertion when the case first came on for hearing was as follows:

I was married in September 1856. After my marriage we lived at 22, Park Street. I continued to live with my husband up to 1869. I lived under the same roof with him up to 9th February 1871. I continued to live with him under the same roof, but not as his wife. That was at 17, Joratallao Street. He had been gradually withdrawing himself for many years from my society, and my own self-respect forbade I should do more than live under the same roof. We lived for two years under the same roof, but not as husband and wife. I made repeated endeavours, both by letter and in person, to induce him to [487] return to me. I went from Joratallao Street to the house in Circular Road, in consequence of a distress in the house. I lived in Circular Road for ten months. He lived in that house all the time. From Circular Road I returned to my family. I did so with his consent, simply because we were getting more and more involved, and he made so many demands on me for money which I could not meet. I understood he was going to his mother according to a previous arrangement, but just before leaving, he told me he would not go there, and refused to tell me where he was going. He did not ask me to go

with him. He left Calcutta in March 1872. In the interval he did not endeavour to contribute to my support. I have seen him since in passing, but not to speak; once at the King of Oudh's menagerie, but not to speak to. It was about a year after in one of his visits to Calcutta. He did not come and speak to me. He has not since contributed to my support in the slightest degree. I have never offered to go and live with him where he now is, because I expected the offer from him. I could not thrust myself on him after the way in which he behaved. I have never requested or written to him to return and cohabit with me. After he had neglected me so long, I could not do so."

On this evidence it was contended by Mr. Jackson and Mr. Trevelyan for the petitioner, that desertion had been made out, and the cases were cited which are referred to in the following judgment:—

KENNEDY, J.—(I am very much afraid I cannot give this lady the relief she seeks. On her own showing there never was a time at which desertion could be said to have commenced. It is not necessary for me to express my opinion of the respondent's conduct, the unfortunate lady seems to have had much to complain of, but differences arose and conjugal intercourse, we are told, ceased two years before that, which amounted to a separation. No doubt they seem to have lived very unhappily together. Eventually circumstances occurred, which compelled the husband to live apart with her consent. In fact, unless on an undertaking of better behaviour, or the husband seeking to [488] induce her to return to cohabitation, she did not seem anxious to return to cohabitation. She did not write, she says, because it was his part to have first written, and she did not seek to return. The cases cited were very strong, but of very great peculiarity. I think we have got the true principle laid down in *Fitzgerald v. Fitzgerald* (L. R., 1 P. & D., 694) and *Ward v. Ward* (1 Swab. & Trist., 185). In *Fitzgerald v. Fitzgerald* (L. R., 1 P. & D., 694), in which the conduct of the husband seems to have been as bad as bad could be, the principle is laid down in the *placitum* that "no one can desert who does not actually and willingly bring to an end an existing state of cohabitation. If the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion becomes impossible to either, at least until their common life and home have been resumed. The refusal by either of the request of the other to resume conjugal relations does not constitute the offence of desertion."

Therefore, the suggestion I threw out in the argument of converting the original separation into desertion by a requisition to resume conjugal relations would seem not to be well founded law. In the case of *Fitzgerald v. Fitzgerald* (L. R., 1 P. & D., 694) the facts were as bad as anything could be. That *placitum* seems fully borne out by the judgment of the Court. The Judge Ordinary says: "Putting the facts in the most favourable light for Mrs. Fitzgerald, it would, I presume, be argued thus after the first suit was at an end. Major Fitzgerald might at any time have demanded cohabitation of his wife. She was not unwilling to return to him, and if she had been, the law would have compelled her; but he made no such demand, therefore he wilfully kept apart from her, therefore he deserted her. If, indeed, keeping apart from a wife who has voluntarily quitted her husband against his will, and withdrawn from cohabitation, is the same thing as deserting her, the argument must prevail. But I cannot think that it is. It is one thing to make a breach, it is another to refrain from attempts to heal it. Desertion means abandonment, and implies an active withdrawal from a [489] cohabitation that exists. The word carries with it an idea of forsaking or leaving; is hardly satisfied by the negative position of standing apart."

There was a rehearing applied for. The Court retained the same opinion as before. We thus have it established that no one can desert who does not actively and wilfully bring to an end an existing state of cohabitation, which certainly does not seem to have occurred. Possibly it might be held, under the circumstances of this case, that a call to renew cohabitation might convert the separation into desertion, but I think it would be dangerous for the petitioner to try it, as, if acceded to, it would certainly condone the prior offences, and disentitle this unfortunate lady even to judicial separation. In *Ward v. Ward* (1 Swab. and Trist, 185), COCKBURN, C.J., and the Judge Ordinary were sitting together. COCKBURN, C.J., says, the evidence raises a doubt as to the desertion. If disagreements and quarrels took place, and both parties were bound over to keep the peace, can you treat a subsequent separation as desertion? Suppose an arrangement had been made by the advice of the Police Magistrate to separate by mutual consent. Though the husband may have left her, yet if there were a corresponding animus on the part of the wife, if she were a party to his leaving and consented to it, that would not constitute desertion. The act of desertion must be done against the will of the wife.

Again, there is the case of *Townsend v. Townsend* (L. R., 3 P. & M., 129), where the original separation being involuntary in consequence of fear of arrest, it was held not to be a desertion. Here it was involuntary from want of means, and in consequence of that pressure assented to by the petitioner. I think, therefore, that having regard to those decisions I should not be justified in pronouncing for a dissolution. But the petitioner is clearly entitled to a judicial separation. I shall not, however, give a final decision that the petitioner may determine whether she will take the opinion of another Court, or whether she will try the effect of such a notice as I suggested.

The case came on again on the 6th of August for further [490] hearing to establish the desertion, and evidence was given by the petitioner, which, as far as material, was as follows :

I had laid by several things to use again for house-keeping. We certainly had not given up all idea of living together again. There were some articles of plated-ware and door screens, things of that sort expensive to buy again. My husband wrote for them to raise money. I gave over the plated things to my husband on his letter. I was not aware of his going at the time he went to Madras. I would certainly have joined him at Madras if he had asked me. The separation from my husband in house was entirely caused by pecuniary pressure on us both. In consequence of that pecuniary pressure it was a joint arrangement that I should live with my family, and he with his mother. I consented to the arrangement till my husband could get a berth, and again offer me a home. If he had asked me to go to him at Madras, I certainly would have done so without any pledge of better behaviour from him.

KENNEDY, J.—Possibly, if Mr. Jackson's very able argument had been addressed to me before I had occasion to consider the case and had formed a deliberate opinion, I might have given judgment in favour of his client, but when I gave my former judgment I had thoroughly convinced myself, at least by examination of all the decisions bearing on the subject, that there was not in this case what amounted to desertion; and I still retain this opinion. I had not intended to permit further argument, but the petitioner having applied for leave to put further evidence on the record, I postponed the case for that purpose, and I then did not wish to prevent Mr. Jackson calling my attention to his view of the authorities.

Naturally the Court before whom this question had come were anxious rashly to avoid laying down a general principle, and as much as possible relied on the special circumstances in each case as constituting desertion or preventing the separation from taking that character; but in *Fitzgerald v. Fitzgerald* (L. R., 1 P. & D., 694) the Judge ORDINARY does lay down, in unmistakeable terms, a principle, which I think I am bound to accept even if it did not [491] commend itself to my mind as correct. He says, "no one can desert who does not actively and wilfully bring to an end an existing state of cohabitation." He explains, as I understand him, that mere absence does not necessarily cause a breach of cohabitation; that there may be cases in which, as in *Williams v. Williams* (3 Swab. & Trist., 547), there was personal severance, but what may be called constructive cohabitation; but I do not see that the present case is brought within them. *Townsend v. Townsend* (L. R., 4 P. & M., 129) shows the withdrawal from the wife's society under pressure of circumstances is not abandonment against her will, and even if, in spite of the language in *Fitzgerald v. Fitzgerald* (L. R., 1 P. & D., 694), any subsequent events may change the original separation into desertion, I do not find anything to bring this within them, as they are explained in *Fitzgerald v. Fitzgerald* (L. R., 1 P. & D., 694), and to make me believe that the cohabitation was merely suspended.

On the contrary, in this case, this unfortunate lady had suffered long and much from her husband's misconduct. Conjugal cohabitation, in its full sense, had ceased for two years before there had been a severance of residence by mutual consent caused by the pressure of circumstances, and I cannot help believing that she must unconsciously overrate her wish to return to cohabitation, when one sees the earlier statements in her first examination, and her description of her attempts to reclaim him, which forcibly brought to my mind the case of Adriana in the Comedy of Errors. I cannot get over the express language of Lord PENZANCE in *Fitzgerald v. Fitzgerald* (L. R., 1 P. & D., 694): "If the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion, in my judgment, becomes impossible to either, at least until their common life and home have been resumed."

If, however, this opinion of mine be erroneous, my error may be corrected by the Court of Appeal, and I have therefore afforded this lady the fullest opportunity of bringing upon the record every fact deemed material by her advisers.

The petitioner appealed from the decree which gave her merely a decree for a judicial separation, on the ground that the [492] evidence was sufficient to establish desertion without reasonable excuse for two years and upwards, and that therefore the decree should have been one for dissolution of the marriage.

Mr. Jackson and Mr. Trevelyan for the Appellant.

The following cases were cited:—*Fitzgerald v. Fitzgerald* (L. R., 1 P. & D., 694), *Haviland v. Haviland* (32 L. J., P. & M., 65), *Gatehouse v. Gatehouse* (L. R., 1 P. & D., 331), *Meara v. Meara* (35 L. J., P. & M., 33), *Cudlip v. Cudlip* (27 L. J., P. & M., 64), *Lowe v. Lowe* (unreported), *Graves v. Graves* (33 L. J., P. M. & Adm., 66), *Williams v. Williams* (3 Swab. & Trist., 547), and *Gibson v. Gibson* (29 L. J., P. & M., 25).

The judgment of the Court (GARTH, C. J., and MARKBY, J.) was delivered by

Garth, C. J.—In this case the parties were married in September 1856, the petitioner being then about 15 years of age. They lived together, in Calcutta,

for some years after the marriage, but had no children. In October 1864, the petitioner discovered that the respondent had committed adultery with her ayah. She did not on this account withdraw from cohabitation with the respondent, but from that time the respondent treated her with neglect. About this time she began to support herself by teaching in a school, and in 1869; in consequence of his constant absence until a late hour at night, she ceased to have sexual intercourse with him. They continued, however, to live together, and there is no reason to suppose that the husband was desirous of renewing the intercourse. On the contrary, she states, and this is not denied, that at this time her husband wholly neglected her. During this time also the respondent contributed nothing to the support of the petitioner, and frequently made demands for money upon her for his own purposes. They became involved, and in 1871, were obliged to give up the house in Circular Road, in which they then resided. [493] The petitioner then proposed that they should take a smaller house, which they could have done, but the respondent refused to sign any lease, and it was then, under the pressure of pecuniary difficulties, that they arranged that he should go to his mother's house until they could find means to provide a home. Whilst he was at his mother's house, she visited him twice, but he treated her with the greatest indifference. When the house in Circular Road was given up, the wife had retained sundry articles of furniture with a view to the possibility of their living together again, but the husband had them sold, and the proceeds were spent by him. He afterwards left his mother's house, and refused to tell his wife where he was going. In 1872, without any communication with his wife, he left Calcutta for Madras, where he has since resided, and has been guilty of frequent acts of adultery. He has occasionally visited Calcutta, and she once saw him, but only in public. On this occasion she did not speak to him, nor he to her. From 1869 down to the present time, the petitioner has resided in Calcutta, and the respondent has contributed nothing to her support.

There being no doubt as to the adultery, the only question is as to the desertion. The learned Judge of the Court below thought that he was compelled, upon the authority of the case of *Fitzgerald v. Fitzgerald* (L. R., 1 P. & D., 694), to hold that in this case there had been no desertion, because the separation in 1871 was assented to by the wife.

Now, we do not for a moment dispute the proposition that either where the separation is the act of the wife, or where the wife of her own free will assents to a complete separation, there can be no desertion; nor, until husband and wife have again cohabited, can subsequent conduct transform what was a voluntary separation into desertion by the husband. But we think this is not a case of that kind. In the case of *Fitzgerald v. Fitzgerald* (L. R., 1 P. & D., 694), upon which the learned Judge relied, the separation took place by the act of the wife alone, not in obedience to any external necessity, but for the express purpose of avoiding continued intercourse: and intercourse was not merely suspended by her, but put an end to. It is upon these grounds that [494] Lord PENZANCE considered the desertion in that case to be the act of the wife. But here the case is wholly different. The wife, notwithstanding the gross misconduct of her husband, continued to live with him for seven years, during the latter years struggling, by her own earnings, to keep up a house for herself and him, whilst he did nothing. Even when at last she was compelled by their debts, and his refusal to enable her to take a smaller house, to separate from him, she did all she could to prevent an entire separation, and to make it practicable for them to live together again. But she was thwarted in these attempts by her husband; he sold the little furniture she had saved;

he repelled her visits; and at last he refused to let her know where he was to be found. No doubt, after he left Calcutta for Madras, she made no further attempt to go to him or to induce him to return. But we think she had done, not only all that any woman could be reasonably expected to do, but from a legal point of view, enough to show that the separation was neither brought about by her, nor in accordance with her wishes. It may indeed be true that the respondent would have been perfectly willing to go on living with the petitioner, if she could have earned enough money for them both, whilst he remained in idleness; and as long as she could do this, she was also willing, in spite of his misconduct, to live with him, even upon these terms. But we think it is clear from his conduct, immediately after they gave up house in 1871, and subsequently, that when he found his wife could not support him, he was desirous to be rid of her altogether. After they had been compelled by difficulties of his own creating to live apart, he was bound to keep up with her such intercourse as the nature of the case admitted: but this, in our opinion, he distinctly refused to do.

When the case was being argued, we were disposed to think, that the petitioner having for two years withdrawn from conjugal intercourse with the respondent, she could not afterwards complain that her husband had deserted her; but it is clear that this withdrawal was brought about entirely by the husband's misconduct, and that it was a matter to which he on his part was wholly indifferent.

[496] We cannot find any authority that a withdrawal under such circumstances disentitles a wife to charge her husband with desertion.

We think, therefore, that we ought to grant a decree *nisi* for a dissolution of the marriage, instead of a judicial separation, and that the petitioner should have her costs in both Courts on scale 2.

Appeal allowed.

Attorney for the Appellant: Mr. Fink.

NOTES.

[DIVORCE—DESERTION—THE RULE IN FITZGERALD v. FITZGERALD—

A parallel case is that of *Hurtable v. Hurtable* (1899) 68 L. J. P., 83, where at the inception there was an agreement to live apart until sufficient was saved to find a home.

Desertion is a question of fact:—*Duckworth* (1889) 5 I. L. R., 608.

The rule in *Fitzgerald v. Fitzgerald* has been explained in *Kay v. Kay* (1904) P. 382, *Bradshaw v. Bradshaw* (1897) P. 24; *R. v. Leische* (1891) 2 Q. B., 418 C. A..

This case was followed in (1878) 1 Cal., 260]

[3 Cal. 496]
APPELLATE CRIMINAL.

The 22nd March, 1878.

PRESENT :

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE CUNNINGHAM.

The Empress

versus

Kudrutoollah and others.

[C. L. R. 2]

Practice—Committal for trial after charge has been drawn up—Criminal Procedure Code (Act X, 1872), ss. 4, 220, 221.

Section 221, † of the Criminal Procedure Code authorizes a Magistrate, after a charge has been drawn up, to stop further proceedings, and commit for trial.

Although the explanation to s. 220 provides that, if a charge is drawn up, the prisoner must be either convicted or acquitted, it does not require that the conviction or acquittal should be by the Magistrate who drew the charge.

THE prisoners were charged with rioting under s. 147 of the Penal Code.

The facts of the case, and the reasons for the reference, sufficiently appear from the order of the Sessions Judge referring it to the High Court, and which ran as follows :—

" At the sitting of the Court for the trial of this case an illegality was " apparent on the very face of the commitment. It appears that the Joint Magis- " trate has gone through the case and all but decided it, having drawn up a " charge, examined the witnesses for the defence, and recorded two judgments, " or a judgment with a postscript, the former dated 29th December 1877, and " the latter dated 18th January 1878. On this last date the Joint Magistrate " records an order that the charge [496] which he had himself drawn up was " cancelled, and that the prisoners were committed to the Sessions. This I " hold that the Joint Magistrate had no power to do. * Having drawn up a " charge, the Joint Magistrate was bound to convict or acquit. He had no " third course open to him, *vide* explanation, s. 220, Criminal Procedure Code. " It cannot be contended that s. 221 helps the Joint Magistrate, because it is " clear that the two sections must be read together. It cannot be said that " s. 221 justified a procedure which s. 220 distinctly precludes ; and there is all " the more reason for this when it is borne in mind that the explanation to " s. 220 is altogether new in the Criminal Procedure Code. Clearly then the " Legislature knew what they were about, and they could hardly, with their

* Criminal Reference, No. 17 of 1878, from the order of H. C. Sutherland, Esq., Sessions Judge of Zilla Backergunge, dated the 13th March 1878.

† [Sec. 221:—In any trial before a Magistrate, in which it may appear at any stage of the proceedings that from any cause, the case is one which the

How the Magistrate is to proceed when, after commencement of trial, he finds the case beyond his jurisdiction.

Magistrate is not competent to try, or one which, in the opinion of such Magistrate, ought to be tried by the Court of Session or High Court, the Magistrate shall stop further proceedings under this chapter, and shall, when he either cannot or ought not to make the accused person over to an officer empowered under section thirty-six, commit the prisoner under the provisions here- inbefore contained. If such Magistrate is not empowered to commit he shall proceed under section forty-five.]

"eyes open, have introduced the explanation to s. 220 providing that if a charge is drawn up the prisoner must be either acquitted or convicted, and go on in s. 221 to provide a third course for Magistrates to follow. I hold then that, by the words 'at any stage of the trial,' in s. 221, the Legislature fully and deliberately intended that the explanation in the previous section should be followed and read consistently, and read to mean at any stage, before the Magistrate had drawn up a charge.

"There is a further difficulty in the case. The Joint Magistrate has only committed on the same charge on which he had previously charged the prisoners as triable before him. The necessity for the commitment is not, therefore, apparent.

"I have searched in vain for any reported case to throw light on the present difficulty. I certainly never before heard of a Magistrate cancelling a charge once made.

"The case must be referred to the High Court under s. 197, explanation, Criminal Procedure Code, in order that the Joint Magistrate's commitment may be quashed."

No one appeared upon the hearing of the reference, and the judgment of the Court was delivered by

Jackson, J.—"Trial," according to the definition in s. 4 of the Criminal Procedure Code, means "the proceedings taken in Court after a charge has been drawn up." It is clear, therefore, that s. 221 of the Criminal Procedure Code, which [497] follows s. 220, authorizes a Magistrate, although a charge may have been drawn up, to stop further proceedings and commit for trial: for this purpose s. 221 may be regarded as a proviso to s. 220. It may be added that, though the explanation to s. 220 provides that if a charge is drawn up, the prisoner must be either convicted or acquitted, it does not require that the conviction or acquittal should be by the Magistrate who drew it.

We see no reason, therefore, to quash the commitment.

NOTES.

[CRIMINAL PROCEDURE—COMMITTAL AFTER DRAWING UP CHARGE—]

See the Criminal Procedure Code, 1898, secs. 347 and 258, the provisions of which are substantially the same as those in the Criminal Procedure Code of 1872.]

[3 Cal. 497]
APPELLATE CIVIL.

The 4th March, 1878.

PRESENT:

• MR. JUSTICE L. S. JACKSON AND MR. JUSTICE CUNNINGHAM.

The Empress

versus

•Butto Kristo Doss and another.†

Public Servant—Penal Code, ss. 21 and 109.

A person appointed by the Government Solicitor, with the approval of Government, and under an arrangement made by the Governor-General in Council, to act as Prosecutor in the Calcutta Police Courts, is a public servant within the meaning of s. 21 of the Indian Penal Code.

In this case the accused were charged under s. 109 of the Penal Code with offering a bribe to Mr. Hume, who was alleged to be a public servant. It would appear that Mr. Hume was appointed by the Government Solicitor, with the approval of the Government, and under arrangements sanctioned by the Governor-General in Council, to act as Government Prosecutor in the Calcutta Police Courts.

The point referred by the Presidency Magistrate for the opinion of the High Court was, whether, under these circumstances, Mr. Hume was to be considered a public servant.

No one appeared on the hearing of the reference, and the judgment of the Court was delivered by

Jackson, J.—We think it clear that the person appointed by the Government Solicitor, with the approval of the Government, to act as Government Prosecutor, under the arrangements made by the Governor-General in Council, is a public servant within the meaning of s. 21, Indian Penal Code.

[498] APPELLATE CIVIL.

The 26th November, 1877.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRCH.

Gogon Manjy.....Defendant

versus

Kashiswary Deby and others.....Plaintiffs.†

Suit for Kabuliat—Enhanced Rate—Presumption of Landlord's willingness to grant Pottah.

In order to entitle a landlord to sue a tenant for a kabuliat at a certain rate of rent, he should either have tendered a pottah to the tenant at the rate of rent mentioned in the

* Criminal Reference, No 51 of 1878, from an order passed by F. J. Marsden, Esq., Presidency Magistrate of Calcutta.

† Appeal under cl. 15 of Letters Patent against the decree of Mr. Justice WHITE, dated the 18th of July 1877, in Special Appeal No. 2158 of 1876.

kabuliat, or he should be willing to grant a pottah at that rate; and if the Court considers that the rent which he claims is the correct amount, it will presume that he is ready to grant a pottah at that rate, and will give him a decree for the kabuliat.

But this presumption will not hold if the Court thinks that the rate claimed is too high; and in such a case, therefore, the presumption having failed, the landlord will not be entitled to a kabuliat at such lower rate as the Court may think just, but his suit will be dismissed. *Golam Mohamed v. Asmut Ali Khan Chowdhury* (10 W. R., F. B., 14) followed. and *Gopeenath Jannah v. Jeteo Mollah* (18 W. R., 272) dissented from.

THIS was a suit for a kabuliat at an enhanced rent by the owners of a jote against a ryot in occupation of the jote, who paid their share of the rent to each of the plaintiffs. The Court of First Instance found that the defendant was a ryot liable to enhancement of rent, and that he had been duly served with a proper notice of enhancement under Bengal Act VIII of 1869, s. 14; that enhancement was sought on the ground that the rent paid by the defendant was below the rate prevailing in adjacent places. It also found that the plaintiffs had not established that ground, and it appeared that the plaintiffs had not tendered a pottah to the defendant at the rate mentioned in the kabuliat, nor had they expressed themselves willing to grant a pottah at that rate, and upon these facts dismissed the plaintiffs' suit. The Lower Appellate Court took evidence as to what was a proper rent to be paid, and granted [499] the plaintiff a kabuliat at that rate, which was lower than the rate claimed.

From this decree the defendant preferred a special appeal to the High Court on the ground that the plaintiffs having failed to prove that they were entitled to a kabuliat for the enhanced rent claimed by them, their suit should have been dismissed, and that the Lower Appellate Court was wrong in giving a decree for a kabuliat for a rent which the plaintiffs had not before suit expressed their readiness to accept.

Baboo Kishori Mohun Roy for the Appellant.

Baboo Sreenath Doss for the Respondents.

This special appeal came on for hearing before WHITE, J., who confirmed the order of the Lower Appellate Court, and the defendant thereupon preferred the present appeal under cl. 15 of the Letters Patent.

Baboo Kishori Mohun Roy for the Appellant.

Baboo Griya Sunker Mozoomdar for the Respondents.

Garth, C. J. (BIRCH, J., concurring).—We think that this appeal should be allowed. The judgments of the Subordinate Judge, and that of Mr. Justice WHITE, appear to us to be directly opposed to the ruling of the Full Bench in the case of *Golam Mohamed v. Asmut Ali Khan* (10 W. R., F. B., 14).

The grounds upon which that case proceeded, as we understand them, are these: that in order to entitle a landlord to sue a tenant for kabuliat at a certain rent, he should either have tendered to the tenant a pottah at the rate of rent mentioned in the kabuliat, or he should be willing to grant a pottah at that rate; and when he brings a suit against his tenant for a kabuliat at a certain rent, it must be presumed that he is ready to grant a pottah at that rate. That presumption would enable him to succeed in his suit, if the Court considers that the rent which he claims is the correct amount. But if the [500] Court thinks that he is not entitled to a kabuliat at the rate claimed, but at a lower rate, then it is plain that no presumption can be made in favour of his having been willing to grant a pottah at that lower rate. On the

contrary, the fact that he has attempted by legal proceedings to enforce the payment of the higher rent, raises a presumption that he would not have been content, when he brought his suit, to accept a kabuliat at the lower rate.

He is, therefore, not entitled to a decree for a kabuliat at the smaller rate, because the Court cannot presume that he would have granted a pottah at that rate.

This is the ground upon which, as we understand it, the judgment of the Full Bench proceeds, and it had since certainly been acted upon in that sense in many other instances.

It appears to us, that the case of *Gopeenath Jannah v. Jeteo Mollak* (18 W. R., 272), decided by Mr. Justice KEMP and Mr. Justice GLOVER, is not in accordance with the rule laid down by the Full Bench, and that we are, therefore, justified in dissenting from it.

It has been contended before us that it is the same thing whether the landlord sues for enhanced rent *simpliciter*, or sues for a kabuliat at an enhanced rate. But that is not so. When a landlord, after notice, sues for enhanced rent, the Court may give him a lower rate of enhanced rent than that which he claims, because in such a suit it is not necessary that the landlord's willingness to grant a pottah at the rent demanded should be proved or presumed, and when in that suit the proper amount of rent has been ascertained and fixed between the parties, the landlord may safely demand from the tenant a kabuliat at that rate, and sue him for it.

This distinction between suits for enhanced rent and suits for a kabuliat at enhanced rent, appears to us to be clearly pointed out by the Chief Justice in the Full Bench case.

For these reasons we consider that the Subordinate Judge was wrong; and we consider that, in a suit of this nature, no distinction can be drawn between cases in which a kabuliat is demanded after notice and cases in which no such notice is [501] given. The judgments of both the Appellate Courts will be reversed, and the judgment of the First Court restored, with costs in each Court.

Appeal allowed.

NOTES.

[The principle of this case has no application where the parties having referred the matters in dispute to arbitration the award validly given was for a rate of rent less than what was claimed in the plaint. In such case the suit for kabuliat should be decreed :— (1880) 6 Cal., 251.]

[3 Cal. 501]

APPELLATE CIVIL.

The 18th January, 1878.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRCH.

Heera Lall Pramanick and others.....Plaintiffs

versus

Barikunniassa Bibee.....Defendant.*

[= 1 C. L. R. 596]

Evidence Act (1 of 1872), ss. 101, 103, 106—Onus of proof.

In the year 1862, the plaintiff brought a resumption suit against *A*, in respect of the lands in dispute in this case, upon the ground that she was holding them by an invalid lakheraj title, and obtained a decree. After some years the plaintiff brought the present suit against *B*, who derived her title through *A*, to have the rent assessed. *B* pleaded by way of bar to the jurisdiction, that the lakheraj grant, under which *A* claimed, was made previously to 1790. Held, that the onus of proving this plea was upon *B*.

Baboo Gooroodass Banerjee for the Appellants.

Mr. H. E. Mendies for the Respondent.

THE facts material to the point decided in this appeal were sufficiently stated in the judgment of the Court, which was delivered by

Garth, C. J.—So far as the merits of this case are concerned, we are not called upon here to adjudicate upon them. The Munsif has determined the rate of rent which is payable by the defendant, and the District Judge, in his judgment of the 14th February 1877, says, that as regards the Munsif's decision on remand, in which the merits of the case were discussed and settled, the appellant did not raise any question before him.

The only point, therefore, which could be, or has in fact been, raised on special appeal in this Court is that of jurisdiction, [502] which was determined in a former judgment of the Officiating Judge, dated the 13th of May 1876, in favour of the plaintiff. That judgment has been reversed by the learned Judge of this Court, and we have to consider the correctness of his judgment upon that point only.

The question arises in this way. The plaintiffs, in the year 1862, brought a resumption suit against the defendant's mother (under whom the defendant claims) in respect of the land in dispute, upon the ground that she was holding them by an invalid lakheraj title. The defendant in that suit contested the claim, but the plaintiff obtained a decree.

It does not appear from the proceedings in that suit, whether the lakheraj grant under which the defendant claimed, was before or after the year 1790; but it was distinctly stated in the decree, that the plaintiff (the decree-holder) was entitled to assess the property.

The plaintiff then, after a lapse of some years, brought this suit against the present defendant (who claimed under the defendant in the resumption suit) to have the rent assessed, and the defendant then set up (by way of plea to the jurisdiction of the Civil Court) that the lakheraj grant under which the defendant in the resumption suit claimed, was previous to 1790.

* Appeal under cl. 15 of the Letters Patent against the decree of Mr. Justice AINSLIE, dated the 1st August 1877, in Special Appeal No. 967 of 1877.

The Munsif, accordingly, framed the ninth issue in the case in these words: "Whether the resumed lakheraj was of anterior date to the 1st of December 1790?"

The Munsif considered that the onus of proving the negative of this issue was upon the plaintiffs, apparently because he thought that the plaintiffs ought to prove that the Civil Court had jurisdiction to try the suit, and as the plaintiffs did not prove the negative of the issue, the Munsif dismissed the suit.

On appeal, the Officiating Judge reversed the Munsif's decision, and remanded the case to be tried upon the merits. He considered that the case of *Rani Shama Soonderee v. Situl Khan* (8 B. L. R., App. 85; s. c., 15 W. R., 474) was an authority in the plaintiff's favour, and that the onus of proving the ninth issue lay upon the defendant.

On special appeal the learned Judge of this Court thought the Officiating Judge was wrong, and he restored the Munsif's [303] first judgment, upon the ground, that as the jurisdiction of the Court to entertain the suit had been impugned, it was for the plaintiff to prove that the Court had jurisdiction.

After fully considering the point, we are unable to agree in the learned Judge's conclusion. The objection made to the jurisdiction of the Court was raised affirmatively by the defendant, by a statement, that the lakheraj grant was previous to 1790. The affirmative of the ninth issue, which was framed to meet that allegation, was asserted by the defendant, and by the 101st and 103rd sections of the Evidence Act, the burthen of proving any particular fact in issue lies upon the party who asserts that fact.

Moreover, in this case, the rule laid down in s. 106 of the Evidence Act is in favour of the plaintiffs' view, because if the defendant and her ancestors held and claimed to hold this property under a lakheraj grant, the terms and

* [Sec. 101:—Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

Burden of proof.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations.

- (a) *A* desires a Court to give judgment that *B* shall be punished for a crime which *A* says *B* has committed. *A* must prove that *B* has committed the crime.
- (b) *A* desires a Court to give judgment that he is entitled to certain land in the possession of *B* by reason of facts which he asserts and which *B* denies to be true. *A* must prove the existence of those facts.]

† [Sec. 103:—The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustrations.

- (a) *A* prosecutes *B* for theft, and wishes the Court to believe that *B* admitted the theft to *C*. *A* must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.]

Burden of proving fact especially within knowledge. † [Sec. 106:—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations.

- (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
- (b) *A* is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.]

the date of that grant would certainly be rather within the knowledge of the defendant than of the plaintiff.

It is perfectly true, as observed by the learned Judge, that if the grant had in fact been made previously to 1790, the Collector's Court would have had jurisdiction to assess the revenue upon the property (see Reg. XIX of 1793, ss. 6 to 9). But this fact raises no presumption in favour of the grant having been made prior to 1790. On the contrary, if any presumption were to be made as regards jurisdiction, it would be in favour of the ordinary and general tribunals of the country, to the exclusion of any special jurisdiction exercised under a particular statute by the Collector, and if any presumption could be made in this case from the proceedings in the resumption suit, it would certainly be in favour of the plaintiff, because the decree in that suit contains a declaration "that the plaintiff is entitled to assess the lands."

We think, therefore, that having regard to the rules laid down by the Evidence Act, as well as to the general law and the circumstances of this particular case, the onus of proving the affirmative of the ninth issue was upon the defendant.

[504] The judgment of the High Court will, therefore, be reversed, and the judgment of the District Court restored with costs in both Courts.

Appeal allowed.

[3 Cal. 504]

APPELLATE CIVIL.

The 26th February, 1878.

PRESENT :

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE CUNNINGHAM.

Chunder Nath Chowdhry.....Plaintiff

versus

Tirthanund Thakoor and another.....Defendants.

[= 2 G. L. R. 147]

*Suit for possession—Fraud—Limitation Act IX of 1871, sched. II, art. 95—
Sale for arrears of Government revenue.*

Article 95† of second schedule to Act IX of 1871 was not intended to apply to suits for possession of immoveable property when fraud is merely a part of the machinery by which the defendant has kept the plaintiff out of possession. That article has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences of such act.

THIS was a suit for possession of certain lands. One Jagadanund, the paternal grandfather of the plaintiff, and Nobo Kishore, were uterine brothers, and were jointly entitled to the property in question. On the death of Nobo

* Special Appeal, No. 1052 of 1877, against the decree of J. D. Ward, Esq., Judge of Zillah Purneah, dated the 5th April 1877, affirming the decree of S. Wright, Esq., Subordinate Judge of that district, dated the 10th January 1877.

† [Art. 95 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For relief on the grounds of fraud.	3 years.	When the fraud becomes known to the party wronged.]

Kishore, his widow Annopoorna Chowdrain became entitled to a life-interest in her husband's share of the joint estate. On the 24th Bysakh 1269 B. S. (6th May 1862) Annopoorna Chowdrain granted to one Kharoo Lall Thakoor, the father of the first and second defendants, a patni lease of the property in dispute, in which she was jointly entitled with Gournath Chowdhry, the father of the plaintiff. A dispute took place, and the Collector made a settlement with Gournath and Annopoorna as widow of Nobo Kishore. Gournath Chowdhry thereupon brought a suit contesting the validity of the patni lease, and by a decree of the 7th August 1867, it was declared the patni lease should endure only during the lifetime of the widow. Subsequently, on execution of a money-decree obtained against Annopoorna Chowdrain, the right, title, and interest of the judgment-debtor in the lands in [505] dispute were purchased by Koomar Ali, a mooktear. Again, in execution of another money-decree obtained against Gournath Chowdhry, the first defendant, caused to be sold and himself purchased, the reversionary right of the judgment-debtor to the property in which Annopoorna Chowdrain enjoyed a life-interest Annopoorna Chowdrain survived Gournath Chowdhry, and on her death on 21st February 1869, Kharoo Lall, the father of the defendants, who had for some time previous been in sole possession of the property in dispute, made default, it was alleged through fraud, in the payment of Rs. 33 due as Government revenue. At the Government sale the lands were purchased by one Shib Persaud, the third defendant, and a cousin of the other defendants. The plaintiff's allegation being that such purchase was in reality made on behalf of the defendant himself, he, accordingly, brought this suit as heir and reversioner under the Hindu law after the death of Annopoorna against Tirthanund Thakoor, his younger brother, and Shib Persaud. The first two filed a joint written statement, and the third defendant, a separate one. In both written statements it was contended that third defendant was an independent person distinct from the other defendants, and had purchased the property for himself. They further urged that as the sale had been for arrears of Government revenue it could not be impeached. It further appeared that when default was made in payment of the Government revenue, the plaintiff had come forward to pay the same, but the Collector refused to receive it. The Court of First Instance dismissed the suit on the ground that the claim was barred, inasmuch as the plaint under art. 95, sched. ii of Act IX of 1871, had not been filed within three years of the discovery of the alleged fraud. The Lower Appellate Court dismissed the appeal, holding that the Government sale was a bar to all further suits.

The plaintiff now filed a special appeal to the High Court.

Baboo *Kalmohun Dass* (with him Baboo *Juggodanund Mookerjee*) for the Appellant.

Baboo *Gopal Lall Mitter* (with him Baboos *Chunder Madhub Ghose*, *Hemchunder Banerjee*, and *Taraknath Sen*) for the Respondents.

[506] The judgment of the Court was delivered by

Jackson, J. (who, after stating the facts of the case as above, and having observed that there could be no doubt that the purchase by Koomar Ali was made on behalf of the first defendant, and that Annopoorna having survived Gournath, the purchaser of the latter's reversionary right took nothing, proceeded as follows):—

Both the Courts below have dismissed the suit. The Judge in the third paragraph of his judgment says:—"It is quite unnecessary to go at length into the question of limitation which the Subordinate Judge has discussed; it

"seems to me that the revenue sale, as a bare fact by itself, utterly bars the suit. In the first place, when it occurred it may be doubted whether Kristanund was the person responsible for the revenue, for he was merely Annopoorna's patnidar, and at the instance of the father of the plaintiff, a competent Court had declared that the patni title would only last for Annopoorna's lifetime. According to plaintiff's own allegation, she died on 21st February 1869, and the plaintiff himself was therefore rightful reversioner in 1870, when the sale took place, and the arrear fell due. But be this as it may, there is no sort of privity as between joint holders for paying their shares of the revenue of an estate; and whatever may have been Kristanund's motives, I do not think his right to default can be questioned. The plaintiff had every right and chance of coming forward and looking after himself."

The Judge has omitted to notice that, in the first place, this property was unquestionably in the hands of Kharoo Lall, father of the defendant Tirthanund, at the time of Annopoorna's death. He also has forgotten that, on the occurring of the default, when the property was sold, the plaintiff came forward and asked to be allowed to put in the Government revenue and have the sale stayed, which, for what reason it is difficult to understand, the Collector disallowed. Now it seems clear that if the plaintiff succeeded in proving that the principal defendant's father had committed default in the payment of the Government revenue with the view of bringing the property to be purchased [507] in the name of Shib Persaud for his own benefit, that would be such a fraud as would entitle plaintiff to the assistance of the Court, and the property ought to be reconveyed to the plaintiff. But then it is said that if the plaintiff's suit was brought on that ground, he ought to have come in, under art. 95 of the second schedule to the now repealed Limitation Act, within three years from the date of the fraud being known to the party wronged. It seems to me that that article does not apply to a case like the present. That article has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences of those acts. In such a case he is bound to bring his suit within three years from the time when the fraud becomes known to him. In the present case, the fraud in question is merely a part of the machinery by which, if the plaintiff's case is true, the defendants have kept the plaintiff out of possession of a property to which he became entitled at the death of the widow Annopoorna. Becoming so entitled he was allowed by the usual Limitation Law twelve years from the date of his right accruing to begin his suit, and it certainly could not have been the intention of the Legislature that, whereas in an ordinary case the plaintiff would be allowed twelve years to bring such a suit, his period would be cut down to three years, because, in addition to wrongful possession on the part of the defendants, there had been a gross and carefully concocted fraud. That article, consequently, does not apply to the present case. It seems to me, therefore, that the lower Courts ought to have enquired whether the facts have been as alleged by the plaintiff,—that is to say, whether Kharoo Lall, defendant Tirthanund's father, had allowed the arrears to fall due with the fraudulent intention of subsequent purchase, and whether Shib Persaud is really, as contended, no other than Tirthanund himself—a conclusion to which, I am bound to say, the facts of the case appear very strongly to point—and if that be so, the plaintiff, I think, was undoubtedly entitled to a verdict. The case, therefore, must go back to the Lower Appellate Court in order that these questions may be tried.

Case remanded.

NOTES.

[LIMITATION ACT—ART. 95 (FRAUD)—

- (a) The article does not provide for every suit in which fraud enters as an element :—
(1878) 3 Cal., 504 ; (1897) 25 Cal., 49.
- (b) A suit for compensation by way of damages for fraud will be within the Article :—
(1903) 27 Mad., 343 ; 31 Mad., 230.
- (c) Whether in a case of fraud as in this case, Art. 95 would not be the appropriate one, see :—(1884) 6 All., 406 ; (1886) 11 Bom., 119 ; (1883) 6 All., 75 ; (1907) 34 I. A., 138.
See also (1907) 34 Cal., 241 --5 C.L.J., 385.
- (d) The fraud within the Article is a fraud practised upon a party to the decree or a party to a transaction in which the fraud was committed, and not others :—(1878) 3 Cal., 504 ; (1907) 30 Mad., 402 ; (1907) 34 I. A., 138.]

[508] APPELLATE CIVIL.

The 21st December, 1877.

PRESENT :

MR. JUSTICE AINSLIE AND MR. JUSTICE KENNEDY.

Sham Narain Singh.....Defendant

versus

Rughooburdial.....Plaintiff.*

[--1 C. L. R. 343]

Mitakshara Law — Ancestral Property — Foreclosure — Alienation.

Until foreclosure, the vendee, under a bond of conditional sale, holds the lands, the subject of the bond, only as security for the money lent.

Semble.—The effect of foreclosure is to put an end to the original conditional sale and to make the property *ab initio* the immoveable property of the person who advanced the money.

Query.—Whether ancestral property which was moveable when it descended, but has been converted into immoveable property, is not immoveable ancestral property for the purposes of the Mitakshara law.

SUIT to recover possession of certain lands acquired by one Brij Lall Sahu, the grandfather of the plaintiff, under a deed of conditional mortgage dated the 20th February 1847. Brij Lall Sahu afterwards foreclosed the mortgage, and on his death his son, Ram Buksh Sahu, the father of the plaintiff, instituted proceedings for and obtained possession of the lands and afterwards alienated them to the defendant. The plaintiff contended that such alienation was invalid as against himself, on the ground that the land was immoveable ancestral property, and therefore inalienable under Mitakshara law, and further that no legal necessity existed for the sale.

The defendant, in the third paragraph of his written statement, stated "that though the deed of conditional sale, dated 20th February 1847, was

* Special Appeal, No. 708 of 1877, against the decree of E. Grey, Esq., Officiating Judge of Zilla Patna, dated the 15th of January 1877, reversing the decree of Baboo Matadin Roy Bahadur, Subordinate Judge of that district, dated the 29th of May 1876.

"executed in favour of Brij Lall Sahu, father of Ram Buksh Sahu, yet the property in suit had not become the right and interest of the plaintiff's grandfather during his lifetime. Eventually Ram Buksh Sahu, father of the plaintiff, instituted a suit, and with great labour, expense and exertion, acquired the property in suit."

The Court of First Instance dismissed the plaintiff's claim.

[509] The Lower Appellate Court held that the property in suit was ancestral property, and that, inasmuch as the defendant had failed to give proof of legal necessity for the alienation, the appeal must be allowed. The learned Judge was also of opinion that *Girdharce Lall v. Kantow Lall* (14 B. L. R., 187; s.c., 22 W. R., 56) did not apply.

The defendant now preferred a special appeal to the High Court.

Baboo Chunder Madhub Ghose and Baboo Rajendra Nath Bose for the Appellant.

Mr. R. E. Twidale and Moonshee Mahomed Yoosuf for the Respondent.

The judgment of the Court was delivered by

Kennedy, J.—In this case there is an appeal from the judgment of the Judge of Patna reversing the decision of the Subordinate Judge. As I understand, three points have been argued on behalf of the special appellant. The first question which he raises, is with respect to the nature of the property which is claimed by the plaintiff. The special appellant contends that, in truth, this is not ancestral immoveable property. We are, however, of opinion that it must be treated as being ancestral immoveable property.

The ancestor, Brij Lall, acquired this property by a deed of conditional sale. Now it has been held, and I have no hesitation in saying with perfect correctness, that up to the time of the foreclosure becoming absolute, the interest of the vendee by the conditional sale amounts only to securing his money. He has the land, he has it simply as security. One must remember, however, that from the beginning it was not so. Originally it was really a conditional sale, which became absolute on the expiry of the limited term. Legislation intervened, and by the Regulation, that which was by itself ripening into an absolute estate in land became converted into [510] something which remained conditional until foreclosure proceedings were adopted; but if it were necessary for me to decide this point, I should strongly be inclined to think that the effect of the foreclosure would be to put an end to the original conditional sale and to make the property the immoveable property of the person who advanced the money from the commencement. However, I do not think it necessary here to decide that, for we find a most careful abstention by the defendants in their written statement from alleging that the proceedings which converted the interest in the property into an absolute interest were taken by Ram Buksh. Paragraph 3 of the defendant's written statement says—(*Reads*). Evidently only referring to the proceedings for possession which invariably follow upon the foreclosure which converts a conditional into an absolute sale. And, therefore, I think that the property having been in the hands of Brij Lall, whether subject to the right of redemption or not, the defendant, appellant, would be bound to show that when it came into the hands of Ram Buksh it was not immoveable property; that he has certainly failed to do on the face of these proceedings. And I am now informed that on the face of the proceedings it appears that the foreclosure proceedings were in fact taken by Brij Lall. I do not at all see that even if moveable property came into the hands of a descendant and was converted into immoveable property, that that would not be an immoveable

ancestral estate. I do not know of any authority which shows that the meaning of an immoveable ancestral estate is an ancestral estate which has descended in immoveable form. I am inclined to think that it includes an ancestral estate, no matter whether it descends in moveable or immoveable form.

The next point which has been raised is, that this money was applied for the purpose of carrying on a business which was for the benefit of the joint family. Now, if that had been an ancestral business, I should have had little difficulty in holding, as it has been determined at least on the Original Side of this Court, that it is a part of the ancestral property which the descendant is bound to keep up, and to the [511] support of which he may apply all the ancestral assets. (See *Johurra Bibee v. Sreegopal Misser*, 1 L. R., 1 Cal., 470. See also *Ramlal Thakursidas v. Lakmichand*, 1 Bom. H. C., App., 51, at p. 71; *Petumdoss v. Ramdhone Doss*, Tay., 279). But it appears quite clear that this was not an ancestral business, but the separate business of Ram Buksh, which he transacted during the lifetime of his father. And, therefore, though it may have been for the benefit of Ram Buksh, who was a member and *karta* of the joint family, it is quite clear that it was not for the benefit of the joint family.

Again, it has been suggested that as this was a case in which there had been a suit for recovery of property, that which is recovered becomes the separate property of the recovering member of the family. In the first place, the principal passage from the Mitakshara read by the pleader for the appellant only speaks of recovery had with the consent of the other members of the family. In the next place, it only refers to a partition amongst brothers. And I do not think it has derogated from the ancestral character of the property, although it may be enjoyed separately. In the third place, this is not such a recovery as is meant in the Mitakshara. The property was left in the hands of the mortgagor according to the ordinary meaning of the contract, and a suit after foreclosure proceedings is little more than a matter of form.

There was another point raised by the appellant, namely, that the Judge was wrong in making a distinction between the purchase in this case and the case of sale for discharge of debts. In our opinion, the Judge was perfectly right. The decision of the Privy Council referred to by him—*Girdharee Lall v. Kanto Lall* (14 B. L. R., 187; s. c., 22 W. R., 56)—clearly applies to cases of debts, and its reasoning applies to no other.

The appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[I. COPARCENARY PROPERTY.

Retains in the hands of a coparcener the same character, into whatever shape it has been converted—money into lands or lands into money :—(1894) 18 Mad., 73 at 83.

II. WHAT LOST PROPERTY BECOMES SEPARATE PROPERTY ON RECOVERY :—

See, in addition to this case, the case of (1881) 4 Mad., 250 at 259 :—

“The conditions requisite for the application of the rule are that the property should have been recovered from usurpers holding it adversely to the family; that it should have been recovered without the expenditure of coparcenary funds; that there should have been an abandonment of their rights by the other coparceners in favour of the coparceners

and, where such abandonment is matter of inference, that the coparceners to whom it is imputed should have been in a position to sue." See also (1886) 10 Bom., 528 at p. 551.

III. ALIENATION BY FATHER—

The statement at the end of the judgment that the rule in *Girdharee Lall v. Kantoo Lall* applies to alienations for debts and not for other purposes, has been affirmed in:—(1909) 31 All., 176; (1910) 35 Bom., 169; (1907) 34 Cal., 735, (1905) 29 Mad., 200.]

[312] APPELLATE CIVIL.

The 10th January, 1878.

PRESENT :

MR. JUSTICE KEMP AND MR. JUSTICE MORRIS.

Shib Narain Shaha and another.....Decree-holders

versus

Bipin Behary Biswas and another.....Judgment-debtors.*

[— 1 C L R. 539]

*Execution -- Transfer of decree -- Jurisdiction -- Striking case off the file—
Act VIII of 1859, ss. 285, 286.*

The jurisdiction of a Court to which a decree has been transferred for execution is strictly limited to carrying out such execution. Such Court has no power to issue a certificate under ss. 285,† 286 ‡ of Act VIII of 1859, transferring the decree, already transferred to it, to another Court for execution. The Court to which a decree has been properly transferred for execution having struck the case off the file, a subsequent application for a further transfer of the case to another Court for execution should be made to the Court which originally passed the decree sought to be executed.

Bagram v. Wise (1 B. L. R., F. B., 91) considered.

A DECREE was obtained in this case on the 31st of December 1862 in the Court of the Munsif of Rungpur. On the 22nd of February 1872 the decree was, under ss. 285, 286 of Act VIII of 1859, transferred to the Court of the Munsif of Julpigori for execution. On the 21st March 1874 the case was struck off the file of the Court of the Munsif of Julpigori. On the 26th March 1876 an application, accompanied with the usual certificate, was filed in the

* Miscellaneous Special Appeal, No. 92 of 1877, against the decree of R. F. Rampini, Esq., Judge of Zilla Julpigori, dated the 16th of January 1877, affirming the order of Baboo Khetter Prowad Mookerjee, Sudder Munsif of that district, dated the 8th of July 1876.

† [Sec. 285 :—The plaintiff in such case may apply to the Court whose duty it is to execute the decree, to transmit a copy thereof, together with a certificate that satisfaction of such decree has not been obtained by execution within the jurisdiction of the said Court, and a copy of any order for execution of such decree that may have been passed, to the Court by which the applicant may wish the decree to be executed.]

‡ [Sec. 286 :—The Court, unless there be any sufficient reason to the contrary, shall cause such copies and certificate to be prepared; and the same, after being signed by the Judge and sealed with the seal of the Court, shall be transmitted to the Court indicated by the applicant if that Court be within the same district, otherwise to the principal Civil Court of original jurisdiction in the district in which the applicant may wish the decree to be executed; and the Court to which such copies and certificates are transmitted shall cause the same to be filed therein, without any proof of the judgment or order for execution, or of the copies thereof, or of the seal or jurisdiction of any Court, or of the signature of any Judge, unless it shall, under any peculiar circumstances, be specified in an order, require such proof.]

Court of the last-mentioned Munsif, under s. 284* of Act VIII of 1859, for an order transferring the decree to the Court of the Munsif of Azimgunge for execution. The Julpigori Munsif refused the application, on the ground that, under cl. 167 of schedule II of Act IX, of 1871, the application ought to have been filed within three years from the date of the last application for execution, or from the date of the issue of notice under s. 216 † of Act VIII of 1859. The application not having been made within that time was barred by limitation. On appeal the District Judge, relying upon *Brojendro Narain Roy v. Benode Ram Sen* (11 W. R., 269), [513] held, that the case having once been struck off the file of the Munsif's Court, it had no jurisdiction to entertain the application, and that the application should have been made to the Munsif of Rungpore, and not to the Munsif of Julpigori. The judgment-creditor appealed to the High Court.

Baboo *Nogendro Nath Roy* for the appellants. —The Court of First Instance had jurisdiction to entertain the application made; see *Bagram v. Wise* (1 B. L. R., F. B., 91).

The respondent was unrepresented.

The judgment of the Court was delivered by

Kemp, J. (who, after stating the facts of the case, continued). —The pleader for the special appellant refers to *Bagram v. Wise* (1 B. L. R., F. B., 91), and contends that the finding of the Judge is wrong. In that case the late learned Chief Justice, Sir BARNES PEACOCK, who delivered the judgment of the Full Bench, remarked, that "as soon as a copy of the decree, which is sent for execution to another Court, is filed in the Court to which it is transmitted, it has the same effect as a decree of that Court," and "that Court," that is to say, the Court to which the decree is transmitted, "is to proceed to execute it according to its own rules in the like cases."

No doubt the Munsif of Julpigori had authority and was competent to execute a decree of the Munsif of Rungpore that was transmitted to him, provided he had jurisdiction; but this is a case which, in our opinion, is not covered by the decision of the Full Bench quoted above. This was an application to the Munsif of Julpigori not to execute the original decree passed by the Munsif of Rungpore, but to take proceedings in execution upon his copy-decree and order, as provided in ss. 285 and 286 of the Civil Procedure Code, within the

* [Sec. 284 :—A decree of any Civil Court within any of the British Territories in India or established by authority of the Governor-General of India in Council in the territories of any Foreign Prince or State, which cannot be executed within the jurisdiction of the Court whose duty it is to execute the same, may be executed within the jurisdiction of any other such Court in the manner following.]

How a decree of one Court may be executed within the jurisdiction of another Court.

† [Sec. 216 :—If an interval of more than one year shall have elapsed between the date of the decree and the application for its execution, or if the enforcement of the decree be applied for against the heir or representative of an original party to the suit, the Court shall issue a notice to the party against whom execution may be applied for requiring him to show cause, within a limited period to be fixed by the Court, why the decree should not be executed against him. Provided that no such notice shall be necessary in consequence of an interval of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of the last order passed on any previous application for execution; and provided further that no such notice shall be necessary in consequence of the application being against an heir or representative if upon a previous application for execution against the same person, the Court shall have ordered execution to issue against him.]

In certain special cases notice to show cause why the decree should not be executed shall be issued.

him. Provided that no such

Proviso.

application for execution; and provided further that no such notice shall be necessary in consequence of the application being against an heir or representative if upon a previous application for execution against the same person, the Court shall have ordered execution to issue against him.]

jurisdiction of another Munsif, viz., that of Azimgunge. Clearly it was beyond the scope of the instructions conveyed to the Munsif of Julpigori, and outside his jurisdiction, to [514] grant a certificate for this purpose. Moreover, as the execution case had been already struck off his file by him, the appellant before us ought, under s. 290, to have applied to the Sudder Munsif of Rungpore, who passed the original decree of the 31st December, 1862, for the issue of a fresh certificate.

We, therefore, dismiss this appeal, but without costs, as no one appears for the respondent.

Appeal dismissed.

[3 Cal. 514]

The 18th February, 1878.

PRESENT :

MR. JUSTICE WHITE AND MR. JUSTICE MITTER.

Rajcoomaree Dassee.....Plaintiff

versus

Gopal Chunder Bose and others.....Defendants.

Decree for Partition. Execution of—Partition of a Poojah Dalan—Consent of coparceners—Modification of Execution Order by Court.

A decree directed partition of a family dwelling-house† with its appurtenances, including a poojah dalan and courtyard adjoining it. In execution of that decree, the Civil Court Ameen, at the request and with the consent of two out of three coparceners, did not partition the poojah dalan and courtyard. To this the third coparcener objected, but her objection was overruled by the lower Courts, and it was directed that the property in question should remain undivided. *Held*, that the Court would be disinclined to order the property to be divided without giving the coparcener or coparceners who might wish to keep it entire an opportunity of doing so.

Held per WHITE, J., that having regard to the form of the decree, it was not open to the Court executing it to order that any part of the property should remain joint, except with the consent of all the coparceners who were parties to the suit.

Semle per MITTER, J., that the lower Courts were not precluded by the decree from dealing with the property in the mode in which they had done.

IN this case the respondent before the Court obtained a decree on 9th February 1875 against the appellant and one Ambica Churn Biswas for partition of a six-anna share of a [515] family dwelling-house together with its appurtenances, including a poojah dalan with a courtyard adjoining it. The appellant was a sonless Hindu widow claiming her late husband's six-anna share in this property, of which a four-anna share belonged to Ambica Churn Biswas and the remaining six-anna share to the respondent. Several objections were taken by the appellant in the Courts below to the partition made by the Civil Court Ameen. The only one material to the present report had

* Miscellaneous Special Appeal, No. 301 of 1877, against the order of H. B. Lawford, Esq., Officiating Judge of Zilla 24-Pergunnahs, dated the 29th June 1877, affirming the order of Baboo Kristo Mohun Mookerjee, Additional Subordinate Judge of that district, dated the 28th April 1877.

† Partition of a family dwelling-house may be claimed as of right by a Hindu—*Hulodhur Mookerjee v. Ramnauth Mookerjee and others*, Marsh., 85.

reference to the poojah dalan and courtyard, which, at the request of the respondent, and with the consent of Ambica Churn Biswas, the Ameen had not partitioned. As to this objection the Subordinate Judge was of opinion that, under the principles of the butwarah law, the poojah dalan and courtyard should be kept joint, as it was meet that the place of family worship should be always kept joint; and he did not consider the Court would be departing from the direction in the decree by ordering the place of family worship to remain undivided. He further expressed his opinion that if the objector, a Hindu widow, had a son living to perpetuate religious worship in her husband's house, such a frivolous objection would not have been raised, more especially as the other coparceners were willing that the property in question should remain as it was.

On appeal the Lower Appellate Court upheld the decision of the Subordinate Judge, being of opinion that it was quite impossible that a fair and equitable partition of this part of the property could be made.

The present appeal to the High Court was accordingly presented.

Baboo Hem Chunder Bannerjee for the Appellant.

Baboo Radhica Churn Mitter for the Respondent.

White, J.—Several objections have been taken by the appellant to the partition which was made by the Ameen in this case, and upon which the orders of the two lower Courts have proceeded. To none of them do I think that this Court can yield in special appeal, except that which complains that certain [516] property has not been divided as directed by the decree. The property which has been thus dealt with by the lower Courts consists of a poojah dalan, certain rooms on either side of it, a courtyard adjoining the dalan, and the western wall of the courtyard. This property has not been divided, but ordered by the Courts below to remain joint.

I think that, having regard to the form of the decree, it was not open to the Court in executing that decree to order that any part of the property should remain joint, unless it was with the consent of all the coparceners who were parties to the suit. It appears that in this case two of the coparceners did consent to this portion of the property remaining unpartitioned, but one of them, who is the appellant before us, objected to its remaining joint. This portion of the property is in its nature divisible, and no authority has been cited to show that it is undivisible by reason of the uses to which it is put. We must, therefore, set aside that part of the order of the lower Courts which declares that the property in question shall remain joint. Considering, however, the nature of the property and the fact that some of the coparceners desire that it should continue undivided and be used as heretofore in its present condition, we are not prepared to direct that it should be divided amongst the three coparceners in proportion to their shares, without giving the coparcener or coparceners who may wish to keep it entire an opportunity of doing so, if he or they can agree on the subject with the other coparceners. The order, therefore, which we shall make in the present case is the following:—Let the poojah dalan, the rooms on either side of it, the courtyard attached thereto, and the western wall of that courtyard, being the property left undivided by the order of the lower Court appealed against, be valued, and if any one or two of the coparceners wish to retain the same separately or jointly as part of his or their share, let the proportionate share of its value be paid to the remaining coparcener or coparceners who do not wish to retain the same. If none of the three coparceners agree to take the same as part or parts of their share or shares, paying to the other or others of them a proportionate

share of its value, or if the three coparceners cannot agree [517] amongst themselves as to which of them shall be allowed to take the same as part of his or their share of shares, then let this property be divided between the three coparceners in proportion to their respective shares in the same. This will give to the two coparceners who wish to keep it undivided an opportunity of doing so by paying a six-anna share of the value to the appellant, Rajcoomaree.

Each party will bear his own costs in this Court.

Mitter, J.—I concur in this order. But I desire to add that I would put it, not upon the ground that the lower Courts are precluded by the decree from dealing with this property in the mode in which they have done, but upon the ground that the order which we have passed is more equitable.

Decree varied.

[3 Cal. 517]

The 10th January, 1878.

PRESENT :

MR. JUSTICE KEMP AND MR. JUSTICE MORRIS.

Bhyrub Chunder.....Judgment-debtor

versus

Golap Coomary.....Decree-holder.*

Right of Appeal—Decree—Execution-Proceedings—Registration Act (XX of 1866), ss. 52, 53.

There is no appeal from a decree, nor from orders passed in execution of a decree, made under s. 53 of Act XX of 1866 (Registration Act).

Hurnath Chatterjee v. Futtick Chunder Sumadilar (18 W. R. 512), *Radha Krsto Dutt v. Gunga Narain Chatterjee* (23 W. R., 328), *Huro Soonduree Debra v. Punchoo Ram Mundal* (24 W. R., 225) followed.

IN this suit the judgment-creditor applied for execution of a decree obtained under s. 53 of Act XX of 1866 (Registration Act) upon an agreement specially registered under s. 52 of that Act. The judgment-debtor raised the point [518] of limitation, which was overruled by the Court of first instance. The judgment-debtor appealed to the High Court.

Baboo Rash Behari Ghose (with him *Baboo Nullit Chunder Sen*) for the respondent, raised the objection that no appeal lay on the authority of the above cases

* Miscellaneous Special Appeal No. 173 of 1877, against the order of Baboo Digamber Biswas, Subordinate Judge of Zilla East Burdwan, dated the 22nd of March 1877.

† [Sec. 52 :—Whenever the obligor and obligee of an obligation shall agree that in the event of the obligation not being duly satisfied, the amount secured thereby may be recovered in a summary way, and shall at the time of registering the said obligation apply to the Registering Officer to record the said agreement, the Registering Officer, after making such enquiries as he may think proper, shall record such agreement at the foot of the endorsement and certificate required by Sections 66 and 68, and such record shall be signed by him, and by the obligor, and shall be copied into the Register Book No. 1 or No. 6, as the case may be, and shall be *prima facie* evidence of the said agreement.]

Baboo Hem Chunder Banerjee for the Appellant in reply.

The judgment of the Court was delivered by.

Kemp, J. who was of opinion that the cases quoted conclusively showed that an appeal could not be maintained.

Appeal refused.

NOTES.

[I. APPEAL FROM ORDERS IN EXECUTION OF SUMMARY DECREES UNDER XX OF 1866:—

This case together with the authorities on which it was based was **overruled** by a Full Bench of the Calcutta High Court in (1886) 12 Cal., 511 which decision was in conformity with that of the Allahabad High Court in 1 All., 583, and of the Bombay High Court in 5 Bom., 678.

In those cases the right of appeal was recognised.

II. OBSOLETE BY SUBSEQUENT LEGISLATION:—

Besides, the value of this case has been lost altogether by the summary procedure provided in the old Registration Acts (XX of 1866; VIII of 1871) being omitted from the Indian Registration Acts of 1877 and 1908.]

[3 Cal. 518]

The 11th January, 1875.

PRESENT:

MR. JUSTICE KEMP AND MR. JUSTICE MORRIS.

Unnoda Persad Roy.....Decree-holder

versus

Sheikh Koorpan Ally.....Judgment-debtor.*

[= 1 C. L. R. 408]

*Limitation—Application for Execution of Decree—Limitation Act (IX of 1871)
Sched. II, art 167—Act VIII of 1859, s. 214.*

On the presentation of the last of a series of applications made for the execution of a decree, the Court is competent to consider the question whether, on the date of making a prior application for execution, the decree sought to be enforced was barred by limitation, and that notwithstanding the fact that notice of such prior application had been served on the judgment-debtor under s. 216 of Act VIII of 1859.

The time prescribed by the Limitation Act (IX of 1871) within which applications for execution may be made, govern all such applications made during the time that Act was in force.

Bemul Doss v. Ikbāl Narain (25 W. R., 249) followed.

In this case an application was made for the execution of a decree on the 18th of June 1869. Again, on the 5th of August 1872, after the Limitation

* Miscellaneous Special Appeal No. 188 of 1877, against the order of F. C. Fowler, Esq., Judge of Zilla Tipperah, dated the 18th of April 1877, reversing the decree of Baboo Mutty Lal Mookerjee, First Munsif of Brahmanbaria, dated the 10th of January 1876.

Act (IX of 1871) was in force, a [519] second application was made for the execution of the same decree; and on the 7th August 1872 the usual notice under s. 216 of Act VIII of 1859 was issued upon the judgment-debtor. No further steps seem to have been taken by the judgment-creditor towards the realization of his decree till the 19th of June 1875, when a further application was made for execution of the decree. The judgment-debtor contended that, at the time of making the application of the 5th August 1872, such application was barred under art. 167, sch. II of the Limitation (Act IX of 1871) then in force. The present application, therefore, could not be entertained by the Court. The Court of First Instance granted the application. The Lower Appellate Court reversed the decision of the Court below, on the ground that the application for the execution of the decree made on the 5th August 1872 was barred, being made more than three years after the filing of the prior application of 18th June 1869. The Court held, on the authority of *Jibhai Mahipati v. Parbhu Bapu* (I. L. R., 1 Bom. 59), that the limitation prescribed by art. 167, sch. II of Act IX of 1871, governed all applications made for execution of decrees during the time that Act was in force.

The judgment-creditor thereupon appealed to the High Court.

Bahoo Trailakhya Nath Mitter for the Appellant.—The present application is not barred by limitation, being made within three years of 7th of August 1872 being the date of the notice of execution served on the judgment-debtor. The lower Court could not look beyond the fact of the issue of that notice, or take into consideration the question whether the decree was barred prior to the issue of such notice; see *Rohini Nundun Mitter v. Bhugwan Chunder Roy* (14 B. L. R., 144; S. C., 22 W. R., 154) and a Full Bench ruling. *Eshan Chunder Isore v. Prannath Nag* (14 B. L. R., 143; S. C., 22 W. R., 512). As the first application for execution was made before Act IX of 1871 came into force, that Act is not applicable, and the subsequent applications [520] are, therefore, governed by the Limitation Act in force when the first application was made.

Munshi Serajul Islam for the Respondent.—Act IX of 1871 does apply; see *Bemul Doss v. Ikbal Narain* (25 W. R., 249), *Rughon Nath Dass, Cookman v. Raneer Shromoner Pet Mohadebee* (24 W. R., 20).

The judgment of the Court was delivered by

Kemp, J.—The decree-holder is the special appellant in this case. The question is, whether the application which was made on the 19th of June 1875, is within time or not. The Judge of Tipperah has held that it is not. The grounds of special appeal taken are: *first*, that the Lower Appellate Court is wrong in holding that the last application for execution was barred by limitation; *second*, that the Lower Appellate Court is wrong in holding that the proceedings in execution taken before the passing of Act IX of 1871 are to be governed by the said law. The contention of the pleader who appears for the decree-holder on the first ground raised in special appeal is, that a notice having been issued under the provisions of s. 216, on the 7th of August 1872, and the present application being dated the 19th June 1875, he is within time and that the Judge was not competent to look behind the date of the notice, and to take cognizance of any proceeding which had been taken before the date of that notice.

Now the Judge finds that, on the 5th of August 1872, when the application was made by the decree-holder, upon which application the notice was issued under the provisions of s. 216 of the Code, the decree was no longer alive; that it was barred, inasmuch as the application made prior to the 5th of August 1872 is dated the 18th June 1869, or more than three years before the later

application. The pleader contends, that the Judge, as we have already stated, is not competent to go behind the notice, and that he ought to have held that the starting point was the 7th of August 1872, irrespective of the fact that the decree had already become barred by not being [321] enforced between the 18th of June 1869 and the 5th of August 1872. In support of this contention he quotes two rulings, *Rohini Nundun Mitter v. Bhugwan Chunder Roy* (14 B. L. R., 144; S. C., 22 W. R., 154) and a Full Bench ruling, *Fshan Chunder Bose v. Prannath Nag* (14 B. L. R., 143; S. C., 22 W. R., 512). The first ruling by Mr. Justice MARKBY, sitting with Justice ROMESH CHUNDER MITTER, decided that, under the new law of limitation, Act IX of 1871, schedule II, article 167, prescribing three years as the time within which application should be made for execution of decrees, it was intended that there should be two specific dates from which the three years were to be counted, without reference to any inquiry whether the proceedings were taken for the purpose of enforcing the decree or were merely colourable for the purpose of keeping the decree alive. Now the Judge in this case could not have gone into the question whether the application and notice under s. 216 was a *bona fide* application or a colourable application: but the Judge was competent to decide whether, at the time that application was made, any decree was alive or not. He has done so, and found that, at the time that application was made, the decree was not alive. With reference to the Full Bench decision referred to by the pleader at page 512 of the same volume, the late Chief Justice Sir RICHARD COUCH, who delivered the judgment of the Full Bench, observes, that Act IX of 1871 clearly gives to a person who has a decree, the power, so far as regards the law of limitation, of applying for execution of it within three years from its date, or within three years from the date of the application to the Court to enforce it or keep it in force, and that there is no restriction as to the second or third or any subsequent application. Now this ruling assumes that the party who applies has a decree which is alive, and that he can make an application to enforce that decree either within three years from its date or from the date of any application made to enforce or keep in force that decree, or from the date of any notice which he may have issued under the provisions of s. 216. We think that the view of the Judge is a correct view with reference to this ground of special appeal, which we therefore overrule. The second ground [322] by the pleader for the appellant is fully disposed of by the case of *Bemul Doss v. Ikbal Narain* (25 W. R., 249). The principle of this decision is the same as that which has been affirmed by the Full Bench decision in *Bissessur Mullick v. Dhiraj Mahatab Chunder Bahadoor* (B. L. R., Sup. Vol. 967), which has not been in any way interfered with by subsequent rulings of the Full Bench.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[NO LONGER LAW—

This decision is directly opposed to the ruling of the **Privy Council** in *Mungul Pershad Ditch v. Girija Kant Lahuri Chowdhry* (1881) 8 Cal., 51: 8 I. A., 123, where the issue of limitation having been once determined (by necessary implication from an unreversed order that attachment should issue), it was not permitted to be re-opened.

Later decisions have drawn a distinction between cases where the judgment-debtor had notice and those where he had not.—13 C. L. J., 26.

But as notice had been served in this case, in no view can this decision be regarded as an authority at the present day.]

[3 Cal. 523]
PRIVY COUNCIL.

The 2nd, 6th and 8th March and 9th June, 1877.

PRESENT:

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH AND
SIR R. P. COLLIER.

Hardeo Bux.....One of the Plaintiffs

versus

Jawahir Singh.....Defendant.

[- 4 I. A. 178]

[On Appeal from the Court of the Commissioner of Seetapore in Oudh.]

*Oudh Estates Act (I of 1869), s. 3—Registered talukdar --Beneficial interests—
Act II of 1863, s. 1, and Act XXXII of 1871, s. 4—Appeals.*

An Oudh taluk standing in the name of J. S., as kabuliatar, having been confiscated under Lord Canning's proclamation of March 1858, was summarily settled with J. S. on the 24th April following. A talukdary sanad was granted to J. S., and he was subsequently registered as talukdar under the provisions of Act I of 1869.

In a suit against J. S. by persons alleging themselves to be joint in family and estate with him, to have their interest in the taluk declared, held by the Commissioner of Seetapore in Oudh, confirming the decision of the Settlement Officer, that, under Act I of 1869, the defendant was protected by his sanad against any claim of the plaintiffs in respect of the taluk. Held, by the Privy Council on appeal, that as a person who has been registered as a talukdar under Act I of 1869, and has thereby acquired a talukdary right in the whole property, may, nevertheless, have made himself a trustee of a portion of the beneficial interest in lands comprised within the taluk for another, and be liable to account accordingly, the suit must be remanded for trial as to whether the defendant had agreed, or become bound, to hold the villages comprised in the summary settlement and sanad, or the rents and profits thereof, in trust for the plaintiffs.

[523] The cases of *Mussamul Thukrain Sookraj Koorar v. The Government of India* (14 Moore's I. A., 112) and *The Widow of Shunkur Sahai v. Rajah Kashi Pershad* (L. R., 4 I. A., 198) approved.

The words "Court of highest civil jurisdiction in any Province" in Act II of 1863 have reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases. A Court which, under the provisions of Act XXXII of 1871, is a subordinate Court, has no authority, under Act II of 1863, to admit an appeal to Her Majesty in Council, even where its decision is final.

THE suit in which this appeal was preferred was instituted in the Court of the Settlement Officer of Seetapore in Oudh on the 28th August 1865, by the appellant and one Purbat Singh, who did not join in the appeal, as plaintiffs, against the respondent, as defendant, to establish their right and title under the Hindu law to the possession and enjoyment of a two-thirds undivided share of and in Taluk Bassaindeh situated in the Seetapore district. The plaintiffs alleged that they, along with the defendant, were members of a joint undivided Hindu family, and that the taluk in question was joint ancestral property.

The defendant contended that, with a small exception, the taluk was his own separate property in which the plaintiffs were not entitled to share, and of which he had always held sole possession; and that as the lands had been settled with him, and a talukdary sanad had been granted to him in his sole name by the British Government, the claim of the plaintiffs could not be entertained.

On the 21st December 1871, the suit was dismissed by the Settlement Officer upon the sole ground that the defendant was protected by his sanad under the provisions of Act I of 1869. On the 10th June 1872 the decision of the Settlement Officer was confirmed by the Commissioner of Seetapore as "in accordance with the invariable practice of the Courts since re-occupation." Subsequently, however, on the plaintiffs' application, the Commissioner certified the case to be a fit one for appeal to Her Majesty in Council, on the ground that, since his decision had been pronounced, cases had been decided by the Privy Council, the effect of which had been to modify the view of the [524] law relating to taluks in Oudh formerly taken by the Oudh Courts.

The facts of the case and the nature of the proceedings taken in the Courts below will appear from their Lordships' judgment.

On the appeal coming on for hearing, Mr. *Doyne* for the Respondent took the preliminary objection that the Commissioner of Seetapore had no legal authority to admit it. Under Act II of 1863, s. 1, 'an appeal to the Privy Council must be from an order of the Court of highest civil jurisdiction. But under s. 4† of Act XXXII of 1871, the Court of the Commissioner of Seetapore was subordinate in grade to that of the Judicial Commissioner. It did not matter that, in this instance, the decision of the Commissioner confirming that of the Settlement Officer was final. The Privy Council Appeals Act of 1874, which alters the words of Act II of 1863, and provides for an appeal from "the Court of final appellate jurisdiction," did not come into force until after the admission of the present appeal.

Mr. *Leith*, Q.C., for the Appellant, contended that it must be taken to have been intended by the Legislature, in framing Act II of 1863, that the Court making the final decree in a suit should be deemed the Court of highest jurisdiction within the meaning of the Act. Here the judgment of the Commissioner,

* [Sec. 1 :—If a party in a suit is desirous of preferring an appeal to Her Majesty in Council from any final judgment, decree, or order made on appeal or revision by the Court of highest civil jurisdiction in any Province in British India not subject to the general regulations, or from any such final judgment, decree, or order made in the exercise of original jurisdiction by the said Court, in any case in which the sum or matter at issue is above the amount or value of 10,000 Rupees, or in which such judgment, decree, or order shall involve, directly or indirectly, any claim, demand, or question to or respecting property amounting to or of the value of 10,000 Rupees, or from any other final judgment, decree, or order made either on appeal or otherwise as aforesaid, when the said Court shall declare that the case is a fit one for appeal to Her Majesty in Council, such Court shall admit such appeal subject to such rules and orders as shall be in force, or shall from time to time be made in that behalf by Her Majesty in Council in respect of such appeals from Her Majesty's High Courts of Judicature in British India]

Admission of appeal.

Grades of Courts in Oudh. †[Sec. 4 :—There shall be five grades of Courts in Oudh, namely :—

- (1) The Court of the Tahsildar.
- (2) The Court of the Assistant Commissioner or Extra Assistant Commissioner.
- (3) The Court of the Deputy Commissioner or of the Civil Judge of Lucknow.
- (4) The Court of the Commissioner.
- (5) The Court of the Judicial Commissioner.]

affirming the judgment of the Settlement Officer, was final under s. 18* of Act XXXII of 1871. If the objection is to prevail, the appellant is put in the position of having now to apply to Her Majesty for special leave to appeal.

Sir BARNES PEACOCK on behalf of their Lordships said, that the question raised was so doubtful that they would recommend the appellant to present a petition for special leave to appeal, which their Lordships would grant: and in the meantime as the parties were ready with their arguments, their Lordships would hear them *nunc pro tunc*.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for the Appellant, submitted that, having regard to the evidence that the parties were members of a joint family, and the admission of the res-[325]pondent that the appellant was his co-sharer, the onus was on the respondent to show that the property in question was his sole and separate property. The fact that, for the convenience of the joint family the estate had stood in the name of the defendant as kabuliatar had led to the summary settlement being made with him, and the sanad being granted in his sole name. But it was, nevertheless, to be taken that he held only in a representative capacity and in trust for the benefit of all the other members of the joint family. In favour of their contention they cited the judgment of Lord Justice JAMES in the case of *Mussamut Thukram Sookraj Koowar v. The Government of India* (14 Moore's I. A., 112, at pp. 126, 127) and the cases of *Hurpurshad v. Sheo Dyal* (L. R., 3 I. A., 259) and *The Widow of Shunkur Sahai v. Rajah Kashi Pershad* (L. R., 4 I. A., 198). They further contended that if the appellant could not claim to be declared a joint sharer in the taluk, he should at any rate be declared to be a subordinate holder.

Mr. Doyne for the Respondent.—The Courts below were right in dismissing the suit. Under Act I of 1869 the full proprietary rights in the taluk are vested in the respondent. He is the registered talukdar, and has an absolute title. The cases cited in which their Lordships had given effect to equitable rights as against talukdars were not analogous. In *Thukram Sookraj Koowar* (14 Moore's I. A., 112, at pp. 126, 127) the interests involved were not joint but separate, and there was an express written engagement entered into by the defendant to respect the plaintiff's rights if she consented to his being registered as sole talukdar. That case, moreover, was not as to the effect of a sanad in connection with Act I of 1869, but of a mere summary settlement in connection with the Government letter of the 10th October 1859, declaring the position of talukdars with whom lands had been settled. [SIR M. SMITH.—Is not the effect of the Government letter the same as that of the Act? SIR J. COLVILLE.—The case is at any rate authority for the proposition that, in spite of a summary settlement of the taluk, we may go behind what appears and find a trust. There can be no trust of the talukdary rights, but there [326] may be beneficial interests in the lands comprised within the taluk subject to a trust.] In the case of *Hurpurshad v. Sheo Dyal* (L. R., 3 I. A.,

Decision of the First Appellate Court confirming decision of decision of the Court of First Instance, such decision Court of First Instance to be final. shall be final :

*[Sec. 18 :—If the Court of First Appeal confirms the

Provided that where in the trial of any appeal such Appellate Court entertains any doubt in regard to a question of law or usage having the force of law, or as to the construction of a document affecting the merits of the decision, the Court may, either of its own motion or on the application of any of the parties to the case, draw up a statement of the case, and refer it, with the Court's own opinion, for the decision of the Judicial Commissioner.]

259), also, there was no question as to the effect of Act I of 1869. The question was, whether the person who had acquired talukdary rights had transferred them. In the case of *The Widow of Shunker Sahai v. Rajah Kashi Pershad* (L. R., 4 I. A., 198), the defendant, in an application for a summary settlement, had solemnly and distinctly acknowledged the plaintiff's interest in a specific portion of the taluk, and had followed that acknowledgment by other admissions. The case was also distinguishable as a case not of confiscation, as in the present instance, but of exemption from confiscation under Lord CANNING's proclamation of the 15th March 1858. In a case of exemption the presumption was, that it was made in favour of all the members, and not merely of a single member of a joint family. But where confiscation takes place all the previous rights of the joint family in the confiscated estate are lost, and the new grant must be construed strictly as made in favour of that person only who is named in it.

Mr. Leith in reply.

Their Lordships' judgment (which was postponed until, under the special leave granted, a petition of appeal had been duly lodged and referred to the Judicial Committee) was delivered by

Sir B. Peacock.—This is an appeal from a decree of the Commissioner of Seetapore, in Oudh, dated the 10th June 1872, affirming a decree of the Settlement Officer of that district, dated the 21st of December 1871.

When the appeal was called on for hearing, Mr. *Doyne*, the learned counsel for the respondent, took a preliminary objection and contended that the Commissioner had no legal authority to admit the appeal. In support of his contention, he referred to the Oudh Civil Courts Act (No. XXXII of 1871), and to Act No. II of 1863. By the 4th section of the former Act, five grades of Civil Courts in the Province of Oudh were established, [527] of which that of the Judicial Commissioner was the highest. By s. 15, cl. 3, of the same Act, an appeal from a decree of the Commissioner, when an appeal is allowed by law, lies to the Judicial Commissioner; but by s. 18 it was enacted that if the Court of First Appeal confirms the decision of the Court of First Instance, such decision shall be final.

By s. 1 of Act II of 1863, which was a general Act to regulate the admission of appeals to Her Majesty in Council from the Courts in the Non-Regulation Provinces in India, the right of appeal was limited to final judgments, decrees, or orders made on appeal or revision by the Court of highest civil jurisdiction.

It was contended on the part of the appellant that, as the judgment of the Commissioner affirming the judgment of the Settlement Officer was final, and no appeal lay from it to any Civil Court of higher jurisdiction, the Court of the Commissioner was, as regards this case, the Court of highest civil jurisdiction in the Province. It should be remarked that, in the Privy Council Appeals Act of 1874, which was passed after the appeal in the present case was allowed, and which repealed Act No. II of 1863, the words "Court of final appellate jurisdiction" are used in place of the words "Court of highest civil jurisdiction."

Their Lordships are of opinion that the Court of the Commissioner was not in this case the Court of highest civil jurisdiction in the Province within the meaning of Act II of 1863, notwithstanding that the decision of the Commissioner was final. If the Commissioner had reversed the decree of the Settlement Officer, his decision would not have been final, but an appeal might

have been preferred to a higher Court of civil jurisdiction in the Province—viz., to that of the Judicial Commissioner.

In their Lordships' opinion, the words "Court of highest civil jurisdiction in any Province," in Act II of 1863, had reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases. If the Court of the Commissioner was the Court of highest civil jurisdiction in the Province, within the meaning of that section, because an appeal from his decision in the particular case did not lie to [328] a higher Court in the Province, a Court of Small Causes would be equally a Court of highest civil jurisdiction in a case in which its decision is final; and, in that case, it might, under the provisions of the same section, admit an appeal to Her Majesty in Council, if it should declare the case a fit one for such appeal.

When the preliminary objection was made their Lordships recommended the appellant to present a petition for special leave to appeal, which was accordingly done, and special leave was granted. In order to avoid delay and expense, the Court suggested that the case should be argued *nunc pro tunc*, and that course was assented to by the learned counsel on both sides and adopted.

Under the special leave a petition of appeal has now been duly lodged, and referred to the Judicial Committee.

The suit was brought by Hardeo Bux, the appellant and Purbut Singh against the present respondent. Purbut Singh has not joined in this appeal.

The plaintiffs in their plaint stated that, during the King's time, the Talukas of Bassaindeeh and Sijaolia formed one taluka, and that the fathers of the parties were seven brothers descended from a common ancestor; that four of them separated and partitioned Taluka Sijaolia from Bassaindeeh; that Taluka Bassaindeeh formed the share of Havanchal Singh, father of Hardeo Bux, plaintiff, Fateh Singh, father of Purbut Singh, plaintiff; and Bhawani Singh, father of Jawahir Singh, the defendant; that the plaintiffs' fathers, being seniors, used to make collections from the estate and to manage household expenses, including those incurred in marriage and funeral ceremonies; that the father of the defendant treated them as his superiors, and never interfered in the affairs of the estate; that defendant's father was junior, and was treated by the plaintiffs' fathers as if he were their own son; that they (the plaintiffs' fathers) got the kabuliati executed in his name with the view to avoid inconvenience to themselves, and to connect him with offices, but they all lived in commensality, and defrayed their expenses out of the income of the said taluka; that after the death of the fathers of the parties the old practice prevailed between them up to date; that they had been living [529] together and their expenses paid out of the profits of the same estate; that the plaintiffs had continued to enjoy the possession of the taluka while the defendant had been the kabuliatar; that as the defendant was kabuliatar the sanad had been granted to him; that for one or two months, the defendant had, under the sanad, given rise to enmity, and intended to dispossess them and put a stop to the profits enjoyed by them for the time past, and wished to deprive the real owners of their right, while the said sanad did not contemplate to destroy the rights of the plaintiffs; that in the arbitration case of *Bishashar Bux and Ganga Bux*, talukdars of Sorara, the defendant had, in his own deposition, stated that in case of his (defendant's) brothers claiming their shares he would not decline to give them their shares; that the defendant had altogether forgotten this written admission. Wherefore the plaintiffs prayed that, after proper inquiry, orders be passed that they be not deprived of their right.

In their written statement dated the 6th October 1865, they stated that they had been compelled, by an order of the Criminal Court, dated the 15th September 1865, to give up possession, but that previously to that time they had held continuous possession. They prayed that, under the conditions laid down in the sanad, in cl. 2, Circular 2 of 1861, the Government of India letter No. 23, dated the 19th of October 1859, and Circular No. 6 of 19th June 1861, justice be done to them, and that they might not be deprived of their right:

The defendant, in his written statement, alleged that the taluka in dispute was the solely acquired property of his ancestors, and particularly of his father; that there had all along been only one kabuliati; that he had held possession without any one as co-sharer; and that he, of his own free will, had been assisting his near relations with food, etc., without their having any right; and that a summary settlement had been made with, and a Government sanad granted to, him alone.

The Settlement Officer did not enter into the question whether the property was the self-acquired property of the defendant's father or was the joint ancestral property of the three brothers mentioned in the plaint, but he dismissed the suit upon the sole ground that the defendant was protected by Act No. I of 1869. [530] He stated that he considered himself bound by the opinion of the Financial Commissioner in the late Supreme Court of Landed Estates Jurisdiction, in which, upon a petition presented by the plaintiff relating to another matter, the Financial Commissioner stated "that the defendant was protected by his sanad, that the plaintiffs could get nothing, and that it was perfectly useless their continuing litigation."

The plaintiff Hardeo Bux appealed from that decision to the Commissioner who, without giving any reasons, dismissed the appeal, stating that the suit had been dismissed in accordance with the invariable practice of the Courts since re-occupation. Subsequently, upon an application by the plaintiff to the same Commissioner for a certificate that the case was a fit one for appeal to the Privy Council the Commissioner made the following remarks:—

"I have had this case before me several times since the receipt of the files, and I have consulted the Judicial Commissioner on the points as to which I have felt doubts.

"The case is before me on an application from the appellant for a certificate that it is a fit suit for appeal to the Privy Council. I have no hesitation in granting this certificate, for, though the order of this Court passed in appeal, and which it is now proposed to contest, is one so obviously in conformity with the previous practice of the highest Courts of Appeal in this province, that it hardly admitted of dispute, and did not require to be supported by any lengthy argument at the time it was written, since that time several cases have been before their Lordships, the orders passed in which have considerably modified the view of the law applying to talukas in Oudh previously taken by the Courts of the Financial and Judicial Commissioners; and though I do not find any case so clearly in point as to require me to hear an application for review, a course which has been suggested by the appellant, the case is clearly one in which he should be allowed every facility for bringing it before a higher tribunal.

"The certificate will, therefore, be granted, and this order will be filed with the record."

The suit was commenced long before Act I of 1869 was passed, viz., as far back as the 26th of August 1865, but the judgment of the Settlement Officer, the Court of First Instance, was not pronounced for upwards of six years afterwards. Some [531] of the proceedings which were taken in the meantime are

detailed in the judgment of the Settlement Officer, and well might he describe them as "most extraordinary!"

The lands to which the suit relates were included in that part of Lord Canning's Proclamation of March 1858, which declared that the proprietary right in the soil was confiscated to the British Government which would dispose of that right in such manner as to it might seem fitting.

By the Government letter of the 10th October 1859, set out in the first schedule to Act I of 1869, it was declared that every talukdar, with whom a summary settlement had been made since the re-occupation of the province, has thereby acquired a permanent hereditary and transferable proprietary right in the taluka for which he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the taluka.

By s. 3 * the Governor-General in Council desired that the Chief Commissioner of Oudh should have ready a list of the talukdars upon whom a permanent proprietary right had then been conferred.

Previously to that letter, viz., on the 24th April 1858, a summary settlement of the lands had been made with the defendant. He was consequently included in the list of talukdars, and a sanad was granted to him. After the passing of Act I of 1869, he was also registered in List No. 1 under Act I of 1869, s. 8, and also in List No. 5 (*Oudh Government Gazette*, August 7th, 1869).

The order for the summary settlement with the defendant was made by Colonel Barrow, the then Special Commissioner. The defendant, in his application for the summary settlement, stated that he had no partner other than the plaintiff Hardeo Bux.

(Their Lordships then referred to and read certain correspondence which passed between Mr. Wood, the Settlement Officer, and Colonel Barrow, the Commissioner of the Lucknow Division, as to the parties with whom the settlement had been made and a memo. of the information conveyed by those letters, which had been sent by the Settlement Officer to the Commissioner of the Seetapora Division, and the orders of the Financial Commissioner thereon, and continued.)

In consequence of these orders the proceedings appear to have been suspended until the 13th December 1871, when the plaintiffs presented a petition praying for final orders. In the meantime Act I of 1869 had been passed. The then Settlement Officer took up the case, and, on the 21st December 1871, held, as before stated, that the plaintiffs' claim was barred by that Act.

* [Sec. 3 :—Every talukdar with whom a summary settlement of the Government revenue was made between the first day of April 1858 and the tenth day of October 1859, or to whom, before the passing of this Act and subsequently to the first day of April 1858, a talukdari sanad has been granted, shall be deemed to have thereby acquired a permanent, heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or kabuliyat executed by such talukdar when such settlement was made, or which may have been or may be decreed to him by the Court of an officer engaged in making the first regular settlement of the province of Oudh, such decree not having been appealed from within the time limited for appealing against it, or, if appealed from, having been affirmed, subject to all the conditions affecting the talukdar contained in the orders passed by the Governor-General of India on the tenth and nineteenth days of October 1859 and republished in the first schedule hereto annexed, and subject also to all the conditions contained in the sanad under which the estate is held.]

Their Lordships cannot help remarking upon the irregularity of many of the above proceedings. They cannot attach any weight to Colonel Barrow's recollection to which he refers in his letter of the 6th April 1866. If any information from Colonel Barrow was considered necessary, he ought to have been examined as a witness. The Settlement Officer, who was acting as a Judge, ought not to have written to him to know what his recollection was upon the subject of the summary settlement. His answer was not evidence, and cannot, any more than the opinion expressed in his letter of the 25th September 1866, be properly used in forming a judicial opinion on the case. Indeed, Colonel Barrow does not appear to have always entertained the opinion that the settlement was made with Jawahir Singh for his benefit alone, for in his Minute, dated 11th April 1868, he says: -

"I have been much troubled by this case in many ways, and Jawahir Singh, by his bad faith with his relation, *who had lived with him as an undivided family in the Nawabee*, is only leading to his own discomfiture. I would have him look to the summary settlement which was made with him and Hardeo Bux. *Perchance that may yet be carried out.*"

Officers who act as Judges, if entrusted at the same time with administrative duties, ought to be most scrupulous in the endeavour to form their opinions independently. They ought not to refer to their superiors, whether judicial or administrative, for opinions to enable them to form their own judgments, or for instructions or orders directing them as to the course which they, as Judges, ought to pursue. As properly remarked by the Chief Commissioner in his Circular No. 6, p. 39, [533] "the Courts are open to all and must be guided by their own rules."

Colonel Barrow had no authority to stay, until the issue of new rules, the proceedings then pending judicially before the Settlement Officer. It does not appear whether new rules were ever issued. The Settlement Officer, in his judgment, treats the measures referred to by the Financial Commissioner as having acquired the force of law by Act I of 1869.

If the Settlement Officer had acted at once upon his own judgment, instead of referring for instructions or orders, the probability is that his judgment would have been given before Act I of 1869 was passed, and in that case he might have come to a different conclusion.

Be that as it may, their Lordships must deal with the case as they now find it.

The question is: Is the plaintiff entitled to any and what share or beneficial interest in the estate, or is his claim barred by Act No. I of 1869?

In support of the appeal the case of *Thukrao Sookraj Koowar v. The Government of India* (14 Moore's I. A., 112) was referred to. In that case the plaintiff's husband, the younger branch of the great Oudh family of Bhinga, had, up to the time of the annexation of Oudh, been in the undisturbed and absolute possession of an estate called Deotaha, which had been united in the time of the Native Government with the large taluk of Bhinga, of which the Rajah of Bhinga, the representative of the elder branch of the family, was the talukdar, the plaintiff's husband paying to the talukdar his proportion of the jumma assessed upon the whole taluka.

Upon the making of the summary settlement in 1858-59, after the suppression of the Mutiny, the plaintiff was about to apply to the British Government for a summary settlement of the mehal which belonged to her husband, and which had descended to her. She was, however, dissuaded by the Rajah of Bhinga from so doing, he fully acknowledging in writing her right, and

suggesting that, as she was old, she had better leave [534] the protection of her interest to him, and pledged himself that her possession of the mehal should be respected and safe. The summary settlement was accordingly made with him alone. Subsequently one-half of the Rajah's estates was confiscated to Government in consequence of the discovery of some concealed guns, whereupon he pointed out for confiscation the entire mehal of the appellant as part of the one-half of his estates, and the plaintiff's estate called Deotaha was taken by Government, and the greater part of it made over to Oudh loyalists as a reward for good services.

It was contended that the summary settlement and the Government letter of the 10th October 1859 constituted the talukdar the absolute owner of the whole estate, including the appellant's estate, Deotaha, and consequently that it passed to Government under the confiscation against him. It was, however, held by the Judicial Committee that the settlement and letter had no such effect.

In delivering judgment Lord Justice JAMES, speaking of the Government letter of the 10th October 1859, said (14 Moore's J. A., 127): "In English language it gave the registered talukdar the absolutely legal title as against the State and against adverse claimants to the talukdary: but it did not relieve the talukdar from any equitable rights to which, with a view to the completion of the settlement, he might have subjected himself by his own valid agreement. In this case the appellant was the acknowledged *cestui que trust* of the registered talukdar, who bound himself expressly in writing that he would respect her rights if she would permit him to be alone so registered. It would be a scandal to any legislation if it arbitrarily, and without any assignable reason, swept away such rights, and in this very painful case it is, at all events, agreeable to their Lordships to find that no such scandal attaches to the laws or regulations or Government Acts in force in Oudh, and that the cruel wrong, of which this lady has been the victim, is due to the misapprehension of the law by the Commissioner. It is almost superfluous to add that the lady being clearly as she was, the equitable [535] owner, the decree of confiscation against her trustee could, on no principle of law, equity, or good conscience, be made to affect her, and certainly not to justify a sentence which, in effect, made her the sufferer for his offence."

An under-proprietary right, being the interest to which the appellant was entitled at the time of the annexation of Oudh, was, therefore, awarded to her, notwithstanding the summary settlement and the Government letter.

In that case there was a written agreement by the talukdar, prior to the summary settlement, to respect the rights of the widow if she would allow him to obtain the summary settlement. In the present case, however, there was no written agreement by the talukdar prior to his obtaining the summary settlement, but merely a representation by him that he had no partner except the plaintiff.

In the case of *The Widow of Shunker Sahai v. Rajah Kashi Pershad* (L. R. 4 I. A., 198), decided in the Privy Council, 29th July 1873, there was also no written agreement signed by the talukdar, but merely a representation made by him at the time of his applying for a summary settlement, followed, apparently, by other admissions. In that case the widow of Shunker Sahai was entitled as co-partner with Rajah Kashi Pershad to one-third share in seven villages. The summary settlement of 1858 was made with the Rajah as talukdar of twenty-six villages, including the seven in which the plaintiff was interested. In his application for the settlement, he stated that, in 1264 Fuslee, the summary settlement was made as to the seven villages in partnership with

both him and the widow at one-third as the share of the widow and two-thirds for himself. In the settlement proceedings it was ordered that the settlement of the seven villages with others should be made with the Rajah as talukdar, and that the widow should be recorded as a co-partner. The settlement was accordingly made with the Rajah alone, and he alone engaged for the revenue. The sanad of the talukdary, including the seven villages, was, under the Government letter of 10th October 1859, granted to the Rajah alone. The Rajah disputed the widow's claim, and she sued [536] for proprietary, and also for under-proprietary rights. It was held by the Court of First Instance that her suit for the former was barred, by the sanad being in the name of Rajah Kashi Pershad only; and that she could not recover under-proprietary rights because any title she might have had must have been to proprietary rights. It was held by the Financial Commissioner that the widow was entitled to one-third of the profits of the seven villages when the annual accounts should be made up. Upon appeal to Her Majesty in Council it was held by the Judicial Committee that there was no ground for holding that the summary settlement and the subsequent order of 1859 conferred talukdary rights on the widow, but that she was entitled to one-third share of the profits of the seven villages.

That case so closely resembles the present in many particulars, and the remarks of the Judicial Committee are so applicable to it, that their Lordships will read an extract from the judgment, which does not appear to have been yet reported. They say (L. R., 4 I. A., at p. 206):

"The construction which their Lordships would put upon the words 'and that the name of Shunkur Sahai's widow be recorded as a shareholder' is not that the Settlement Officer gave or intended to give the widow the right of making a summary settlement as talukdar, but simply desired to place on record for her benefit her admitted beneficial interest in some and some only of the villages which made up the settled taluk."

"Mr. Capper seems to have admitted as to the seven villages that though the appellant had not been in independent possession of one-third of the collections, yet that the Rajah might have so bound himself by writing as to have incurred the obligation of accounting to her for one-third of the profits. He ultimately dismissed her suit because her agent had failed to produce a deed in writing so binding the talukdar. Colonel Barrow, however, appears to have held that the admission of the Rajah at the time of the summary settlement and on other occasions, the former being in the nature of an admission on record, were equivalent to such a deed; and that accordingly, the relation of trustee and *cestui que trust* having so to speak [537] been established between them, she was entitled to one-third share of the profits of the villages when the annual accounts were made up. In this part of the Financial Commissioner's order their Lordships entirely concur."

This case is, therefore, an authority for the proposition that a person who has been registered as a talukdar under Act I of 1869, and has thereby acquired a talukdary right in the whole property, may, nevertheless, have made himself a trustee of a portion of the beneficial interest in lands comprised within the taluk for another, and be liable to account accordingly.

In that case the *cestui que trust* was a stranger. In this the plaintiffs claimed as persons constituting with the defendant a joint Hindu family.

It appears that the respondent, in his application for a summary settlement in the case now under consideration, stated that there was no partner of his other than Hardeo Bux, but he said nothing as to Purbut Singh.

On the 22nd March 1866, the plaintiff deposed that he, Purbut Singh, and the respondent all lived together, and had everything in common up to January then last, which was nearly eight years after the date of the summary settlement, and more than six from the date of the sanad.

Their Lordships are of opinion that, up to the time of Lord Canping's proclamation, the whole of the villages mentioned in the summary settlement were the joint family property of the petitioner and Purbut Singh and the defendant, and that they were either ancestral or purchased with the proceeds of ancestral estate. The defendant himself, more than a year after the date of the summary settlement, stated in his deposition on oath made in another case, on the 8th July 1859, that the custom prevailing in his family was that if his cousins, meaning the plaintiff and Purbut Singh, who were his partners, should claim, they could get their shares divided. He said, "they at present live with me, and receive food and clothing." It does not appear clearly from the latter words whether the estate was held as joint family property, or whether the defendant merely made an allowance to the plaintiffs.

The defendant in his deposition deposed that his statement [538] made at the time of the summary settlement referred to Mouza Gungoa only. But that seems to be at variance with the statement itself.

The lower Courts appear to have decided the case merely upon the ground that the defendant was protected by the sanad, without advertng to s. 15 of Act I of 1869, or inquiring whether, notwithstanding the summary settlement, the sanad, and the Statute, the plaintiffs or the appellant had, either before or after the passing of Act I of 1869, acquired or become entitled to a beneficial interest in any part of the property.

Their Lordships are of opinion that, looking to the allegations in the plaint and written statements, an issue ought to have been raised to try that question. They do not, on the materials before them, feel competent to decide it. The defendant's sanad is not on the record. They have no evidence of all the circumstances under which the summary settlement was made, nor of those under which the sanad was granted, nor of what was done with respect to it or the property comprised in it before the registration of the defendant under Act I of 1869.

Their Lordships will, therefore, humbly advise Her Majesty that the Commissioner be directed to try or to refer to the Settlement Officer for trial the following issue, namely, whether the respondent has, in any and what manner, agreed or become bound to hold the villages comprised in the summary settlement and sanad, or any and what part thereof, or the rents and profits thereof, or any and what part thereof, in trust for the appellant and Purbut Singh, or either and which of them; that either party be at liberty to adduce such evidence upon the trial of that issue as he may be advised, and that the finding upon such issue, together with a translation of any additional evidence which may be adduced, be forwarded to the Registrar of the Privy Council, in order to enable the Judicial Committee to report to Her Majesty their opinion upon this appeal.

Agent for the Appellant : Mr. T. L. Wilson.

Agents for the Respondent : Messrs. Barrow and Barton.

NOTES.

I. SUBSEQUENT LITIGATION :—

For proceedings after the remand, see (1879) 6 I. A., 161. An off-shoot of this litigation is the case of *Pirthi Pal Singh v. Thakur Jawahir*, (1886) 14 I. A., 37.

II. REGISTERED TALUKDAR MAY HOLD ESTATE BENEFICIALLY FOR OTHERS:—

See (1877) 3 Cal., 645; (1881) 8 I. A., 215; (1882) 8 Cal., 769; (1889) 17 Cal., 311; (1898) 25 I. A., at p. 166 (*benami* claim); (1899) 26 I. A., 229 (though sanad to one alone).

Trest in favour of tenant does not arise simply because at the time of application the talukdar promised to retain him.—(1884) 12 I. A., 61.

III. GRANT IN FAVOUR OF A MEMBER OF THE FAMILY:—

Does not necessarily give rise to trust:—(1877) 5 I. A., 1 (Hindu widow, estate held to be *stridhan*).

IV. PRE-EXISTING RIGHT PRESERVED :—(1905) 32 I. A., 229; (1909) 36 I. A. 118.]**[539] ORIGINAL CIVIL.**

The 8th April, 1878.

PRESENT :

MR. JUSTICE PONTIFEX.

Groom and another

versus

Wilson.

Practice—Summary Suit on Promissory Note—Time extended for Defendant to appear and defend Suit—Civil Procedure Code (Act X of 1877),

Chap. XXXIX.

THE High Court has power to extend the time within which a defendant in a suit brought under chap. xxxix (summary procedure on negotiable instruments) of the Civil Procedure Code can come in and obtain leave to defend: therefore, in a suit in which it appeared that the defendant resided at Peshawur, the time for the defendant to obtain leave from the Court to appear and defend was extended to twenty-eight days.

MR. COLLIS applied, under cl. 12 of the Charter, for leave to file a plaint under the provisions of chap. xxxix of the Civil Procedure Code on a promissory note made outside, but payable within the jurisdiction; and asked that the summons should issue in accordance with form No. 172 of the 4th schedule to the Code. The defendant was an officer stationed at Peshawur.

Pontifex J., granted leave; but, as the defendant was at Peshawur, directed that the time within which the defendant might obtain leave to appear and defend should be extended to the period of twenty-eight days. The learned Judge was of opinion that, inasmuch as s. 532 provides that the summons shall issue either in the form mentioned in the schedule, or in such other form as the High Court may from time to time direct, the Court had the power to extend the time.

Attorneys for the Plaintiff: Messrs. *Roberts, Morgan & Co.*

[540] APPELLATE CRIMINAL.

The 17th January, 1878.

PRESENT :

MR. JUSTICE AINSLIE AND MR. JUSTICE McDONELL.

The Empress on the Prosecution of Ram Manikya Chakroborty and others
versus
Dononjoy Baraj.*

[— 1 C. L. R. 478]

*Practice—Distinct offences—Separate charges - Criminal Procedure Code—
(Act X of 1872), ss. 532, 553, 554, Illustration (b)—555.*

Section 453 of the Criminal Procedure Code simply places a statutory limit on the number of charges which may legally form part of a single trial. There is nothing in the section, however, to prevent an accused from being separately charged and tried on the same day for any number of distinct offences of the same kind committed within the year.

THE letter of reference showed that the accused was tried and convicted by the Deputy Magistrate in eight cases for extorting various sums of money from some villagers, the complainants in each case being separate individuals. Five out of the eight cases were tried on the same day, and so far as can be gathered from the letter of reference, it would appear that each of these cases was tried separately. Separate sentences were inflicted on each case. The accused appealed to the Court of the District Magistrate, who affirmed the order of the Deputy Magistrate. A further application was then made on behalf of the accused to the Sessions Judge, who referred the matter to the High Court under s. 296 of the Criminal Procedure Code, on the ground that the convictions were bad in law. The alleged offences being of one kind and having been committed within one year, it was not open to the Court, under s. 453 of the Code of Criminal Procedure, to draw charges and try the accused at the same time for more than three of such offences.

No one appeared on the hearing of the reference.

The judgment of the Court was delivered by

Ainslie, J.—We see no grounds for interfering. Section 453 of the Criminal Procedure Code modifies s. 452, which requires a [541] separate charge and a separate trial for every distinct offence, by allowing three charges of three distinct offences of the same kind and committed within one year of each other to be tried at the same time; but this does not mean that, if at one time or within one year a man commits fifty distinct offences of the same kind, he shall not in one day be prosecuted for more than three such offences. This is clear from illustration (b), s. 454.

* Criminal Reference, No. 88 of 1877, from the order of F. H. McLaughlin, Esq. Officiating District and Sessions Judge of Noakhally, dated the 7th December 1877.

[3 Cal. 541]
ORIGINAL CIVIL.

The 8th April, 1878.

PRESENT :

MR. JUSTICE PONTIFEX.

Pestonjee Eduljee Gurdur

versus

Mirza Mahomed Ally and another.

*Practice—Joinder—Suit against drawer and acceptor of a bill—Civil Procedure Code (Act of 1877), s. 29.**

The drawer and acceptor of bills of exchange can be joined as co-defendants in a suit brought by the holder of such bills.

THE plaintiff, as holder of certain bills of exchange drawn and accepted in Calcutta on 17th February 1877, sued the drawer and acceptor thereof to recover the amount due on the bills.

The defendants had not entered appearance, and the case, accordingly, came on as undefended. Notice of dishonour was duly proved.

Mr. *Trevelyan*, for the plaintiff, referred to Byles on Bills, 12th ed., p. 407, and s. 29 of the Code of Civil Procedure, as authority for the joinder of the drawer and acceptor as defendants in the same action.

Pontifex, J. was of opinion that s. 29 permitted such a joinder, and gave a decree for the amount due under the bills against both the defendants.

Case decreed.

Attorneys for the Plaintiff : Messrs. *Trotman and Watkins*.

* [Sec. 29 :—The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract including parties to bills of exchange, hundis and promissory notes.]
Joinder of parties liable on same contract.

[542] APPELLATE CIVIL.

The 21st December, 1878.

PRESENT :

MR. JUSTICE AINSLIE AND MR. JUSTICE KENNEDY.

Goopee Nath Dobey.....Judgment-debtor

versus

Roy Luchmeeput Singh Bahadur and another.....Decree-holders.*

[= 1 C. L. R. 349]

*Sale in execution of decree—Postponement of sale—Notice—
Proclamation— Act VIII of 1859, s. 249.*

Where a sale in execution of a decree is postponed, whether indefinitely or to a fixed date, it is necessary, in the absence of an express arrangement between all the parties, that a fresh proclamation should be made giving notice of the day to which the sale has been postponed.

It may be presumed, when the notice is wanting, that there has been an absence of bidders, from which alone substantial injury must probably have arisen to the judgment-debtor (see also *Shib Prokash Singh v. Sardar Dayal Singh*, post, p. 544).

Okhoy Chunder Dutt v. Erskine (3 W. R., Mis. R., 11) followed.

IN May 1876 Lutchmeeput Singh obtained a decree against the judgment-debtor, under which certain property in the district of Shahabad was attached and ordered to be sold. The 6th November 1876 was, in the first instance, the day fixed for the sale. On the 25th of October the sale was postponed at the request of two rival decree-holders to the 11th December. The order postponing the sale was passed in the presence of the vakils for the decree-holders, but without the consent of the judgment-debtor and without any notice to him. The proclamation of the postponement was notified simply by a notice to that effect put up in the Court-house, but no steps had been taken to convey information of the change of day to intending purchasers in the mofussil. The sale took place on the 11th December.

The judgment-debtor applied to the District Court to have the sale set aside, on the ground that no fresh proclamation, under s. 249 † of Act VIII of 1859, was made on the day to which the sale was adjourned.

* Miscellaneous Regular Appeal, No. 265 of 1877, against the order of A. V. Palmer, Esq., Judge of Zilla Shahabad, dated the 5th of September 1877.

† [Sec. 249 :—In all cases of intended sale by public auction, whether of moveable or immoveable property, in execution of a decree, a proclamation of the intended sale, specifying the time and place of sale, the property to be sold, the revenue assessed upon the estate when the property to be sold is an estate or a part of an estate paying revenue to Government, and the amount for the recovery of which the sale is ordered, together with any other particulars that the Court may think necessary, shall be made in the current language of the district. The proclamation shall also declare that the sale extends only to the right, title, and interest of the defendant in the property specified therein. Such proclamation shall be made on the spot where the property is attached by beat of drum or in such other mode as may be customary; and a written notification to the same effect shall be affixed in the Court-house of the Judge who shall have ordered the sale, and in some conspicuous spot in the town or village in which the attachment may have taken place. When the property ordered to be sold may consist of land or of any right or interest in land, the written notification shall also be affixed in the office of the Collector of the district in which

[543] The Judge, although he found that the judgment-debtor had not been represented in Court at the time when the sale was postponed, refused the application.

The judgment-debtor accordingly preferred this appeal to the High Court.

The *Advocate-General* and *Bahoo Gooroo Dass Banerjee* for the Appellant.

Moonshee Mahomed Yusoof, *Bahoo Mohesh Chunder Chowdhry*, and *Bahoo Sree Nath Dass* for the Respondent.

The judgment of the Court was delivered by

Ainslie, J. (who, after stating the facts of the case, continued).—The judgment of the late learned Chief Justice Sir BARNES PEACOCK in the case of *Okhoy Chunder Dutt v. Brskine* (3 W.R., Mis. R., 11) may be quoted as showing that, in all cases in which a sale may be postponed to another day, it is necessary that the formalities required by law should be gone through afresh (unless it be that they have been waived by the parties themselves). He says—
“It is exceedingly important that when an auction-sale is to take place in execution of a decree, a proclamation should be made, giving notice of the day on which the sale is to take place, so that intending purchasers may go and bid for the articles put up for sale, and Act VIII of 1859 is express on the point.”
He then goes on to quote s. 249.

The case then before the Court is, no doubt, somewhat different from the present case, inasmuch as in that case the postponement had been indefinite, whereas in the present case the postponement was to a certain fixed day. Still it appears to us that the principle applies, that in all cases the proscribed notice must be given in order that intending purchasers may be able to attend and bid at the sale, unless the giving of such notice is specially waived. In the present case there was no such notice as is required by s. 249, though it had become necessary in consequence of the first notice having become inoperative otherwise than by the action of the parties to the suit.

[544] With reference to the substantial injury arising from this irregularity, we think that we ought to hold that, as the law distinctly requires a notice, and as the notice is so important, in order to secure a fair chance of a proper price being offered for the property to be sold, it may be presumed, when the notice is wanting, that there has been an absence of bidders, from which alone substantial injury to the judgment-debtor must probably have arisen.

There is some evidence, moreover, in this case that the property was sold for less than its actual value. The Judge has rejected that evidence as untrustworthy, but we think that it should be read in the light of the presumption that there must probably be substantial injury from want of notice, and that some weight should consequently be given to that evidence, unless it is clearly rebutted by evidence of the other side. There being no such rebutting evidence, we are bound to hold that there is sufficient proof of substantial injury.

The order of the lower Court must, therefore, be reversed, and the sale set aside with costs payable by the purchaser-respondent.

such land is situate and in the Court-house of the principal Civil Court of the district where the Court which ordered the sale is subordinate to such Court. The sale shall not take place until after the expiration of at least, thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the notification shall have been affixed in the Court-house of the Judge ordering the sale.]

Time of sale.

NOTES.

[PROCLAMATION OF SALE—POSTPONEMENT—

Omission to issue a fresh one an irregularity :—(1891) 18 Cal., 496 ; when a portion was released from attachment :—(1878) 3 Cal., 544. See also (1881) 7 Cal., 466 ; (1881) 7 Cal., 730 ; (1895) 18 All., 37.

But the irregularity may be waived :—(1901) 6 C. W. N., 42 and a fresh one is also called for when the aggregate of the postponement amounts to more than 7 days :—(1901) 6 C. W. N., 44.]

[3 Cal. 544]

The 20th March, 1878.

PRESENT :

MR. JUSTICE WHITE AND MR. JUSTICE R. C. MITTER.

Shib Prokash Singh.....Judgment-debtor

versus

Sardar Doyal Singh.....Decree-holder.*

[2 C. L. R. 260]

*Sale of Property in Execution of Decree—Proclamation of Sale**—Material Irregularity—Act VIII of 1859, ss. 249, 256.*

The property of a judgment-debtor was proclaimed and advertised for sale in execution of a decree on a certain day. The proclamation set out particulars of the property, but subsequent to such proclamation a portion of the property was released to a third party. Notwithstanding this fact, no fresh proclamation was made, and the sale took place on the day originally fixed. *Held*, that the omission to issue a fresh proclamation was a material irregularity, inasmuch as the judgment-debtor was entitled to have a proclamation issued accurately describing the property to be sold, and that such proclamation should be published thirty days before the sale (See also *Gopeenath Dopey v. Roy Lutchmeeput Singh Bahadur*, ante p. 542).

[545] IN this case the property of the judgment-debtor had been put up for sale in 1877, under a proclamation which bore date the 11th January 1877, and which was published on the 27th of the same month, fixing the 5th March 1877 as the day for sale. The proclamation stated that the property to be sold was a 2-anna 8-pie share in a certain taluk, the jumma of which was 1,269 rupees 5 annas and 4 pies. Between the 11th January and 5th March, a portion, consisting of 12 kalums of the property advertised to be sold, was released from attachment upon the application of one Nursing Roy. No fresh proclamation, however, was issued ; but, on the date of sale, those who had assembled for the purpose of bidding for the property, were informed, at the time and place of sale, that a portion of the advertised property had been released, and that the sale would, therefore, only extend to 2-anna 8-pie share of the taluk, less the portion released. A sale having taken place, the judgment-debtor applied to have it set aside for irregularity. The Subordinate Judge overruled the objection.*

The judgment-debtor, therefore, appealed to the High Court.

Baboo Akhil Chunder Sen for the Appellant.

• Baboo Anund Gopal Paulit for the Respondent.

* Miscellaneous Regular Appeal, No. 239 of 1877, against the order of Moulvie Mohamed Noorul Hossain, Subordinate Judge of Zilla Shababad, dated the 19th of May 1877.

The judgment of the Court was delivered by

White, J. (who, after stating the facts of the case, and the release of a portion of property to Nursing Roy, continued) :—The result of the release of this portion was, that the description of the property which was advertised to be sold was no longer an accurate description.

NOW s. 249 of the Code, in prescribing what the proclamation is to contain, makes express mention of "the property to be sold," and there can be no doubt that that particular, is one of the greatest importance. In a case where, as here, a variation had arisen between the property advertised to be sold and the property actually sold, in consequence of the release obtained by Nursing Roy, it was necessary and proper that a fresh proclamation should have issued in order to comply with [546] the requirement of the section to which I have referred. No such fresh proclamation, however, issued; but on the day of sale, those who had assembled for the purpose of bidding for the property were informed at the time and place of sale that a portion of the advertised property had been released, and that the sale would, therefore, only extend to a 2-anna 8-pie share of the taluk, less that portion. It is obvious that this was not a compliance with the Code, and that serious injury may have resulted to the appellant from the adoption of such a course. The judgment-debtor is entitled to have a proclamation issued which shall state accurately the property to be sold, and which is published thirty days before the sale. The method adopted deprived him of the benefit of the thirty days' advertisement, and is open to the further objection that intending purchasers were left in the dark as to the extent of the portion which Nursing Roy had procured to be released, and as to how much it reduced the value of the 2-anna 8-pie share of the taluk which was advertised for sale. That the proceeding, under these circumstances, to sell the appellant's property under the proclamation of the 11th January 1877 amounted to a material irregularity, we think there can be no doubt. The way in which the Subordinate Judge has dealt with the objection is this. He says :— "No rule has been pointed out and urged that in a case like this the writ of attachment and sale proclamation should be served and published anew under that rule. It being so, to call such an omission an irregularity, is altogether false and improper." The objection is not pointed to the omission to issue a fresh writ of attachment, but to the omission to issue a fresh proclamation. A reference to s. 249 of the Code would have satisfied the Subordinate Judge that a fresh proclamation was, in strictness, required, inasmuch as the property actually sold did not correspond with that which was proclaimed to be sold.

The irregularity being in our opinion material, we have next to determine whether the judgment-debtor has proved that he has sustained substantial injury by reason of that irregularity. We can easily suppose that he may have done so, and it is an irregularity of such a sort that very little evidence would satisfy [347] the Court on the point. It is necessary, however, for him to give some evidence of substantial injury, but this he is unable to do upon the present application, because he cannot show what is the value of the 12 kalums which have been deducted from the 2-anna 8-pie share of the taluk.

The Court below does not appear to have examined the evidence with a view to this point, nor indeed did the question properly arise there, because it held that the objection on the score of irregularity failed, in which case, of course, it would be unnecessary to consider whether substantial injury had or had not been suffered by the judgment-debtor.

* [Sec. 249 :—q. v. *supra* I.L.R., 3 Cal. 542.]

This question now becomes material, and we think, considering the course which the application took in the Court below, that the judgment-debtor should have an opportunity of substantiating this part of his case. We shall, therefore, with these remarks, remand the case to the Subordinate Judge, and direct him to ascertain from the evidence on the record, and from any further evidence that may be adduced by the parties, whether the appellant has sustained substantial injury by reason of the occurrence of the irregularity complained of. The appellant and respondent respectively will have liberty to produce such further evidence.

The costs of this appeal will abide the result of the remand.

NOTES.

[See Notes to I. L. R., 3 Cal., 542 *supra*.]

[3 Cal. 547]

The 6th December, 1877.

PRESENT:

MR. JUSTICE MARKBY AND MR. JUSTICE MITTER.

Golokemoney Dabia and others.....Decree-holders

versus

Mohesh Chunder Mosa and another.....Judgment-debtors.

[1 C. L. R. 149]

Application for Execution of Decree for Arrears of Rent—Limitation—Proper Application—Circular Order, 10th July 1874—Beng. Act VIII of 1869, s. 58.

The words "no process of execution of any description whatsoever shall be issued on a judgment in any suit.....after the lapse of three years" in s. 58 of Beng. Act VIII of 1869 mean, that execution shall not issue unless a proper application for execution is made within three years from the date of the judgment. Therefore, where, on an application made on 5th July, [548] 1875, for execution of a decree for arrears of rent, obtained on the 31st January 1873 a warrant for the arrest of the judgment-debtors was issued, but not executed, a subsequent application for execution of the same decree made on 17th March 1876 was held not to be barred.

The law as laid down in *Rhody Krishna Ghose v. Karis Chandra Bose* (4 B. L. R., F. B., 82; S. C., 13 W. R., F. B., 3) is not affected by the Circular Order No. 18, dated 10th July 1874 (13 B. L. R., Cir. Or., 62).

*Miscellaneous Special Appeal, No. 145 of 1877, against the order of H. T. Prinsep, Esq., Judge of Hooghly, dated 10th March 1877, affirming a decree of Baboo Bepin Beharee Mookerjee, Munsif of Amta.

† [Circular Order No. 18, dated Calcutta the 10th July 1874:—

The Court, having observed that irregularities are committed in the execution of decrees in rent suits, are pleased to direct the attention of District Judges to the positive rule laid down in section 58 of Act VIII of 1869 (B. C.) as to judgments for amounts not exceeding Rs. 500 and to intimate that the same process of execution cannot be executed more than once, and the Court accordingly direct that the reception of supplementary lists of property to be attached or other devices by which the provisions of this section are evaded, may be at once put a stop to.

By order of the High Court.

(Sd.) H. J. S. COTTON,

Offg. Registrar.]

THE facts of this case are as follows:—

On the 31st January 1873, the present appellants, with certain other parties, obtained a decree for arrears of rent against the respondents. On the 5th July 1875, an application was made for execution by arrest and for attachment and sale of the property of the judgment-debtors, and a warrant for their arrest was granted; but on the 22nd September 1875, the decree-holders informed the Court that a proposal for compromise was made by the judgment-debtors, and that their arrest was unnecessary. On the compromise falling through, a second application was, on the 17th March 1876, made for the arrest of the judgment-debtors and for an attachment of their property. This application was refused by the Munsif; and on appeal to the District Judge the order was upheld, the Court being of opinion that the matter was barred by limitation under s. 58 of Beng. Act VIII of 1869, and that the Circular Order of the High Court, dated 10th July 1874, which directed attention to the positive rule laid down by that section of the Act, and provided that in respect of judgments therein specified, the same process of execution could not be executed more than once, was intended to apply to cases like that of the application the subject of the appeal. The decree-holders thereupon appealed to the High Court.

Baboo *Bhairub Chunder Banerjee*, for the appellants, contended, that the application of the 17th March 1876 for the arrest of the judgment-debtors was not barred under s. 58 of the Rent Law, because that application was only a continuation of the former application, and in support of this argument, cited *Rhidoy Krishna Ghose v. Kailas Chandra Bose* (4 B. L. R., F. B., 82; s. c., 13 W. R., F. B. 3), and further that [549] the Circular Order of the High Court, dated the 10th July 1874 (13 B. L. R., Cir. Or., 62), had been misconstrued by the lower Court, as the Circular simply provides that a process once executed shall not be issued again; but in the present case, as the warrant of arrest was never executed, the Circular does not apply, and further, that the Circular could not set aside the ruling of the Full Bench reported in *Rhidoy Krishna Ghose v. Kailas Chandra Bose* (4 B. L. R., F. B., 82; s. c., 13 W. R., F. B., 3).

Baboo *Boido Nath Dutt*, for the respondents, pointed out that the judgment-creditors had allowed so much time to elapse between the two applications, that the second application must be taken to be distinct from the first, and therefore was barred, and cited *Lalla Ram Sahoy v. Dodraj Mahto* (20 W. R., 395).

The judgment of the Court was delivered by

Markby, J. (who, after stating the facts of the case, continued).—In this case we think that the decision of the Munsif and of the District Judge was wrong, and that execution ought to have been allowed to issue.

Now the Full Bench have laid down in a case (4 B. L. R., F. B., 82; s. c., 13 W. R., F. B., 3), and that decision is binding upon us, what the true construction of the section is which imposes a term of limitation of three years upon a judgment-creditor when applying for execution. The effect of that decision is stated in the judgment of Mr. Justice MACPHERSON, who says that "the words should be considered as meaning that execution shall not issue unless a proper application for execution is made within three years from the date of the judgment." That I understand to be the decision of the majority of the Judges of the Full Bench. That being so, the real question which we have to determine in this case is whether the proceeding of the 17th March 1876 was a new and substantive application for

execution, or whether it was merely a step taken by the judgment-creditors in furtherance of the execution for which they applied, and applied successfully on the 5th July [580] 1875. Now one of the facts to be noticed in this case is, that the proceedings which took place on the 17th March 1876 and subsequent proceedings were all under the original number which was borne by the proceedings of 1875. I do not say that that was conclusive in the matter, but it certainly goes to show that the proceedings which followed upon the application of the 17th March 1876 were not proceedings upon a new execution then for the first time issued, but steps taken in furtherance of the original application. And under all the circumstances of this case, we think that we are justified in saying that the steps taken for the arrest of the judgment-debtors in March 1876 were not new proceedings but a continuation of the old proceedings. If that be so, then, according to the Full Bench decision, it is incumbent upon us to hold that they are not barred.

The District Judge has relied upon the terms of a circular order of this Court. We do not at all wish to weaken the effect of anything which is stated in that circular order. That circular order does not and could not affect the law as laid down by the Full Bench decision. Notwithstanding anything which is contained in that circular order, the question must be decided in the same way, viz., by inquiring whether the application made for execution upon which proceedings were had, was made within three years from the date of the decree.

The vakeel for the respondents has also relied upon a decision in *Lalla Ram Sahoy v. Dodraj Matho* (20 W. R., 395). All that is necessary for us to say upon that decision is this, that the question of delay on the part of the judgment-creditors is not anywhere referred to by the Full Bench. It may be that the question of delay on the part of the judgment-creditors may in some cases be useful in assisting the Court to determine whether an ambiguous proceeding is a fresh application for execution or a step taken in furtherance of a previous application. But there is nothing which will authorize us to import into the law of limitation the question of diligence on the part of the judgment-creditors as a substantive portion of that law.

[581] We think that the decision of the District Judge must be set aside, and the money deposited by the judgment-debtors must be paid out to the decree-holders. The decree-holders will be entitled to their costs in this Court and the Courts below.

NOTES.

[I. LIBERAL CONSTRUCTION—

The words "*from the date of such judgment*" in Bengal Act VIII of 1869, s. 58, were liberally construed in (1881) 7 Cal., 127. See also (1906) 6 C. L. J., 146.

II. LIMITATION—

A suit by the judgment-debtor which was decreed and in which an injunction was granted restraining the execution of the decree but which was ultimately dismissed on appeal, was not such a proceeding as would prevent the decree being time-barred:—(1901) 6 C. W. N., 735.]

[3 Cal. 551]

The 27th February, 1878.

PRESENT :

MR. JUSTICE AINSLIE AND MR. JUSTICE McDONELL.

Sheikh Khoorshed Hossein and others.....Decree-holders

versus

Nubbee Fatima and others.....Judgment-debtors.

[2 C. L. R. 187]

*Suit for Partition + Execution — Limitation — Right of Co-sharer in Partition —
Suit to enforce Decree.*

A decree for partition is not like a decree for money or the delivery of specific property, which is only in favour of the plaintiff in the suit. It is a joint declaration of the rights of persons interested in the property of which partition is sought, and such a decree, when properly drawn up, is in favour of each shareholder or set of shareholders having a distinct share.

A, on the 29th June 1871, obtained a decree for partition against B, his co-shareholder, and, on the 28th November 1876, applied to have the execution proceedings struck off the file. The application was refused, and the partition was ordered to be completed at B's expense. *Held*, that as the execution proceedings taken either by one shareholder or the other were taken on behalf of both, limitation did not apply.

IN this suit the plaintiff obtained a decree on the 29th June 1871 against the defendant, his co-sharer, for partition of a 3-anna 6-gunda share out of 8 annas of Mouza Dilawapore. Plaintiff took out execution, and a greater part of the land had been partitioned under the execution; the plaintiff, however, dissatisfied with the way in which the lands had been divided, applied, on 28th November 1876, to have the execution proceedings struck off the file, whereupon the defendant expressed his willingness to carry on the execution proceedings. The Court of First Instance rejected the plaintiff's application, and directed the partition to continue at the defendant's expense. The Lower [552] Appellate Court having confirmed this order, the plaintiff preferred a special appeal to the High Court.

Moonshee Mahomed Yusoff for the Appellants.

Mr. M. L. Sandel for the Respondents.

The Judgment of the Court was delivered by

Ainslie, J. (who, after stating the facts of the case, continued).—In special appeal it is contended that the defendant is not entitled to execute the decree at all; and if entitled, that he is barred by limitation.

With regard to the first point, we are of opinion that a decree for partition is not like a decree for money or for the delivery of specific property, which is only in favour of the plaintiff in the suit. It is a joint declaration of the rights of persons interested in the property of which partition is sought, and having been so made, it is unnecessary for those persons who are defendants in the suit to come forward and institute a new suit to have the same rights declared under a second order made. It must be taken that a decree in such suits is a

* Miscellaneous Special Appeal, No. 308 of 1877, against the order of R. J. Richardson Esq., Judge of Zilla Tirhoot, dated the 6th of June 1877, affirming the order of Baboo Gresh Chunder Ghose, First Subordinate Judge of that district, dated the 28th of November 1876.

† The partition under a decree of an estate paying rent to Government is now to be made by the Collector, see s. 265 of the Civil Procedure Code [—C.P.C., 1908, sec. 1, Or. 21, r. 54.]

decree, when properly drawn up, in favour of each shareholder or set of shareholders having a distinct share. In the present instance there being fortunately only two parties, there was no room for ambiguity in the drawing up of the decree.

On the question of limitation, we think that it is impossible, in a case like this, to hold that the execution proceedings taken by either one shareholder or the other are anything but proceedings on account of both the shareholders. The necessary result of those proceedings was to divide off the share of the defendant, and while this was going on at the instance of the plaintiff, it would have been merely superfluous for the defendant to have put in an application to have the same thing done at her instance. Therefore, we think that it must be taken that the proceedings in execution earlier than 1876 have the same effect as if they had been originated in the name of the defendant: consequently limitation does not apply.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[PARTITION DECREE—

1. The explanation of the nature of such decree given in this case has been adopted in (1897) 22 Mad., 494; (1897) 20 All., 81.
2. See (1889) 12 All., 506, where it was held that the share to be obtained by the plaintiff would give the Court jurisdiction and the shares of the defendants should not be ascertained when there was no prayer for it. SIR JOHN EDGE added, "should the question in 3 Cal., 551 arise, we would not be prepared to follow that decision."
3. But where the plaintiff fails to obtain a decree for his share, the defendants cannot insist on their shares being ascertained and decreed in that suit:—(1906) 31 Bom., 271.
4. As between co-defendants issues may arise and would be when determined *res judicata*:—11 Bom., 216; (1903) 31 Cal., 95 S.C.W.N., 30.]

[533] ORIGINAL CIVIL.

The 4th and 9th April, 1878.

PRESENT:

MR. JUSTICE PONTIFEX.

The Administrator-General of Bengal

versus

Apcar.

Will, Construction of—Absolute Gift—Inference drawn by subsequent provisions for enjoyment of such gift—Intention of Testator.

Where a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment to secure certain objects for the benefit of the legatee, and where such objects fail, the absolute gift prevails and does not fall into the residue of the testator's estate. Therefore, where a testator gave legacies to certain of his grandsons and grand-daughters, but nevertheless declared that such legacies should be held upon trust (as to the legacies to the grandsons) to invest the same and to apply the income during the

minority of the legatee towards his maintenance and education, and upon his attaining the age of 21 years to pay him the income during his lifetime, and after his death to pay such income unto the widow of such grandson, and after the death of both of them to transfer the capital unto the child or children of such grandson as being a son or sons should attain the age of 21 years, or being a daughter should attain that age, or marry in equal shares as tenants-in-common; and where the testator especially provided as to the legacy left to one grandson that upon the happening of certain events it should be paid to his other grandchildren: *Held*, that the gifts to the grandsons were absolute, and that the subsequent provisions were simply a qualification of the gifts for the benefit of the legatees; and that, therefore, upon the death of one of the grandsons unmarried, his legal representative was entitled to the legacy left to him.

Jassence v. Tierney (1 M. and G., 551) and *Kellett v. Kellett* (L. R., 3 H. L., 160) followed.

IN this case the Administrator-General of Bengal, as legal representative of Paul Apcar, who had died intestate and unmarried in June 1877, sued the defendants as executors of the will of Aratoon Apcar. The testator had died many years ago, and the plaintiff claimed payment of a legacy of Rs. 20,000, to which he contended the estate of Paul Apcar was entitled under his will. The defendants, however, stated that, as the will in question did not direct how the legacy bequeathed to Paul Apcar was to be disposed of in the event of Paul [534] dying without issue and without leaving a widow, they were advised not to make over the same to the plaintiff without a decree of Court.

The clause of the will relating to the matters in question was as follows:

"I give to each of my grandsons and granddaughters (sons and daughters of my deceased son Apcar Aratoon Apcar, viz., Aratoon Apcar, Gregory Apcar, Alexander Apcar, Paul Apcar, Cachtick Apcar, Johannes Apcar, Sarah Amelia Apcar, and Hanudi or Anne Apcar, now the wife of Mr. G. A. Bishop, the sum of Rs. 20,000. Nevertheless, I declare that the said shares or legacies of each of my said grandsons and granddaughters shall be held by my trustees upon the trusts hereinafter declared concerning the same respectively, that is to say, as to the legacies of each of my grandsons upon trust to lay out and invest the same in the purchase of Government or Parliamentary stocks or funds in India, or Great Britain, or in Bank of Bengal shares or in or upon any mortgage of freehold estate in Great Britain or within the Town of Calcutta or on loan to the firm of Messrs. Apcar & Co., on their own personal security, with power from time to time to vary such investments and during the minority of such grandson in the discretion of my said trustees to apply all or any part of the annual produce and income arising from the said investment in or towards his maintenance or education or otherwise for his benefit and to accumulate the unapplied income. But such accumulations are nevertheless to be paid and applied to or for the future benefit of such grandson, and, after such grandson shall have attained the age of 21 years, to pay the income arising from the said investment to him, during his lifetime (subject nevertheless as to the legacy of my said grandson Aratoon Apcar, to the proviso hereinafter contained), and after the decease of such grandson, to pay the said income unto any wife of such grandson who may survive him during her life, and after the decease of both of them the said grandson, and any wife of his who may survive him upon trust to transfer the capital of the said share, and the funds and securities whereon the same may be invested, [555] unto such child or children of such grandson, as being a son or sons shall attain the age of 21 years, or being a daughter or daughters shall attain that age or marry, in equal shares, as tenants-in-common, for the absolute use and benefit of such child or children respectively. The testator then made

a limitation over of the legacy to his grandson Arratoon Apar and also provided that the trustees should be at liberty if they thought fit to transfer the legacies left to the grand-daughters to separate trustees.

Mr. J. D. Bell (with him Mr. Ferguson) for the plaintiff, contended, on the authority of *Lassence v. Tierney* (1 M. and G., 551),* that the legacy to Paul Apar was an absolute gift, and that therefore on his death, it did not revert back to the testator's general estate. That the provisions relating to this legacy only showed how it was to be enjoyed by the legatee and in no way cut down the previous absolute gift. The following cases were cited: *Campbell v. Brownrigg* (1 Phillips, 301), *Martin v. Martin* (L. R., 2 Eq., 404), *Randfield v. Randfield* (8 H. L., 225), *Crozier v. Crozier* (L. R., 15 Eq., 282).

Mr. T. A. Apar, for the defendants, argued that Paul only took a life-estate in the Rs. 20,000 and, as he died without leaving a widow, the legacy had now lapsed unto the testator's general estate. He further argued that the case of *Lassence v. Tierney* (1 M. and G., 551) did not apply, as that was a case relating to females, whereas the present was one concerning males, and that a testator might well provide that a legacy to a woman should rest in trustees, but there would be no need for such precaution in case of legacies to males. He cited the following cases: *Scawin v. Watson* (10 Beav., 200), *O'Mahoney v. Burdett* (L. R. 7 H. L., 388), *Whittell v. Dudin* (2 Jac. and W., 279), *Joslin v. Hammond* (3 M. and K., 110).

Pontifex, J.—I think that the gift of this legacy of Rs. 20,000 to Paul Apar, deceased, falls within the rule that, if [556] a testator leaves a legacy absolutely as regards his estates, but restricts the mode of the legatee's enjoyment to secure certain objects for the benefit of the legatee upon failure of such objects, the absolute gift prevails—*Lassence v. Tierney* (1 M. and G., 551). In that case, however, Lord COTTENHAM qualified the rule by adding that the intention of the testator was to be collected from the whole will and not from words, which, standing alone, would constitute an absolute gift, and in that case he found words in other parts of the will which made him decide that the gift in that case was not an absolute one. In *Kellett v. Kellett* (L. R., 3 H. L., 160) the rule referred to cases approved and confirmed. In the present case the gift in the first instance is an absolute one, and the subsequent provisions are simply a qualification of the gift for the benefit of the legatee; and so far from finding in any other point of the will any indication of intention on the part of the testator that the gift should not be an absolute gift, I think, on the contrary, that the fact that the testator does make a limitation over of one of their legacies, namely, the legacy to his grandson Arratoon, shows that he intended the other legacies to be absolute, and I think such intention is further indicated by the provision respecting the legacies to the grand-daughters under which the executors are empowered to transfer the grand-daughter's legacies to separate trustees, which shows that it was the intention of the testator to separate the legacies from his general estate. The Administrator-General is therefore entitled to the legacy of Rs. 20,000 left by the testator to his grandson Paul. Costs of all parties, as between attorney and client, to be paid out of the Rs. 20,000.

Attorney for the Plaintiff: Mr. Carapiet.

Attorney for the Defendants: Mr. Dover.

NOTES.

* [See *Haliburton v. Administrator-General*, 21 Cal., 498; *Bai Bapi v. Jammadas*, 22 Bom., 774; also 24 Cal. 834].

[537] APPELLATE CIVIL.

The 29th March, 1878.

PRESENT :

MR. JUSTICE WHITE AND MR. JUSTICE R. C. MITTER.

Ubilack Rai and others.....Plaintiffs

versus

Dallial Rai and others.....Defendants

Document more than thirty years old, Presumption as to—Evidence Act (Act I of 1872), s. 90—Proof of execution— Authority to sign on behalf of others, proof of.

The plaintiffs sued the defendants for enhancement of rent. The defendants resisted the claim, relying, *inter alia*, on a mokurrari pottah executed on 9th October 1832. This pottah purported to bear the seal of one of the then maliks of the lands, and also purported to be signed on behalf of all the maliks by A. Held, that although the pottah might be an authentic document, it would not bind the maliks who did not affix their seals, nor those who claimed under them, unless it was shown that A had a special authority to sign the names of such maliks to it, or a general authority to sign on their behalf documents of the same description as the pottah, and that until such proof was given, the document was not admissible in evidence. Held further, the fact that the pottah was more than thirty years old gave rise to the presumption that the signature at the foot of it was in the handwriting of A, and that the pottah was executed by him; but that to make it evidence against the representatives of the maliks who had not executed it, the defendants should show that A had authority to sign their names.

THE facts of this case are as follows :—

The special appellants, the plaintiffs, in the first Court, sued the respondents, the defendants in that Court, to enhance the rent of a piece of land.

The defendants successfully contended in both the lower Courts that they were protected from enhancement by reason of a mokurrari pottah executed as far back as the 9th October 1832, or forty-three years before the suit. The maliks of the land at that time were Futtey Ali, Bisharut Ali, and Khoda Buksh. The pottah purported to bear the seal of Futtey Ali, but not of the [538] other maliks. It purported, however, to be signed on behalf of all the maliks by one Shyam Lall.

The Court below considered the seal of Futtey Ali was proved by comparing it with a seal on a duly registered document of 1236 B. S. (1830), and held the mokurrari pottah to be proved for the reasons which sufficiently appear in the judgment of the Court. The appellants in special appeal objected that the Court had omitted to find that Shyam Lall was authorized to sign the pottah on behalf of Bisharut Ali and Khoda Buksh.

Baboo Prannath Pundit for the Appellants.

Mr. H. E. Mendies for the Respondents.

* Special Appeal, No. 391 of 1877, against the decree of Baboo Greesb Chunder Ghose, Subordinate Judge of Zilla Tirhoot, dated the 9th of December 1876, affirming the decree of Hafeez Abdool Kureem, Munsif of Hajepore, dated the 24th of March 1876.

The judgment of the Court was delivered by

White, J. (who, after stating the facts of the case, continued) :—So far as the pottah bears the seal of Futtey Ali, we have no reason to find fault with the mode by which the Court below has arrived at the conclusion that the seal was the genuine seal of Futtey Ali; but inasmuch as besides Futtey Ali, there were two other maliks, who have not sealed or signed the pottah, the authority of Shyam Lall to sign for them should be proved; and such proof is a necessary preliminary to the admission of the document in evidence.

The Judge states thus—“The issue which I have to try, is the mokurrari pottah genuine; and if so, was it effectuated or not.” What the Judge says on this issue is this:—“The evidence adduced on behalf of the pottah is fully satisfactory. True that no direct evidence was given to establish its authenticity, but it is also true that no direct evidence was available. The pottah is more than forty years old. The writing of the lease was proved, by the evidence given by Soonder Lall, the son of Shyam Lall, the writer of it. The seal of Ali Buksh *alias* Futtey Ali, on the pottah is, on comparison with another seal impressed on a document of 1236 (1830), which was duly registered, inferentially proved. Defendants’ possession of the lands under the said pottah has also been proved. From these significant facts the inference is irresistible that the pottah is [559] true. Now a few words will do to dispose of the objections advanced against it,—(1) All the maliks did not sign the lease. True that all of them did not, but it is also true that one of them, Futtey Ali, did; and Shyam Lall, their chief officer, signed for them. The evidence of the impression of one of the maliks’ seal proves its authenticity beyond all doubt.”

Although the pottah may be an authentic document, it will not bind the maliks who did not affix their seals, or those who claim under them, unless it is shown that Shyam Lall had authority to sign their names. As regards the authority of Shyam to bind these two maliks, all that is found in the passage I have read, from which such authority can be inferred, is that “Shyam Lall, their chief officer, signed for them.”

That in our opinion is not sufficient. It was necessary to show either that Shyam Lall received a special authority from these two maliks to sign their names to this document, or that he had a general authority from them to sign on their behalf all documents of the same description as this pottah. Until such proof was given, the pottah was not admissible in evidence. The fact that it was more than thirty years old only gave rise to the presumption mentioned in s. 90 of the Evidence Act,—namely, that the signature at the foot of the pottah which purported to be in the handwriting of Shyam Lall was in his handwriting, and that the execution which on the face of the pottah appears to be the execution of Shyam Lall was an execution of

* [Sec. 90 :—Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person’s handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.]

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

* This explanation applies also to section eighty-one.

Illustrations.

(a) A has been in possession of landed property for a long time. He produces from his

the pottah by him. To make the pottah evidence against the two maliks who did not execute it, and those claiming through them, the defendants must go further and show that Shyam Lall had the authority of those two maliks to sign their names.

This point is of such vital importance in the case, that although it has been pressed upon us on behalf of the defendants that there is a great deal of evidence in support of the view that Shyam Lall had the requisite authority, we have thought it desirable to remand the case for an express finding of the Lower Appellate Court on the point. As the Lower Appellate Court did not have its attention specially drawn to the point, we cannot treat any conclusion that it has come to [560] or any inference that may be drawn from the facts referred to by the defendants' vakil, as satisfactorily establishing that Shyam Lall was duly authorized. We are also influenced in remanding the case by the further circumstance, that the Judge appears to have been under the erroneous impression that there was no direct evidence available to establish the authenticity of the pottah. [The rest of the judgment is not material to this report.]

Case remanded.

NOTES.

[ANCIENT DOCUMENTS—AUTHORITY TO EXECUTE—

1. The case of *Airey v. Stapleton* (1897) 1 ch. 164 (169) bears on the point decided by this case:—

"The deed purports likewise to have been executed by Mr. Reid as Attorney for A. S. Walsh and in that case also I must make the like presumption. But am I to presume anything more? It is contended that I ought to go further, and to presume that Reid was the duly authorised attorney of Mr. and Mrs. Walsh *ad hoc*, i.e., to exercise the power of appointment. I know of no rule which obliges me to make or which countenances my making, any such presumption. I pronounce no opinion upon the broader question whether such a presumption ought to be made where the execution of the deed was a merely ministerial act. But this is the case of the execution of a special power of appointment; and it seems to me that not only am I not obliged to presume, but I ought not to presume that R.H.B. Read who purported to execute an appointment under a discretionary power, was authorized to do that on behalf of the donees of the power" as it would infringe the rule as to delegation of powers.

N. B.—The point decided by this case is not altogether free from doubt as will be seen from the following extract from *Wigmore on Evidence*, Vol. III, sec. 2144:—

"Whether the circumstances of age, custody and the like will suffice as evidence not only of genuineness of execution by the person purporting to execute, but also, when he purports to act only as agent for another, of the existence of due authority to execute given by that other, has been a matter of some difference of judicial opinion. The general consensus is that a mere authority as agent or attorney will be thus assumed to have existed. Any other result would practically nullify the utility of the whole doctrine in its application to such instruments, since the same lapse of time that has removed the evidence of execution will equally have removed (in the usual case) the evidence of authority to execute; [consequently when the document of authority has in fact survived, it must be proved:—(1826) *Tolman v. Emerson*, 4 Pick. 160]. But when the missing

custody deeds relating to the land showing his title to it. The custody is proper.

(b) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c) A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper.]

element is anything beyond an agent's authority, there is in some Courts a hesitation; it may be said that they distinguish, in effect, between a matter of mere authority and a matter of title in the estate [*Airey v. Stapleton* (1897) 1 Ch. 164—authority as attorney to exercise a special power of appointment not presumed.] Nevertheless, the other Courts seem to set no definite limits and to be liberal in assuming all the elements necessary to authenticate and to constitute a *deus ex machina*."

No presumption as to the authority of the persons executing the documents to do as they purported to do:—(1878) 3 Cal., 557; 6 Cal., 209.

See also as to the strength and nature of the presumption that is drawn:—21 Bom., 1; 29 Cal., 740; 26 All., 581 P. C.]

[3 Cal. 560]

APPELLATE CIVIL.

The 9th January, 1878.

PRESENT:

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE KENNEDY.

Zoolfun Bibee.....Defendant

versus

Radhica Prosonno Chunder.....Plaintiff.*

Right of occupancy—No title in landlord—Title by possession—Bengal.

Act VIII of 1869.

A ryot occupying and cultivating land for more than twelve years under a landlord who has no title to the land, nevertheless acquires a right of occupancy. The right is not one conferred by any lessor. It is a right which, by virtue of the law, grows up in the ryot from the mere circumstance of cultivating the land for twelve years or upwards and paying rent due thereon.

Syud Ameer Hossein v. Sheo Suhae (19 W. R., 338; see also *Pandit Sheo Prokash Misser v. Ram Sahoy Singh*, 8 B. L. R., 165) followed.

IN this case the plaintiff sued to recover possession of certain lands by establishing his title as auction-purchaser. The plaint stated that the lands, the subject of the suit, were *julpai* [lands are those subject to inundations by the sea, and from which salt is procurable. *Mudur* means good arable soil, as opposed to *julpai*] lands of certain mouzahs, which had been given up by the Salt Agent, and that, on the abolition of the salt agency, the Collector had settled all the *julpai* lands with the zemindars, that default in [361] the payment of the arrears due being made, the *julpai* mehal was brought to sale and purchased by the plaintiff; and that the defendant was an occupant of the land in question without any title, and would not allow the plaintiff to take possession.

The defendant contended and sought to prove that the lands in dispute were not part of the *julpai* lands, but were *mudur* lands of Mouza Raipore. He further alleged that the estate in which the said lands were included had been let in farm to one Rutnahari Pahari, who had sublet a portion comprising the lands in dispute to one Jonab Ali as a jote, and that the defendant had subsequently purchased the jote tenure from Jonab Ali and had been in possession since the time of such purchase.

* Special Appeal No. 908 of 1877, against the decree of L. R. Tottenham, Esq., Judge of Zilla Midnapore, dated the 21st November 1876, reversing the decree of Baboo Jibun Kristo Chatterjee, Munsif of Namal, dated the 27th September 1875.

The Court of First Instance found upon the evidence that the lands in dispute were parts of the *julpai* lands as mentioned by the plaintiff, and that they were not *mudur* lands as pleaded by the defendants. Further found that the defendant, and her vendor Jonab Ali, long held possession of the disputed lands, by cutting jungle and constructing *kherry* (an artificial lake or reservoir, a tank) bunds, and bringing them under cultivation at heavy expense; and that the defendant had been in possession for about seventeen or eighteen years, and that Jonab Ali was in possession during the Salt Agent's time. On these grounds it decided that the plaintiff was entitled to such proprietary possession as is exercised by a superior landlord, but that the defendant should continue in possession as jotedar having acquired occupancy rights. The plaintiff appealed in respect of this latter portion of the judgment, and the District Judge allowed the appeal for reasons which sufficiently appear in the judgment of the High Court, to which the defendant appealed.

Mr. R. E. Twisdale (with him Moulvie Mahomed Yusuf) for the Appellant.

Baboo Bhowany Churn Dutt for the Respondent.

[562] The judgment of the Court was delivered by

Jackson, J. (who, after stating the facts, continued):— Against the latter part of the judgment the plaintiff appealed to the District Court, and the effect of the District Judge's judgment was this—that although the defendant might have held this land and paid the rent for twelve years and more, yet that, as she was not paying to the plaintiff, but held the land as a portion of a different estate, the right of occupancy, which the Rent Law recognizes and affirms, could not grow up in such circumstances. He says: "The defendant's jote is in the *mudur* land, and her encroachment on *julpai* land, over which neither she nor her vendor had any right, cannot give her a right of occupancy: she was simply a trespasser." He went on: "The finding of the lower Court, that the land is part of the *julpai* estate, is tantamount to a finding that the defendant is only a trespasser. The respondent's pleader argues that as she was acknowledged as a tenant by her lessor, she cannot be treated as a trespasser and ejected, but the party whose tenant she is, had no right in the *julpai* lands, and he could not confer on her a right which he did not himself possess." It is clear from that, that the defendant had not ousted any person who was a rightful jotedar or tenant or anybody else; but that he had taken a lease of these lands from a person claiming to have a right, and, as such lessee, had occupied and presumably paid the rents. Now that a person occupying land under one who is not the rightful landlord does, nevertheless, acquire a right of occupancy, is most clearly laid down by PHEAR and AINSLIE, J.J., in the case of *Synd Ameer Hossein v. Sheo Sukhae* which was apparently a case in direct analogy with the present. In a suit between the zemindars of one estate and the proprietors of another, it had been fairly proved and determined that the land, the subject of the suit, belonged to the plaintiffs: and upon their contending, in the suit, which was then before the Court, that even if the defendants had cultivated for twelve years under the maliks, they could acquire no right of occupancy, inasmuch as the maliks had no title, the learned Judges held, "the mere fact that the person to whom he for some years paid rent had no title cannot take away from him the character of ryot or prevent him from counting those years in the time

* 19 W. R., 338: see also *Pandit Sheo Prokash Misser v. Ram Sahoy Singh*, 8 B.L.R., 165.

"necessary to give him a right of occupancy under Act X of 1859." In that decision, as at present advised, we entirely concur. The Judge, it appears to me, states a fallacy when he speaks of a lessor conferring on the ryot a right which he does not himself possess; that is not a right conferred by any lessor. It is a right which, by virtue of the law, grows up in the ryot from the mere circumstance of cultivating land for twelve years or upwards and paying rent due thereupon. It appears to me, therefore, that the Lower Appellate Court is mistaken; that the judgment of the Judge, therefore, must be set aside, and the judgment of the Court of First Instance restored with costs.

[3 Cal. 563]

The 14th and 16th February, 1st March and 1st April, 1878.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MARKBY.

Panchcowrie Mull and others.....Plaintiffs
versus
Chumroolall and others.....Defendants.

Suit for Management of a Religious Endowment --Advocate-General a party to such suits--Ambiguous description of plaintiff--Jain sect--Hindu law --Sebat--Jurisdiction of High Court--Religious endowments--Act XX of 1863.

The plaintiffs, describing themselves as the Calcutta Tanno Pantee Anungo Punch Brethren, in whom (as they alleged) was vested the management and control of the temples, endowments, and worship of the Degumbery sect of Jains, and who formed the committee for the management of all the Jain charities as well in Calcutta as in all the other towns and places in India, brought a suit praying, *inter alia*, for the construction of a will, and for a declaration of their rights thereunder as members of the said Punch, and to have property dedicated by the will to religious purposes ascertained and secured. *Held, per KENNEDY, J.* in the Court below, that the description of the character in which the plaintiffs sued was uncertain and ambiguous, that, inasmuch as the property in question was not *devout*, the plaintiffs were not *sebats*, and all they could claim, therefore, was a right of management; and that a mere manager, without some special power which the Hindu law confers on *sebats*, could not institute such a suit, that the plaintiffs not [564] being a corporation could not sue in a corporate character; that, assuming religious endowments had been created by the will, leave to bring the suit should have been obtained under s. 18 of Act XX of 1863; and that, if the gifts in the will could be treated as charitable bequests, possibly the Advocate-General could sue. *Held on appeal*, reversing the decision of the lower Court, that the right in which the plaintiffs sued was sufficiently shown, and that the object of the suit was not to assert any personal right of ownership in the plaintiffs. *Held further*, that the Advocate-General was not

* [Sec. 18 :—No suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit. The application may be made upon unstamped paper. The Court, on the perusal of the application, shall determine whether there are sufficient *prima facie* grounds for the institution of a suit, and it in the judgment of the Court there are such grounds, leave shall be given for its institution. In calculating the costs at the termination of the suit, the stamp duty on the preliminary application shall be estimated, and shall be added to the costs of the suit. If the Court shall be of opinion that the suit has been for the benefit of the Trust, and that no party to the suit is in fault, the Court may order costs, or such portion as it may consider just, to be paid out of the estate.]

Preliminary application for leave to institute suit.

Costs.

that no party to the suit is in fault, the Court may order costs, or such portion as it may consider just, to be paid out of the estate.]

a necessary party, although it was desirable that such suits should be brought only with his consent, or by the leave of the Court. *Held* further, that suits of this description do not fall under Act XX of 1863, but come under the ordinary jurisdiction of the Court, inherited from the Supreme Court, and conferred upon that Court by its Charter—a jurisdiction similar in its general features to that of the Lord Chancellor in England.*

Ganes Sing v. Ram Gopal Sing (5 B. L. R., App., 55) dissented from.

APPEAL from a decision of KENNEDY, J., dated the 20th August 1877.

The suit was one for the construction of a will, to have certain property dedicated by the will for religious purposes ascertained and secured, for an account, for a receiver, and for other relief; but the only question material to this report was as to the right of the plaintiffs to maintain the suit. The first and second paragraphs of the plaint were as follows:—

"The plaintiffs are the persons who constitute the Calcutta Tairo Pantee Anungo Punch Brethren, the said body being a [666] body in which is vested the management and control of the temples, endowments, and worship of the Degumbrey Sect of Jains, and which body forms the committee for the management of all the Jain charities as well in Calcutta as in all the other towns and places in India."

"The only other Tairo Pantee Anungo Punch in the Presidency of Bengal is the Punch of and at Ferozabad, near Agra, in the North-Western Provinces of India; but all the Jain temples and charities in India are under the management of the said Calcutta Punch, and by the usages and customs of the Jains, a member of one Punch becomes, on going to any town where there is a Punch, entitled, by virtue of his being a member of the Punch at one place, to become and act as a member of the Punch of any and every town to which he may happen to go."

The plaint then stated that one Hoolaseelall, a prominent and wealthy member of the said sect of Jains, died in Calcutta on the 21st of December 1826, after making a will, by which, among other things, he directed, with respect to a six-anna share of his business in Calcutta, as follows:

"Six annas my own. The profit that shall accrue any year, the same you will disburse for dhurram (piety) as follows: Particulars,—two annas profit to Sri Munderjee of Calcutta of the Tairo Pantee Jainee Anungo, which you will appropriate for the expenses of its poojarees (persons performing poojah), and tallookas (drudges), and repairs and articles for poojahs; the mooktears to apply the same are the Punch Brethren of the Tairo Pantee Anungos. Two annas you will appropriate for the expenses of Sri Seshorjees Mundeers (temples), poojarees, tallookas, nowbutkhannah repairs, gomastah, and articles for poojahs. Two annas at Purajahad, etc., to the Sadharmee Brethren; such Brethren as go there on pilgrimage, you will give to them in a suitable manner, and will expend all this in the matter of the sadhram: if there be loss, then you

* Chapter XL, s. 539 of the Civil Procedure Code (Act X of 1877) provides, that suits relating to charities may be brought by the Advocate-General acting *ex-officio*, or by two or more persons having a direct interest in the trust, the leave in writing of the Advocate-General having been first obtained.

In England the Attorney-General, representing the Crown in its capacity as *parens patriae* may exhibit informations on behalf of an individual, the object of a general charity. The person who puts the Attorney-General in motion is termed the 'relator,' and although he is commonly required for the purpose of securing costs, yet the Attorney-General may proceed without a relator (*In the matter of the Bedford Charity*, 2 Swanst. 471—520); and when he does, he is entitled to his costs (*Attorney-General v. Draper's Co.*, 4 Beav., 805). By the Code the Advocate-General is not empowered to move on behalf of a third party, nor is there any provision for payment of costs which may be incurred by him in charity suits.

will write such against my name in my six annas Puttee : if there be profit in the six annas, you will appropriate the same for the aforesaid expenses."

By his will, the testator also dedicated various other properties, and gave various other bequests to and for charitable [366] purposes and pious acts ; and then gave the following direction : " And the sums for pious uses that I have directed to be applied by different persons : if any of them shall not apply any sum, or shall keep back any, all the Tairo Pantee Anungo Brethren, of all the towns have the power to cause the same to be applied or to exact an account thereof."

The testator appointed one Hursahay Ghose and one Luchmeechand executors of and trustees under his will, and they both obtained probate of the will and took possession of all his estate ; and on the death of Luchmeechand the whole of it came into the possession of Hursahay Ghose, who continued to carry on the business of Hoolaseelall. The defendants were Chumroolall, Dhunnoo Baboo, an infant, and Sreemutty Monee Bibee, the widow of one Indro Chund Baboo. Indro Chund Baboo was the only son and sole heir and representative of Hursahay, and the executor of his will, and had taken possession of all his estate, among other of all the property belonging to the estate of Hoolaseelall. The defendant Chumroolall was one of the two sons, and Dhunnoo, the grandson by the other son of Indro Chund Baboo, who had come into possession of all the estate of Indro Chund, and, as part of it, of the property of which the plaintiffs claimed a share and an account.

The plaintiffs stated that they were desirous, as members of the Calcutta Tairo Pantee Anungo Punch Brethren, of having the will of Hoolaseelall construed, and of having their rights as such Punch ascertained and declared, and of having the property dedicated to the said religious purposes and pious acts ascertained and secured.

The defendants, in their written statement, set up the defence that the plaintiffs had no cause of action ; and on the case coming on for settlement of issues, the question was raised whether the suit as framed could be maintained.

Mr. Branson and Mr. Jackson for the Plaintiffs.

The Advocate-General (Mr. Paul) for the Defendant Chumroolall.

Mr. Stokoe for the Defendant Dhunnoolall.

[367] KENNEDY, J. — I do not know that I have ever met a document much more difficult to understand than the will produced in this case. Indeed, the interpreters who have had the duty of preparing the translations annexed to the plaint, seem, in some portions of it, to have abandoned the task as hopeless, and marked the passages as unintelligible. As matters stand, however, I feel myself relieved from the necessity of trying to ascertain the meaning of this will, for, in my opinion, the plaintiffs have no such interest as entitles them to maintain a suit.

The plaint sets out in the two first paragraphs the alleged position of the plaintiffs. I may observe that I think if there were no other objection to the suit, it would be difficult to maintain it with so uncertain and ambiguous a description of the character in which the plaintiffs sue, and of the nature and constitution of the body to which they belong ; and this is something more than a mere technical objection, for, if the account in the second para. be true, every member of every Punch in India is in fact a member of the Punch here, and ought to be joined in order to bind him, as well as for other reasons.

I asked Mr. *Branson* if he thought himself able to contend that the property in this case was *dewutter*, and he practically relinquished that contention which, indeed, I think on the words of the will would have been wholly untenable. We, therefore, have not the plaintiffs in the position of *sebaits*, and they do not claim,—and it is clear that, on the terms of the will, they could not claim,—property in the subject-matter of the suit; all they claim, or could claim, is a right of management. Well, I confess that it is a little new to me to find a suit for property instituted by a mere manager without some special power. The Hindu law does confer such power in the case of a *sebaite* (if in truth he be a mere manager); but then the property is vested in the deity, and the *sebaite* merely represents him. Here, the property not being *dewutter*, it is not vested in any one, and the only claim is to have the right of management, which is not alleged to have been vested in them under the provisions of Act XX of 1863. It seems to me that this, in itself, is a sufficient objection to the present frame of this suit; see *King of Spain v. Machado* (4 Russ., 225).

[568] There is, however, a further difficulty, which seems to me insuperable; it was that, which was most strongly pressed by Mr. *Advocate-General*; and I did not hear any answer to it from Mr. *Branson*, save a faint suggestion as to the possible difference of Indian law. It is this: the plaintiffs sue not in their own individual right, but as the persons constituting the Calcutta Punch; they do not allege that they were the persons who constituted it at the time of the testator's death, and as that occurred more than fifty years ago, it is in the highest degree improbable that any of them were. They sue, therefore, it would seem, not in their individual, but in their supposed corporate capacity. There is no allegation that they have been legally incorporated, and it is improbable that they have been. Well, in *Lloyd v. Loaring* (6 Ves., 773), the Chancellor distinctly held that the Court ought not to permit persons to sue in a corporate character who do not fulfil it. That is a statement of the law of the Courts in Westminster Hall, thence of the Supreme Court, and derivatively of this Court. It does not come within any of the classes in which native laws are reserved, and if it did, nothing has been suggested to me to show that Hindu law is different in this respect.

Mr. *Branson's* strong point was, that every mode of procedure was so beset with difficulties that he was unable to find an available course. I think it possible that there may be none. The provisions of the will are so confused and absurd that it is quite possible that there may be no person in a position to put them in force; but Mr. Justice NORMAN, in the case of the Sikh *Sungut* in Calcutta—*Ganes Sing v. Ramgopal Sing* (5 B. L. R., App., 55)—has held, and in my opinion rightly held, that the provisions of Act XX of 1863 apply to religious endowments in the Presidency towns, and to persons who are *de facto* trustees, etc. If this were a correct view of the case, the defendants or some of them, might (if any liability attaches on them, and if there be any religious endowments created by the will) be sued as trustees under the 14th section; but in that case preliminary leave under the 18th section would be necessary. If these can be treated as not religious but charitable gifts, possibly the [569] *Advocate-General* could sue; but when I am asked to take the accounts of a trade for upwards of fifty years, in order to carry out and define the trusts of an unintelligible will, I confess that, even if it were not rather inconsistent with my judicial duty to become the adviser of the plaintiffs, and to point out to them a safe course of procedure if any such exist, I should not feel particularly anxious to give them any advice in this matter. My duty is simply to

decide upon their present suit, and this seems to me untenable ; and, if they even are able to get over these difficulties of form, I think they will probably find others of substance lying behind, with which, however, I have at present nothing to do. I must dismiss this suit. »

From this decision the plaintiffs appealed.

Mr. *Branson* and Mr. *Jackson* for the Appellants.

The Advocate-General (Mr. *Paul*) for the Respondent Chumroolall.

Mr. *Stokoe* for the Respondent Dhunnoolall.

Mr. *Jackson* contended that the suit was maintainable in its present form, and referred to the cases of *Ganes Sing v. Ramgopal Sing* (5 B. L. R., App., 55), *Delroos Banoo Begum v. Nawab Syud Ashgur Ally* (15 B. L. R., 167), *Jeyangurulavaru v. Sri Hati Durma Dossu* (4 Mad. H. C., 2), and *Lloyd v. Loaring* (6 Ves., 773).

The Advocate-General was called on for the Respondent Chumroolall.—The plaintiffs here affect to have the whole right of action in themselves, but they only have it jointly with others, viz., the rest of the members of the Punch ; see Mitford on Pleading, 4th ed., p 161. The will does not give them any right to an account except in a suit brought by all the members of the community. No such right is given by the will to the Calcutta community alone ; nor could such right be given, as a corporation cannot be created by will, and the plaintiffs are suing here as a corporation, a course which in *Lloyd v. Loaring* (6 Ves., 773) was not allowed. [570] The suit is not maintainable even as to the jewellery, as to which there is no allegation that it was ever vested in the plaintiffs.

Mr. *Stokoe* for the Respondent Dhunnoolall.—The plaintiffs say they have the management and control of the property, but not that they have any interest in it. The suit, if bad, should not be amended as in *Lloyd v. Loaring* (6 Ves., 773), for here the plaintiffs do not sue as having any interest : they have no *locus standi* as trustees of the sect, or as managers of the fund. Such a body has no legal existence, and can have no legal right ; see Lewin on Trusts, 6th edition, pp. 75 and 805.

A reply was called for only on the point as to how far the decision in *Ganes Sing v. Ramgopal Sing* (5 B. L. R., App., 55) would affect the case.

Mr. *Branson* in reply contended that that decision did not govern the case at all. Act XX of 1863 did not apply. That Act only applies to endowments, &c., to which the regulations it repeals applied. The plaintiffs do not sue under the provisions of that Act, and that Act cannot take away any right to sue which the plaintiffs may otherwise have. It is an enabling Act, and persons can sue under it, who could not otherwise have done so. This endowment never came under the control of the Board of Revenue, and therefore Act XX of 1863 does not apply to it ; see *Kuneez Fatima v. Saheba Jan* (8 W.R., 313), and *Delroos Banoo Begum v. Nawab Syud Ashgur Ally* (15 B. L. R., 183). The subject of suit here could not have been the subject of a public endowment. The case of *Delroos Banoo Begum* (15 B. L. R., 183) has been upheld by the Privy Council. [The Advocate-General pointed out that s. 14 was the first section of the Act in which the word "such" was not used ; the word there used was "any," which was very wide.]

Cur. adv. vult.

The judgment of the Court was delivered by

Garth, C. J. (who, after shortly stating the nature of the suit as appearing from the plaint, continued) :—The learned Judge [571] in the Court below has dismissed the suit (without settling any issues, and without going into evidence), as we understand, upon four grounds—

1st.—That the plaintiffs do not show in what right they sue.

2nd.—That the plaintiffs are not a corporation, and cannot therefore claim to hold property by succession.

3rd.—That the Advocate-General is not a party to the suit.

4th.—That no leave of the Court to bring the suit has been obtained under s. 18 of Act XX of 1863.

The right in which the plaintiffs sue is, in our opinion, sufficiently shown. They describe themselves as the persons forming for the time being the Tairo Pantee Anungo Punch Brethren, and as such they claim to have, on behalf of themselves and others, the general management and control of the religious endowments belonging to the Degumbery sect of Jains. They also show that the bequests, which they seek to enforce, are bequests which the testator directed to be applied under the management and direction of this very same Punch, to certain purposes connected with the worship of this sect. So far, therefore, there appears to us to be no objection to the frame of the suit. Of course, when the issues are properly framed, the plaintiffs will have to prove this part of their case.

The next objection to the suit, in our opinion, also fails. We do not consider the object of the suit to be to assert any personal rights of ownership in the plaintiffs whatsoever. If any part of the plaint is ambiguous in this respect, all doubt as to this might have been removed when framing the issues. What the plaintiffs substantially seek, is to have the trusts of the will, in which they are interested (not beneficially, but as the representatives of their sect), ascertained, and the performance of these trusts secured.

Nor do we consider, that the practice of this Court requires that the Advocate-General should be a party to a suit of this description. We have inquired into the matter, and, as far as we have been able to discover, this is not necessary. For example, in 1861, we find a person named Nolbindoff filing a bill on behalf of himself and all the other Armenian inhabitants of New Naukchewan in Russia, to enforce certain bequests to [572] the institutions of that city; and he only alleged, as his title to bring the suit, that he was one of the inhabitants. In this case a scheme was drawn up and a decree made, without any concurrence of the Advocate-General.

The last objection is, no doubt, supported by the authority of Mr. Justice NORMAN; but having carefully considered the Act XX of 1863, we are unable to agree in the view that it was intended to apply to such a suit as this. The first thirteen sections of the Act clearly do not apply, and although the language of s. 14, which empowers any person interested in a religious endowment to sue a trustee, is general in its terms, yet we do not consider that the Legislature had in its contemplation to interfere with the procedure of the Supreme Court in reference to trusts concerning property, which could not, under any circumstances, come under the direct control of Government. Such a suit as the present is not brought under Act XX of 1863, but under the ordinary original jurisdiction of this Court, inherited from the Supreme Court, and conferred upon the Supreme Court by its Charter—a jurisdiction similar in its general

features to that of the Lord Chancellor in England; see *Attorney-General v. Brodie* (4 Moore's I. A., 190).

At the same time, whilst we believe that this is the correct view of the law as it stands at present, we cannot help thinking it extremely desirable, that suits of this kind to enforce trusts, which are of a public character, should only be brought either by the consent of the Advocate-General, or by the leave of the Court. Such suits are very often vexatious and open to abuse, and we consider that a procedure similar to that which is provided by Act XX of 1863, for suits to which that Act extends, might usefully be applied to all suits of this nature. This of course could only be effected by legislative interference.

We think that the learned Judge was wrong to dismiss the suit upon the grounds stated by him. The decree will, therefore, be set aside and the suit remanded to be heard upon its merits.

The costs of the appeal will be costs in the cause.

Case remanded.

NOTES.

I. XX OF 1863 NOT APPLICABLE TO THE PRESIDENCY TOWNS WHERE THERE WERE SUPREME COURTS—

See (1900) 24 Mad. 219; (1896) 6 M. L. J. 239; (1878) 2 C. L. R., 128.

II. THE ADVOCATE-GENERAL NEED NOT BE A PARTY—

This case has been followed:—(1900) 24 Mad. 219; (1897) 23 Mad. 28; 7 M. L. J. 281; (1896) 6 M. L. J. 239.

III. LEGISLATION—

The C. P. C. of 1882, sec. 539, included religious or charitable trusts, and the C. P. C., 1908, sec. 92 (2) enacts:—

“Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.”

IV. RIGHT OF SUIT BY WORSHIPPER ETC.—

In his own right, as such, apart from suing in representative character on behalf of all to enforce religious and charitable trusts under a will, etc.—See in addition to this case (1878) 2 C. L. R. 128 (where substitution of one self for the trustee was prayed); (1884) 8 Bom. 450; (1899) 23 Mad. 28; (1897) 21 Mad. 10; (1890) 6 C. L. R. 58; (1884) 7 All. 178; (1881) 8 Cal. 32.]

[578] APPELLATE CRIMINAL.

The 25th and 27th March, 1878.

PRESENT :

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE CUNNINGHAM.

The Empress on the Prosecution* of Denonath Ghattack

versus

Rajcoomar Singh and another.*

Land held by joint Owners—Abatement of a Nuisance—Riot—Criminal Trespass—Mischief—Penal Code, ss. 141, 147, 425—Examination of Witnesses for Defence—Criminal Procedure Code (Act X of 1872), ss. 219, 359, 362—High Court, Extraordinary jurisdiction—High Court Charter, cl. 15.

A, a joint owner of a parcel of land, erected on it an edifice without the consent and against the will of B, another joint owner. A dispute having arisen in consequence, the Magistrate held an enquiry, and made an order under s. 530 of the Criminal Procedure Code, awarding to A, exclusive possession of the part of the land on which the edifice had been erected. *Held per JACKSON, J.*, that such order was erroneous, as the matter was not one to which s. 530 could apply.

B subsequently brought a suit in the Civil Court to establish his title to joint possession of the whole parcel and for a declaration that A was not entitled to erect any edifice thereon; and he further prayed that such edifice should be removed. B obtained a decree, whereupon his servants went on the land and pulled it down. They were charged before the Deputy Magistrate with having committed mischief, and on this convicted and fined. *Held per JACKSON, J.*, that as there had been no causing of wrongful loss the accused had not been guilty of mischief.

On the 8th October, the accused, who were the servants of B, found the men in the employ of A were putting up this erection, a *nombut-khana* again, and accordingly protested against its erection, pulled down the bamboos, thrust aside the servants of A throwing to the ground one man who was clinging to the bamboos. On the 9th October, 1877, these servants were charged before the Magistrate with rioting, and being called upon for their defence, named several witnesses, and summonses on the following morning were issued for their appearance, but they were not found. The accused then applied for further time for the appearance of the witnesses. This the Magistrate refused to grant, and convicted the accused on 12th October 1877. *Held per JACKSON, J.*, that this being a warrant case it was the duty of the [574] Magistrate to summon the witnesses that might be offered by the accused, and that he might at his discretion have adjourned the case.

Held further per JACKSON, J., that the meaning of s. 359 of † the Criminal Procedure Code is, that if among the persons named by the accused as witnesses, the Magistrate considers that

* Criminal Rule, No. 39 of 1878, against the order of J. P. Grant, Esq., Sessions Judge of Zilla Hooghly, dated the 23rd February 1878, enhancing the order of A. H. Haggard, Esq., Joint Magistrate of Serampore, dated the 12th October 1877.

† [Sec. 359:—If the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice he

may require the accused person to satisfy him that there are reasonable grounds for believing that such witness is material. If the Magistrate be not so satisfied, he shall not be bound to summon the witness; but, in doubtful cases he may summon such

witness, if such a sum is deposited with the Magistrate as he thinks necessary to defray the expense of obtaining the attendance of the witness.]

any witness is included for the purpose of vexation and delay, he is to exercise his judgment and enquire whether such witness is material ; but that the section is not intended to enable the Magistrate to enquire into what the defence of the accused person is to be, and to consider whether, on learning the nature of the defence, he is absolutely to abstain from summoning the whole of the witnesses cited by the accused ; and further, that in the present case there was not any purpose of vexation or delay, and that by the refusal to grant further time the accused had been probably prejudiced in their defence.

Held further per JACKSON, J., that as the accused were not on the land in question as members of an unlawful assembly, nor for any unlawful purpose, the conviction, as well as the procedure, was illegal.

Held per CUNNINGHAM, J., that the accused were merely exercising the remedy of abating private nuisance, and were exercising a legal right of self-defence.

Held further per CUNNINGHAM, J., that the acts of the complainants in erecting the *nawbut-khana* amounted to mischief, and came within the purview of s. 425 of the Penal Code.

Held further per AINSLIE and McDONELL, JJ., that the High Court, in the exercise of its powers of extraordinary jurisdiction, cannot, in criminal matters, interfere, unless all other remedies provided by law have been previously exhausted. Therefore, where parties who had been convicted of riot by a Magistrate, and who, having a right of appeal to the Sessions Court instead of doing so, moved the High Court under cl. 15 of the Charter, the Court would not interfere until that remedy had been resorted to.

In this case a piece of land was the joint property of Gopee Kisto Gossain and Shama Churn Lahirie and a third party, who took no part in these proceedings. Shortly before the Durga Poojah holidays, 1876, a dispute arose between Gopee Kisto Gossain and Shama Churn Lahirie in consequence of the latter having erected a *nawbut-khana* or platform for musicians resting on bamboo posts, on a portion of the joint piece of land, to which the former objected. Hearing of this dispute, the Magistrate of the sub-division held an enquiry and made an order under s. 530 of the Code of Criminal Procedure adjudging exclusive possession of that part of the land on which the *nawbut-khana* stood, to Shama Churn Lahirie. On this, Gopee Kisto Gossain instituted a suit in [375] the Court of the Subordinate Judge, the object of which was to have it declared that he, Gopee Kisto Gossain, was entitled to joint possession over the whole of this piece of land, and that Shama Churn Lahirie was not entitled to erect a *nawbut-khana* thereon ; and it was specially prayed that this declaration should be granted, and that the *nawbut-khana* should be broken down. On the 19th May 1877 the Subordinate Judge made a decree, which was in terms that the plaintiff's suit be decreed.

In September 1877, the *nawbut-khana* not having been taken down by Shama Churn Lahirie in compliance with the decree of 19th May, some servants of Gopee Kisto Gossain went to the place and pulled it down. On this, upon the complaint of Shama Churn Lahirie, the men who had pulled down the *nawbut-khana* were brought before the Deputy Magistrate, and on the 28th September 1877 convicted of the offence of mischief under s. 425 of the Indian Penal Code and fined.

On the morning of the 8th of October 1877, some servants of Gopee Kisto Gossain, including the petitioners in the present case, seeing some *gharamis* in the employment of Shama Churn Lahirie engaged in re-erecting this *nawbut-khana*, not only protested against the erection, but pulled down the bamboos, thrusting aside the servants of Shama Churn Lahirie, and throwing to the ground one of them who had climbed up on one of the bamboos and refused to come down.

On the forenoon of the 9th October, complaint was made by Shama Churn Lahirie to the Joint Magistrate, who at once summoned the accused; and, on their being brought before him on the same day, at first proposed to deal with the case summarily; but this course being objected to by the pleader of the accused, he proceeded to frame a charge under s. 141* and s. 147† of the Indian Penal Code, and then and there called upon the accused for their defence. Several witnesses were named for the defence, and summonses for their attendance were issued next morning. These witnesses not having been found, the accused, on the 12th, applied to the Joint Magistrate for further time, representing that the time was that of poojah, and they had not had a fair opportunity for procuring the attendance of their witnesses. The Joint Magistrate declined to allow further time and pro-[576]ceeded to convict the prisoners of the offence of rioting under s. 147 of the Indian Penal Code, and sentenced each of them to rigorous imprisonment for three months.

The prisoners, without appealing to the Sessions Court, on the 26th October, moved the High Court (WHITE and McDONELL, JJ.) under cl. 15 of the Charter, to send for the records: and obtained a rule calling upon the complainant Denonath Ghattack to show cause why the sentence passed should not be set aside; and the High Court directed the prisoners to be released on bail. On 18th January 1878 the rule came on for argument before AINSLIE and McDONELL, JJ., and was discharged. The learned Judges delivered the following judgments:—

"Ainslie, J.—Mr. Justice WHITE has expressed a wish that this matter should be disposed of by this Bench. I am of opinion that this Court cannot interfere in the exercise of its powers of extraordinary jurisdiction, unless all other remedies provided by law have been exhausted. The petitioners in this case clearly have the remedy of an appeal. Therefore, until that remedy has been resorted to, this Court, in the view I take of the proper application of cl. 15 of the Charter, ought not to interfere.

"Whether, under any circumstances, it would do so, I need not say. The rule will be discharged. I concur in the suggestion of my learned brother as to the propriety of admitting an appeal, should the petitioners think fit to tender it, and in suspending the execution of the Magistrate's order for one week from this date."

* [Sec. 141:—An assembly of five or more persons is designated an "unlawful assembly," if the common object of the persons composing that assembly is—

Unlawful assembly.
First.—To overawe by criminal force, or show of criminal force, the Legislative or Executive Government of India, or the Government of any Presidency or any Lieutenant-Governor, or any public servant in the exercise of the lawful power of such public servant; or,

Second.—To resist the execution of any law, or of any legal process: or,

Third.—To commit any mischief or criminal trespass, or other offence; or,

Fourth.—By means of criminal force, or show of criminal force to any person, to take or obtain possession of any property or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or,

Fifth.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.]

† [Sec. 147:—Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]

MCDONELL, J.—I have only to add that Mr. Justice WHITE entirely concurs in the view taken by my learned brother AINSLIE; and that had it been brought to our notice that there was an appeal, we should not have granted the rule. At the same time, we think that the Judge would exercise a wise discretion if, under the circumstances, he would admit the appeal after time.

“The applicants are at present on bail, and if they do not appeal within one week from this date, the sentence will be carried out.”

[577] An appeal was, accordingly, presented to the Judge of Hooghly. On 5th February 1878 that learned Judge dismissed the appeal, enhancing the punishment to six months' rigorous imprisonment, and further directed that proceedings should be taken against Goopee Kisto Gossain, the employer of the accused, and also against Nundolall Gossain, his son.

A rule to show cause why the conviction should not be quashed having been granted by the High Court (JACKSON and CUNNINGHAM, JJ.), the records were sent for and the matter came on for argument.

Mr. J. D. Bell (with him Baboo Sreenath Chunder) for the complainant showed cause.

Mr. Branson (with him Mr. Jackson and Baboo Troyluckonash Mitter and Baboo Obhoy Churn Bose) for the Prisoners.

Mr. Bell.—The destruction of the *nawbut-khana* was mischief under s. 425 of the Penal Code. [JACKSON, J.—We must take it as being found by a competent Civil Court that Goopee Kisto Gossain was entitled to joint possession of the whole parcel of land.] Although he may have a certain right, still he cannot take the law in his own hands, and enforce it as was done here. If we had acted contrary to or inconsistently with the Civil Court's decree, the Civil Court could have been appealed to, and an injunction to stop proceedings obtained. Section 425, para. 2, applies to property held joint. Mr. Branson.—The *nawbut-khana* itself was not joint property. Again, the conduct of the other side amounted to criminal trespass under s. 441. [CUNNINGHAM, J.—If co-proprietors disagree as to the enjoyment of joint property and a row ensues, can that be called a riot?] Yes, assuming there was an unlawful assembly, each member of it is guilty of riot. Granting the other side had a right, they sought to enforce it by means which amount to criminal force as defined by s. 350. Bamboos were pulled down, our servants thrust aside, one man thrown to the ground. Clearly this was criminal force, and as it was committed when more than five persons were present, it amounted to an unlawful assembly, and the parties are, therefore, guilty of riot. As to [578] procedure, no material injury has resulted from evidence not being called, as it would not have altered the Magistrate's finding. Moreover, the witnesses were summoned, and although they were in Serampore, they did not choose to appear.

Mr. Branson.—It is not clear that five persons were present; if not, then there would be no unlawful assembly. With the exception of a man being pushed aside there was no force; if there had been, the police would have interfered. We were entitled under the decree of the Civil Court to pull down the *nawbut-khana*, although it would have been more regular if the decree had contained a mandatory injunction directing its removal. Admitting five of our servants were present, still that would not be an unlawful assembly, as they were only removing a nuisance: Blackstone's Commentaries, 3rd vol., fifth edition, p. 354 [11 Q. B., 904 (reads at p. 909)]. The question to be considered is, who had the legal title to the land? *Lows v. Telford* [L. R., 1 App. Ca., 414

(reads at p. 418)]. Here the men were protecting their master's property, and cannot therefore be considered as forming an unlawful assembly. *Shunker Singh v. Burmah Mahto* (23 W.R., Crim. Rul., 25). We were protecting our property and endeavouring to prevent mischief being done to it; in fact, exercising the right of private defence, and that cannot be said to amount to criminal force—*Brij Singh v. Khub Lall* (19 W.R., Crim. Rul., 44).

* As to procedure, the accused were prejudiced in their defence by not having their witnesses examined, as their testimony might have been most material.

Cur. adv. vult.

The following judgments were delivered:—

Jackson, J. (after stating the previous proceedings as set out above, continued as follows):—It appears to me in the first instance, that the Joint Magistrate was in error in making any order in this matter under s. 530 of the Code of Criminal Procedure. It seems to me that the subject-matter was one to which that section could have no application. There was really [579] no question of possession. The land was in the joint possession of the disputants, and the only question was, whether one of them being a joint owner was at liberty to make use of the land in such a manner as to cause what the other joint owner chose to consider an annoyance, and against the will of that joint owner. In fact, the Magistrate himself, in a passage of his judgment, seems to furnish an excellent reason why he should not have exercised jurisdiction under that section. Adverting to an argument of the pleader for the accused, as to the right of Goopee Kisto Gossain to forbid this mode of enjoyment, he says:—"I am unable to accede to the application of this doctrine. The vakil says that the doctrine would be monstrous that a co-sharer might build a house upon land held in joint partnership for his sole use," and so on. Then he goes on to say: "The objection does not apply here, for a *nawbut-khana* is not a house; it is the flimsiest and most unsubstantial of structures. It occupies the air rather than the earth. It is an elevated platform on which musicians may sit. The grass can grow under it, and goats and cattle graze there." The Magistrate's own argument, therefore, was, that Shama Churn Lahiree, in erecting this *nawbut-khana*, proposed to occupy the air; and although s. 530 applies to land and water, it certainly does not comprehend the air. I have no doubt that the order under s. 530 was beyond the power of the Magistrate, and ought not to have been made. The Magistrate, however, not only made that order, but has relied upon it in the proceedings now before us, because he has ordered a copy of it to be filed on the record, although it is manifest, from what afterwards took place, that the order had ceased to have any effect whatever, because the result of the order which he made was that Goopee Kisto Gossain, being affected by it, immediately brought a suit in the Civil Court, and that Court declared that the defendant had no right to erect the *nawbut-khana* in that situation, and in fact decreed that it should be removed. But as an order under s. 530 is only valid until the person to whom possession is given is ousted by due course of law, and as the effect of that judgment of the Civil Court certainly was to oust Shama Churn Lahiree, the order of the Magistrate ought not to have been [580] referred to in any further proceedings. That decree of the Civil Court has not, I understand, been set aside on appeal. But whether it has been appealed or not, and whatever may be the result of such appeal, it is not our business at present to consider the correctness of that decision. Undoubtedly, as far as the parties were concerned, it was a valid decision of a competent Court, and the Magistrate, as well as the parties, were bound to respect it. In respect of what occurred in September 1877, it appears to me that

the first conviction by the Deputy Magistrate was erroneous. The accused persons were convicted of mischief by the Magistrate. Now, the definition of 'mischief' is to be found in s. 425 of the Indian Penal Code, which is this: "Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof, as destroys or diminishes its value or utility, or affects it injuriously, commits mischief." Now, as far as I can see, the only act done by the accused persons in that case was to change the situation of the bamboos (because they were not otherwise destroyed or injured) in so far as to put an end to their continuance in the form of structure. Then, looking to the words 'wrongful loss' as defined in s. 23 of the Indian Penal Code, we have,—“wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled.” Now it is clear from the decision of the Civil Court, which was then in force, that Shama Churn Lahiree was not at that time legally entitled to have those bamboos put together in that place in the form of a *nawbut-khana*, and consequently there was no causing of wrongful loss in the act done by the accused persons. It seems to me, therefore, that if that conviction had been brought before this Court in the exercise of its power of revision, the conviction would have been set aside. But the employer of the accused appears throughout these proceedings to have been singularly ill-advised. He had an illegal order made against him under s. 530, which was allowed to remain untouched. He brings a suit in the Civil Court, of which he fails to obtain the full effect. His servants illegally suffer conviction of the offence [581] of mischief, and that conviction is also allowed to pass unquestioned. He seems to have been then advised to cover this piece of ground with logs of wood and bricks and other materials, which was undoubtedly an unjustifiable act. His servants being then charged with rioting, it appears that their counsel, instead of simply relying upon the decision of the Civil Court, thought fit to argue before the Magistrate at length as to the question of right. Finally, upon the conviction taking place, instead of going at once to the Appellate Court, the accused were advised to come before this Court—a procedure which, undoubtedly, prejudiced them in the mind of the Sessions Judge, and which has added very much to the cost and anxieties of these proceedings.

I am now coming to the particular proceedings which are before us. These petitioners were charged with the offence of rioting. Now, first as to the procedure, it appears to me that the accused were undoubtedly prejudiced by the haste with which the prosecution was pushed on. I am unable to see for what public object this was done, or what was the particular importance of the case to which the Magistrate refers. It seems to have been, in the eyes of the Magistrate, of particular importance that the employer of the accused persons should not gain his object, and from that it seems to result that he thought it of great importance that the complainant should gain his object,—that is to say, whatever the result of this prosecution might be, Shama Churn Lahiree, the virtual complainant in this case, should be enabled to erect and keep erected this *nawbut-khana* for such purposes as he thought desirable; and the Magistrate, in a passage of his explanation, which was submitted to this Court some time ago, says, that on looking back to the proceedings he is unable to see what other course he could have taken. I confess it does seem to me strange, considering that this question had been already submitted to a Civil Court which was competent to entertain it, and that that Court, whether rightly or wrongly, had determined that Shama Churn Lahiree was not entitled to that particular form of enjoyment; it does seem to me strange that it should not have occurred to the Magistrate that the right solution of his difficulty would be

[582] to restrain Shama Churn Lahiree from doing that which the Civil Court had decided he was not entitled to do, until, at any rate, a further decision upon the matter should have been obtained.

I have now to observe upon the refusal of the Magistrate to allow time to the accused for the appearance of their witnesses. The Magistrate, and I observe also the Sessions Judge, relies upon the alleged discretionary power of the Magistrate in this matter. Now, this being what is termed a warrant case, the duty of the Magistrate in this particular is stated in the 219th section of the Code of Criminal Procedure. That section says :—"The Magistrate shall, subject to the provisions of s. 362, summon any witness, and examine any evidence that may be offered on behalf of the accused person, to answer or disprove the evidence against him, and may, for this purpose, at his discretion adjourn the trial from time to time as may be necessary." Section 362 says :—"In warrant cases the Magistrate shall ascertain from the complainant, or otherwise, the names of any persons who may be acquainted with the facts and circumstances of the case, and who are likely to give evidence for the prosecution, and shall summon such of them to give evidence before him as he thinks necessary. The Magistrate shall also, subject to the provisions of s. 359, summon any witness and examine any evidence that may be offered on behalf of the accused person, to answer or disprove the evidence against him, and may, for that purpose, at his discretion, adjourn the trial from time to time." Section 359, to which reference is there made, says :—"If the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice," he may require the accused person to satisfy him that there are reasonable grounds for believing that such witness is material. Now, I understand this s. 359 to mean that if, among the persons named by the accused as witnesses to a defence, the Magistrate considers that any particular witness is included for the purpose of vexation and delay, he is to exercise his judgment and enquire whether such witness is material. I have never heard that it was intended by that provision to enable the Magistrate [583] to enquire generally into what the defence of the accused person is to be, and to consider whether, on learning the nature of the defence, he is absolutely to abstain from summoning the whole of the witnesses cited by the accused. I am aware of no warrant for the exercise of any such sweeping authority. Setting that aside, can it be said here that there was any purpose of vexation or delay for which these witnesses were summoned. The trial was proceeding with great rapidity. The offence of which these prisoners were charged was very serious; the law enabled them to call witnesses in order to disprove or answer the case made against them; and considering what the time of the year was at which the first attempt to procure the attendance of these witnesses had been made, it does seem to me that it would have been reasonable to allow a further time for that purpose; and I moreover think it probable that, by reason of such time not having been allowed, the prisoners were prejudiced in their defence, because this was not a simple question, it was one which depended somewhat upon minute considerations. The conduct of the parties, the mode in which one side or the other had acted, was of the greatest importance in determining *firstly*, whether the accused had committed any offence or not; and *secondly*, what was the nature and extent of that offence. The Magistrate indeed says, in order to justify his refusal, that the accused had confessed that with which they were charged. The accused had confessed no such thing. They were charged with nothing. That which they admitted was, that they had pulled up these bamboos and displaced the erection. That was a long way from confessing the offence of rioting.

Another point on which I think we are bound to remark is, that the Magistrate, having at his command the means of obtaining evidence which was presumably impartial,—that is to say, the evidence of his own police officers,—did not either call or examine any one of them. The witnesses for the prosecution were, I believe, only two; and I should have expected, in a case like this, that the Magistrate should have resorted to the evidence of the police officers as presumably free from having any bias on one side or the other. So far as to the procedure in this case.

[584] I now turn to the conviction. The accused have been convicted of the offence described in s. 147 of the Indian Penal Code. After a good deal of consideration, I am unable to satisfy myself that that which they did came under that section. Rioting, according to the Indian Penal Code, consists of force used in the prosecution of a common object of an unlawful assembly. We must, therefore, find that there was an unlawful assembly, that they had a common object, and that force was exercised in the prosecution of that object. Now, I think it highly probable that, on this occasion, there were five or more persons assembled; but who were these persons? They were not persons assembled together for any unlawful purpose, nor were they persons summoned together for the purpose of committing a breach of the peace. They were the ordinary servants, and probably, relatively speaking, only a few of the ordinary servants of this Baboo Goopee Kisto Gossain. One of them discovers that stealthily the other party had, in the course of the night, put up this structure, which the Civil Court had declared he was not authorized to do, and he calls other servants to assist him in remonstrating, and in removing this structure which was there illegally erected. It was suggested that this matter came either under the third or fourth clause of s. 141. Now, the third clause specifies the object to be that of committing any mischief or criminal trespass or other offence. In regard to mischief, as I have already said with reference to the previous conviction, it appears to me that there was no mischief. In regard to criminal trespass, the allegation appears to me to be absurd. The accused persons were only where they were entitled to be—on their master's own land. They had not gone there, nor did they remain there, for the purpose of trespassing or for any other unlawful purpose. Then it is said that perhaps they had gone there for the purpose of enforcing some right or supposed right. It seems to me they had not gone there for any such purpose. but that the other side having gone there for the purpose of enforcing a right which he perfectly knew the Court had adjudged him not to possess, these persons, merely representing their master, went there for the purpose of resisting that infraction of their [385] master's right. It is admitted that no particular force or violence was used and that this was the case might be further inferred from the fact that the police officers who were on the spot saw no occasion to interfere. It appears to me, therefore, that there was no cause for convicting these persons of the offence of rioting, inasmuch as they were not there as members of an unlawful assembly, nor for any unlawful purpose. I think, therefore, that the conviction, as well as the procedure under which the conviction was had, was illegal, and ought to be set aside.

I have only now to make one or two observations upon what had occurred in the Court of Session. The errors into which the Magistrate has fallen are easily explained by the circumstance that he felt himself, whether rightly or wrongly, impressed with the duty of maintaining not only the peace of the district, but also the authority of his own Court, and also by the fact that he had taken a large part in previous transactions which led up to this conviction,

and therefore that which he did, although it was, as I think, erroneous, was far from unnatural. But these considerations do not apply to the Courts of Session. The Sessions Judge was an officer of infinitely more experience. He was not affected by the necessity of maintaining the authority of the Magistrate's Court, or by any participation in the previous proceeding, and yet he not merely fails to point out the mistakes which the Magistrate had committed, but he actually goes beyond him in the line which the Magistrate adopted. The Joint Magistrate had certainly shown that he was not slow to vindicate the respect due to his own Court, and he passed what he avowedly considered a severe sentence when he punished the petitioners with rigorous imprisonment for three months. I am quite unable to see upon what grounds, or for what reasons, the Sessions Judge not merely affirmed but doubled that punishment. I think, therefore, that this rule must be made absolute, and the conviction and the proceedings quashed. The proceedings taken by the Joint Magistrate against Goopee Kisto Gossain and Nundo Lall Gossain must accordingly be stopped.

Cunningham, J.—I concur in setting aside these convictions. The facts in the case establish that certain co-owners were [386] doing that, in the enjoyment of the common property, which, as between the parties, had been decided by a competent Court to be, and therefore must be regarded by us as being, illegal,—viz., erecting a platform, the erection of which the Court had forbidden. Therefore, the other co-owners came in, and without violence or unnecessary force, and with no breach of the peace, abate the nuisance by pulling up certain bamboos of which the structure, so far as the building had gone, consisted. For this they have been convicted of being members of an unlawful assembly, and sentenced to three months' imprisonment. This sentence was on appeal enhanced to six months.

It appears to me that the accused were merely exercising the remedy familiar to English law of abating a private nuisance. This right is thus described in Stephen's Commentaries, 5th edition, Vol. III, p. 354 :

The rule was laid down by Lord DENMAN in *Ferry v. Fitzhove* (8 A. & E., 757). In that case a commoner, whose right of pasturage was interfered with by a building erected upon it, came and pulled it down "about the plaintiff's ears" while he and his family were actually in it, and it was held that the serious risk of human life involved, and the consequent imminent danger to the peace had, according to the analogy of the law of distress, the effect of rendering the plaintiff's act unlawful.

In the present case there appears practically to have been no violence and no real danger of any breach of the peace. Indeed, the police were standing by and looking on while the abatement took place; and the act of abatement was, therefore, in my opinion, legal.

The same view of the law appears to be reproduced in the Indian Penal Code. "Mischief" is defined in s. 425, Indian Penal Code, as the causing of any change in property in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, with an intent to cause wrongful loss to any person." And Explanation 2 shows that mischief may be committed by an act affecting property of which the person committing it is joint owner with others. Under this [387] definition the act of the complainants in erecting the structure was, as I regard it, mischief.

Then, by s. 99, Indian Penal Code, there is a right of self-defence of property, moveable or immoveable, against an act which falls under the definition

nischief." I do not think that the third exception in s. 99 applies, as the accused had the right to prevent the structure being made, which they could not have done if they had waited to go to the Court for an injunction.

The observations of COUCH, C. J., in a similar case—*Birjoo Singh v. Khub Lall* (19 W. R., Crim. Rul., 66)—seem applicable to the accused in this case.*

Under this view, I think the accused were exercising a legal right of self-defence; consequently, that there was no criminal force, no unlawful assembly, and no riot, and the conviction must be quashed.

NOTES.

I. ABATING NUISANCE—

(a) When the rights are either admitted or ascertained by decree, etc., this may be done :—(1878) 3 Cal., 873.

(b) But not otherwise :—(1909) 11 Bom. L. R., 849 (854)

(c) How far a claim of right to possession is an answer to a charge of mischief :—
*See (1882) 6 Mad., 245.

II. REFUSAL TO SUMMON WITNESSES, A GROUND FOR SETTING ASIDE PROCEEDINGS—

In addition to this case, see

(1881) 3 All., 392.

(1886) 8 All., 668.

(1881) 4 All., 53.

(1892) Rat. 594.

(1881) 6 Cal., 714.

(1897) 19 All., 502.

(1884) 10 Cal., 931.

(1908) 35 Cal., 1093.

III. HIGH COURT'S REVISIONAL POWERS—

Not exercised when the direct remedies provided by the Legislature by way of appeal, etc., have not been exhausted :—(1905) A. W. N., 143; 2 Cr. L. J., 335; Rat. 826 and 977.]

[3 Cal. 587]

PRIVY COUNCIL.

The 17th and 18th January and 5th February, 1878.

PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND
SIR R. P. COLLIER.

Wooma Dace.....Plaintiff

versus

Gokoolanund Dass.....Defendant.*

[5 I. A. 40 : 2 C. L. R. 51]

[On Appeal from the High Court of Judicature at Fort William in Bengal]

*Hindu Law—Benares School—Succession—Priority of Indigent
Daughter—Barren Daughter—Adoption—Dwyamushyana—
Son of Brother—Factum valet.*

In the case of inheritance by daughters on default of nearer heirs, no preference is awarded by the authorities recognized by the Benares School of Hindu Law in Upper India to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow.

* In the High Court, (1875) 15 B. L. R. 405=28 W. R. C. R. 840.

Passages in the Dattaka Mimansa and the Dattaka Chandrika, which prescribe that a Hindu wishing to adopt a son shall adopt the son of his brother, if such a person be in existence and capable of adoption, in preference to any other person, although binding upon the conscience of pious Hindus as defining their duty, are not so imperative as to have the force of laws, the violation of which should be held in a Court of Justice to invalidate an adoption which has otherwise been regularly made.

[588]. The maxim *quod fieri non debuit factum valet* is recognized to some extent by other schools of law in India besides that of Bengal.

Semble.—Under the law of the Benares school a married daughter who is indigent succeeds to the inheritance of her deceased father in preference to a married daughter who is wealthy.

THIS was an appeal from the decision of a Division Bench of the Calcutta High Court, dated the 8th March, 1875, reversing a decision of the Subordinate Judge of Cuttack.

The appellant, who was the plaintiff in the first Court, brought the suit in which the appeal arose against her younger sister Parbutti Daei and against Gokoolanund Dass Mahapatra, the present respondent, as defendants. She set forth in her plaint that her father Hullodhur Dass Mahapatra died in 1870, leaving her and her sister Parbutti, but no male issue; that, inasmuch as her sister was married and in affluent circumstances, she, the plaintiff, being indigent, was, under the Mitakshara law, her father's heir; that on her father's death the defendant Gokoolanund falsely alleging himself to be the adopted son of Hullodhur had obtained a certificate of heirship under Act XVII of 1860, had entered on possession of the estate of the deceased, and obtained registration of his name as proprietor of certain lands belonging thereto. She therefore sought for a declaration of her right of inheritance to set aside the certificate of heirship obtained by Gokoolanund and the order under which his name was registered as proprietor, and to recover possession of her father's estate.

The defendant Parbutti urged in her written statement that the plaintiff had received money and maintenance from her father, whereas she herself was in indigent circumstances, and that she was the mother of sons, while the plaintiff was a sonless widow; under these circumstances, she contended that she had a preferential claim to succeed to her father's inheritance. With reference to Gokoolanund, she denied that he was the adopted son of Hullodhur or in any way related to him, and alleged that he was a stranger from the North-Western Provinces, who had been supported by Hullodhur out of charity.

The defendant Gokoolanund alleged that he was the son of a kinsman of Hullodhur, and had been adopted by Hullodhur. [589] He admitted that the plaintiff was the indigent daughter of Hullodhur, but denied that, having regard to his own adoption, she had any right to her father's estate.

The Subordinate Judge framed issues as to the fact of the adoption and its validity and effect, and a further issue as to which of Hullodhur's daughters would be entitled to the succession in case it should appear that there was no adoption, or no valid adoption. On the evidence he found that Gokoolanund had lived for many years with Hullodhur, by whom he had been brought up and treated as a son; that he had been recognized by others as the adopted son of Hullodhur, and had been so styled by Hullodhur himself in a petition filed by him in the Magistrate's Court. He nevertheless held that the fact of an adoption

had not been established. In arriving at this conclusion, he relied on the *prima facie* improbability of an adoption having been made under the circumstances shown in evidence, and on the insufficiency of the proof of necessary religious ceremonies. He further held that the adoption, even if it had been proved to have been made, would have been invalid, inasmuch as at the time when it was said to have taken place, one Dinobundhoo, the son of a brother of Hulodhur, was living, during whose lifetime the adoption of any one else was invalid under the Hindu law recognized by the Benares school by which the case was governed. On this point he referred to the *Dattaka Mimansa* and to Sutherland's *Synopsis of the Hindu Law of Adoption*, p. 180, of Baboo Kishen Kishore Ghose's edition. He also held that the plaintiff was proved to be indigent, while there was no such proof as to her sister Parbutti, and that the former was consequently entitled under the law of the Mitakshara to succeed to her father to the exclusion of the latter. He accordingly gave a decree in her favour.

The defendant Gokoolanund appealed to the High Court, where the case was heard by a Division Bench (15 B. L. R., 405).

The High Court held that the adoption of Gokoolanund by Hulodhur had been sufficiently proved, and that there was [590] evidence of the appropriate religious ceremonies having been performed. They also held that the adoption was not invalid by reason that at the time when it took place a son of a brother of Hulodhur was in existence. On this point the Court observed that there was no evidence of Hulodhur's brother having been willing to permit the adoption of his son; but supposing him to have been willing, it did not follow that the strict rule laid down by the texts of the old Hindu writers, and by Mr. Sutherland in his *Synopsis*, was of such binding operation as to invalidate the adoption by Hulodhur of another person, such adoption being otherwise regularly made. In support of this view the Court referred to Sir Thomas Strange's *Hindu Law*, Vol. I, p. 85.

On the question as to the plaintiff's right of suit, the Court observed that it was unnecessary for them to decide that point, since they had upheld the adoption, but they intimated their opinion that since the plaintiff was a sonless widow, her sister Parbutti would take in preference to her (in support of which view they cited Mr. Justice STRANGE'S *Manual of Hindu Law*, p. 80, paras 328, 329), and, at any rate, that Parbutti would be entitled to an equal share.

From this decision the plaintiff brought the present appeal to Her Majesty in Council.

Mr. Leith, Q. C., and Mr. Doyne, for the appellant, contended that on the evidence the High Court was wrong in holding Gokoolanund's adoption proved, as the necessary religious ceremonies had not been observed. But assuming the fact of the adoption, it was invalid in law, since at the time it was made there was in existence a son of the whole brother of the adopter, who under the law of the Benares school was the only proper person to be adopted. See the *Dattaka Mimansa*, s. 1, sls. 28, 29, 30, 31, 67, and 74; and the *Dattaka Chandrika*, s. 1, sls. 20, 21, 22, 27, and 28. The view taken by Mr. Sutherland in his *Synopsis* is grounded on these passages.

There is no authority for the contention that the appellant is excluded from her father's inheritance as being a sonless [591] widow. See *Mitakshara*, ch. II, s. 2, paras 1-4, and ch. I, s. 3, para. 11. The plaintiff as an indigent

daughter is entitled to her father's succession in preference to her sister who is wealthy: MacNaghten's Principles of Hindu Law, p. 22.

Mr. Arathoon, who appeared for Gokoolanund Dass Mahapatra, was informed by Sir J. COLVILLE that their Lordships did not think it necessary to hear him as to the fact of the adoption or the due observance of ceremonies; but desired to hear him as to whether the adoption was not bad by reason that a brother's son had been passed over, and as to the plaintiff's right of suit.

Mr. Arathoon contended that the passages cited from the Dattaka Mimamsa and Dattaka Chandrika did not bear out the view put forward by Mr. Sutherland in his Synopsis, that there was a rigid rule of law vitiating any adoption but that of a brother's son where such a son existed. He referred to Sir Thomas Strange's Hindu Law (ed. 1830), Vol. I, pp. 84-85, and to the opinions of Messrs. Colebrooke and Ellis in Vol. II of that work, pp. 98, 99, 103, 104, and 108. At any rate, there must be a brother's son who is available for adoption, and here it was not shown that Denobundhoo could have been lawfully adopted, or that his father would have consented to such an adoption. The act of adoption if duly completed could not be undone, the maxim *factum valet* applying in the Benares as well as in the Bengal school. See Strange's Hindu Law, Vol. I, p. 87, and MacNaghten's Principles of Hindu Law, p. 68.

In support of the contention that the plaintiff had no right to sue, he referred to the Smṛiti Chandrika, ch. XI, s. ii, paras 21, 28, as showing that barren daughters are not entitled to inherit their father's estate, since they are incapable of conferring spiritual benefits upon him through their offspring. See also Strange's Hindu Law, Vol. I, p. 138; Norton's Leading Cases, pp. 515, 516; Strange's Manual, paras 328, 329.

Mr. Leith in reply.—The case is governed by the law of the Mitakshara. The Mitakshara divides daughters into two [592] classes only, the maiden and the married. There is no exclusion of widows, though childless. On this point the law of Benares and that of Bengal differ. The only distinction which the Mitakshara recognizes in the case of married daughters is in giving priority to such as are indigent. There is no authority for the view put forward by Sir Thomas Strange (Hindu Law, Vol. I, p. 138), that widowed daughters are postponed to those whose husbands are living. If there be any difference on this point between the law of Madras and Benares, we are here governed by the latter. The Smṛiti Chandrika relied on as an authority for excluding a sonless widow is opposed to the Mitakshara, and is of no authority out of Madras. The words of the Mitakshara which require the adoption of a brother's son are express. The maxim *factum valet* is not a doctrine of the Benares school. MacNaghten's Principles of Hindu Law, p. 5. The contrary view which MacNaghten put forward at p. 68 of the Principles, rests on the opinions of Messrs. Colebrooke and Ellis, cited by Strange, Vol. II, pp. 98, 99, 103, 104, 108. These opinions are supported by no authority. The passage in the Mitakshara referred to by Colebrooke at p. 103, Vol. II, of Strange, does not bear out his view, which is opposed to that taken by the Pundit in the same case. In the only decided case referred to by MacNaghten, at p. 68 of the Principles, it was held that where a brother's son exists, the adoption of any one else is illegal.

● Cur. adv. vult.

Their Lordships' judgment was delivered by

Sir J. W. Colville.—The general question raised by this appeal is who was entitled to succeed to the estate of one Hullothur Dass Mahapatra, an Oorya

Brahmin, who died in December 1870. He left by his wife Jumoona, who predeceased him some four years before that date, two daughters — Wooma Dae, the plaintiff in the cause, and Parbutti Dae. Both had been married, but Wooma Dae was a childless widow, dependent upon and living with her father at the time of his death, whilst [593] Parbutti was and is living with her husband, a man of some substance, by whom she had had children, still living. He also left the defendant, Gokoolanund Dass, who claimed to be his son by adoption.

In January 1871 the last-named person applied to the Judge of Cuttack for a certificate under Act XXVII of 1860. His claim was resisted by Parbutti, who disputed the adoption, and also by Hurrihur Persad Dass, the great-nephew of the deceased. The Judge held that the latter had no *locus standi* as an objector; and as between Parbutti and Gokoolanund, decided that the latter had *prima facie* established his title as the adopted son of the deceased, and granted the certificate to him.

Wooma Dae was no party to this proceeding, of which the effect was at most to confirm or put Gokoolanund in the possession of the property as the heir of Hullodhur, until displaced by a decree in a regular suit.

In June 1872 Wooma Dae instituted the present suit against Gokoolanund and Parbutti, seeking, as between herself and the latter, to be declared the preferential heir of their father, and, impugning the adoption of the former, to recover the estate from him. The questions raised in the cause are determinable by the law of the Benares school.

That law, in so far as it supports the claim of the plaintiff to succeed to her father's estate in default of a son, natural or adopted, is thus laid down by Sir William MacNaghten (Principles and Precedents of Hindu Law, p. 22). After stating the rule of the Bengal school, he says: "But there is a difference in the law as it obtains in Benares on this point, that school holding that a maiden is in the first instance entitled to the property; failing her, that the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; that in default of indigent daughters, the wealthy daughters are competent to inherit; but no preference is given to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow." * Nothing addressed to their Lordships at the bar induces them to think that this is an incorrect exposition of the law. Mr. Arathoon, indeed, in support of his contention that the plaintiff had lost whatever right to inherit [594] her father's estate she would otherwise have possessed by reason of her being a childless widow, relied upon some passages in the Smriti Chandrika (Chap. xi, s. 21, paras. 21 and 28), in which the author of that treatise adopts and affirms the rule of the Bengal school in respect of the disqualification of a barren daughter. But on these it is sufficient to observe that, according to Mr. Colebrooke and other high authorities, the Smriti Chandrika contains an authoritative exposition of the law only as it prevails in the South of India, and consequently that the passages in question are of no weight when set against the propositions which Sir William MacNaghten has deduced from the text of the Mitakshara and other authorities recognised by the Benares school. That the plaintiff, as compared with her sister, is an indigent, or, in the words of the Mitakshara, "an unprovided daughter," seems to be clear. Their Lordships, therefore, though in the view which they take of the other issues it is not necessary to affirm her title as against her sister conclusively, will assume that she has shown a sufficient title to maintain this suit against the defendant Gokoolanund, and to put him to proof of his alleged adoption.

Two distinct issues have been raised touching this adoption:—(1) Whether it was ever made in fact; (2) whether, if so made, it is good in law. And as to the first issue it is to be remarked that the plaintiff has not been content to rely on any deficiency in the proof of the defendant's case. She has set up, and undertaken to prove, a substantive case of her own.

The case of the defendant is, that he was by birth the second son of Nath Dass, a distant kinsman of Hulodhur Dass; that at a very tender age he was taken into the house of Hulodhur with a view to his being adopted; that when about five years old, and in the year 1837, he was formally given by his natural, and received by his adoptive father in adoption with the requisite ceremonies; that he was brought up and educated by Hulodhur as his adopted son, receiving from him at the proper age the investiture of the Brahminical thread, and being on a subsequent occasion given in marriage by him; that after he reached man's estate he continued to be recognized in the family as the adopted son, and took part in the management of its affairs, and that in [595] the character of adopted son, he performed the funeral ceremonies of Jumoon, and afterwards of Hulodhur himself.

On the other hand, the case of the plaintiff is that the defendant is not the son of Nath Dass; that he was by birth a Kanouj Brahmin, or other native of the North-Western Provinces; that when young he was brought by other pilgrims to Juggurnath, and left at first in a sort of hospice attached to the temple which belonged to the elder brother of Hulodhur; that he afterwards lived in the house of one Hira, who is stated to have been a concubine of Hulodhur; that he was never on terms of commensality with Hulodhur; that he never was, and, being the son of an unknown father, never could have been adopted by Hulodhur; that it was only as a gomashtha or dewan that he ever took part in the management of Hulodhur's affairs; that Hulodhur, some years after the alleged adoption, really adopted one Radakrishna, a son of one Bhika Das, who subsequently died; and that Hulodhur's funeral rites were performed by the plaintiff and the persons authorized by her to do the acts which a female cannot herself do.

Their Lordships might feel it difficult to pronounce with confidence for themselves which of these conflicting statements, supported as each is by the testimony of numerous witnesses, and in a greater or less degree by documentary evidence, is true. And their difficulty would be greatly increased if one of the Indian Courts had broadly affirmed the truth of the plaintiff's statement, whilst the other Court had pronounced in favour of the defendant. But that is not the way in which the case comes before them. The Subordinate Judge, though he decided against the fact of the adoption, did not affirm that the original status and subsequent history of the defendant were what the plaintiff's witnesses represented them to have been; he did not find that Radakrishna (as to whose adoption the evidence is of the most loose and general character) was ever adopted by Hulodhur; he did not find that the plaintiff, and not the defendant, performed the funeral rites of Hulodhur. It cannot therefore be said that the Judge before whom they were examined has pronounced the plaintiff's witnesses to be worthy, and the defendant's witnesses to be unworthy, of credit. On the contrary [596] (giving, perhaps, a little more weight to some supposed admissions by two of the plaintiff's witnesses than their words warrant), he expressed his belief "that the defendant Gokoolanund had for years lived with, and been brought up, and treated as a son, and married by Hulodhur." He held "it also to be clear from the evidence tendered for the defence that the defendant had frequently

been acknowledged by others as the adopted son of Hullodhur, and was even so styled by Hullodhur himself in a written statement filed by him in an Act IV of 1840 : case before the Magistrate of Balasore." We have therefore the Judge of First Instance affirming, contrary to the general evidence on the part of the plaintiff, facts most material to the defendant's case, and the genuineness of the documentary evidence produced in support of it. His finding against the fact of adoption proceeds upon the improbability that in 1837 Hullodhur, who might reasonably hope to beget, would adopt a son, upon the discrepancy between certain of the defendant's witnesses as to the presence of Nath Dass at the ceremony, and upon the insufficiency of proof that all the requisite ceremonies were performed.

In this state of things their Lordships, at the close of the appellant's case, intimated that they could not see their way to a reversal of the very clear finding in favour of the fact of adoption to which the High Court upon a review of the whole evidence had come. Their Lordships conceive that the High Court was right in giving credit to the defendant's witnesses rather than to those of the plaintiff, who have deposed to a case which appears to be in many respects a false one. Their evidence is strongly corroborated, as the Subordinate Judge himself admits, by the documents to which he has given credit; and it seems to their Lordships to prove, as found by the High Court, the performance of the requisite ceremonies with as much certainty as can be expected some thirty years or more after the event.

Against a case so proved, the *prima facie* improbability of the adoption on which the Subordinate Judge so strongly relies cannot, in their Lordships opinion, weigh very heavily. It must be recollected that it is met not merely by the story of [597] the inference drawn by a pundit from the horoscopes of the husband and wife (a circumstance which, if it really occurred, might have had considerable force upon superstitious minds), but also by the fact that Hullodhur and Jumoonah had lived together as man and wife for a good many years before the final adoption without having issue.

Their Lordships must, therefore, deal with this case on the assumption that the fact of the defendant's adoption has been established.

The question whether such an adoption is valid in law is of greater difficulty, and, being one of general application, of far greater moment. It was in order to consider more fully the authorities cited upon this point that their Lordships reserved their judgment.

The objection to the adoption is that it was one of a very distant relation, not even within the class of Hullodhur's sapindas, made in violation of the preferential right of Dinobundhoo, the only son of Juggunnath, who was Hullodhur's brother by the whole blood, to be adopted.

The plaintiff relies mainly upon certain texts of the Dattaka Mimamsa, and the Dattaka Chandrika, of which the former is considered by the Benares school, to be the more authoritative treatise on the subject of adoption.

The texts chiefly insisted upon are the 28th, the 29th, the 30th, the 31st, and the 67th slokas or paragraphs of the second section of the Dattaka Mimamsa; and the 20th, the 21st, the 22nd, the 27th, and the 28th paragraphs of the first section of the Dattaka Chandrika.

It is unnecessary to set out these at length, because it may be conceded that they do in terms prescribe that a Hindu wishing to adopt a son shall adopt the

son of his whole brother, if such a person be in existence and capable of adoption, in preference to any other person; and qualify the otherwise fatal objection to the adoption of an only son of the natural father, by saying that, in the case of a brother's son, he should, nevertheless, be adopted in preference to any other person as a *Dwyamushyana*, or son of two fathers.

The grave question, however, that arises in this case is [598] whether the injunctions just referred to are merely binding upon the consciences of pious Hindus as defining what they ought to do, or so imperative as to have the force of laws, the violation whereof should be held in a Court of Justice to invalidate an adoption which has otherwise been regularly made.

Before considering this question, their Lordships think it right to observe that the two propositions just stated, or at least the last of them, may well be qualified by the incontestable fact that Hullothur was separate in estate from his brother Juggunnath. The whole of the law supposed to affirm the necessity of adopting a brother's son seems to have been deduced by the ancient commentators with what logical sequence it is unnecessary to consider, from a text of Menu, which says:—"If one among brothers of the whole blood be possessed of male issue, Menu pronounces that they all are fathers of the same by means of that son." The direct consequence of this might well be that in an undivided family (the normal state of a Hindu family) the nephew, without further act of affiliation, would effectually perform the funeral obsequies of his uncle, whose share in the joint family property, in the absence of male issue, would pass to his coparceners by survivorship. But in the case of a separated Hindu, the right of performing his obsequies, with the consequent right of succession, is, in the absence of male issue, in his widow, or, failing her, in his daughter and daughter's issue. Again, to constitute a *Dwyamushyana* there must be a special agreement between the two fathers to that effect; or the relation must result from some of the other circumstances indicated by Sir William MacNaghten at p. 71 of his Principles and Precedents. And he there states the consequences to be different from those of an ordinary adoption, inasmuch as the children of the adopted sons would revert to their natural family. Hence the adoptive father fails by such an adoption to perpetuate his own line of male succession,—a circumstance which renders the consent of divided brothers to such an adoption the more improbable. In the present case there is nothing to show, and it is unreasonable to presume, that Hullothur [599] would have been content to receive, or Juggunnath would have been willing to give, the only son of the latter in adoption. And the presence of the name of the latter on some of the documents which describe the defendant as the adopted son of Hullothur, is some evidence that Juggunnath recognized that adoption as valid. Moreover, for aught that appears in the cause, Denobundhoo may at the date of the adoption have become from age, marriage, or other like objection, incapable of being adopted by his uncle.

Reverting, however, to the general question whether the omission to adopt a brother's son is an objection which at law invalidates an adoption otherwise regularly made, and so destroys the civil *status* of the person thus adopted, even after, as in this instance, years of recognition, their Lordships have to observe, in the first place, that they have been referred to no case in which a Court of Justice has so decided. The nearest authority of the kind is that of *Ooman Dutt v. Kunhia Singh* (3 Sel. Rep., 144). That case arose in a district governed by the Mithila law. The plaintiff claimed, under an adoption by his maternal grandfather, not in the *dattaka*, but in the *kritrima*-form, which is recognized by the Mithila law, to dispossess the nephew and heir of that grandfather from the share

of the latter in a joint family estate. Various objections, besides the one in question, were taken to the adoption; the case, after the fashion of those days, went from one Judge of the Sudder Court to another, who consulted different pundits and came to conflicting decisions, but ultimately the suit was dismissed. The marginal note no doubt says: "According to the Hindoo law, while a brother's son exists, the adoption of any other individual as a son either in the *dattaka* or *kritrima* form of adoption is illegal." But the force of this note is very much weakened by the fact that Sir William MacNaghten, who, being the Editor of the Reports, was probably the author of it, afterwards, and with a full recollection of the case, wrote the passage which will be presently cited. The decision itself was merely on an alleged adoption in the *kritrima* form, which, in its inception and consequences, is very distinguishable from one in which the natural father [600] parts with his son in the full faith that he will be effectually and for all purposes received into his new family, and acquire therein the rights which he absolutely loses in his own. The son adopted in the *kritrima* form retains his rights of inheritance in his original and natural family.

The general question seems to have been considered by Sir Thomas Strange, Mr. Colebrooke, and other text-writers of eminence.

Sir Thomas Strange, after recapitulating the rules which ought to guide the discretion of the adopter, including the authorities on which the plaintiff relies, says: "But the result of all the authorities upon this point is, that the selection is finally a matter of conscience and discretion with the adopter, not of absolute proscription, rendering invalid an adoption of one not being precisely him who upon spiritual considerations ought to have been preferred." And by his references to the cases collected in the second volume he shows that Mr. Colebrooke and, more strongly, Mr. Ellis were of this opinion.

Again, Sir William MacNaghten, just after referring to the case of Oman Dutt, deals with the question thus:—"It would appear, however, that according to the law of Bengal and elsewhere where the doctrine of the *Dattaka Chandrika* is chiefly followed, and where the doctrine of *factum valet* exists, a brother's son may be superseded in favour of a stranger; and even in Benares, and in the places where the *Mimansa* principally obtains, and where a prohibitory rule has in most instances the effect of law, so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the validity of an adoption actually made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion. It may be held, then, that the injunction to adopt one's own *sapinda* (a brother's son is the first), and failing them, to adopt out of one's own *gotra*, is not essential so as to invalidate the adoption in the event of a departure from the rule." (*Principles of Hindu Law*, p. 68.)

It may be further observed that even Mr. Sutherland, in his Synopsis (see Stokes' Codes, p. 645) says: "But though Nandita [601] Pandita extends this principle (*i.e.*, that proximity of kindred ought to determine the choice of an adopted son) with elaborate minuteness, it cannot be regarded as a rigid maxim of law, vitiating the adoption of a remote when a near kinsman, or of a stranger, when a relative may exist. The right, however, of a whole brother's son to be adopted in preference to any other person, where no legal impediment may obtain, seems to be generally admitted, and may be regarded as a received rule of law." It is not easy to see upon what grounds the distinction here taken rests. If what the *Dattaka Mimansa* enjoins is to be

taken as imperative, and having the force of law, the language of the 74th Article of the second section, which deals with the duty of selection where there is no brother's son, seems to be hardly less imperative than that of the Articles which affirm the preferential right of the brother's son.

It was urged at the Bar that the maxim *quod fieri non debuit factum valet*, though adopted by the Bengal school, is not recognized by other schools, and notably by that of Benares. That it is not recognized by those schools in the same degree as in Bengal is undoubtedly true. But that it receives no application except in Lower Bengal is a proposition which is contradicted not only by the passage already cited from Sir William MacNaghten's work, but by the decided cases. The High Court of Madras in *Chinna Gaundan v. Kumara Gaundan* (1 Mad. H. C. R., 54), and the High Court of Bombay in the case of *Raje Vyankatray v. Jayavantray* (4 Bom. H. C. R., A. C., 191), acted upon it; and that upon the question of the adoption of an only son of his natural father, on which the High Court of Calcutta, in the case of *Rajah Upendur Lall Roy v. Ranee Bromo Moyee* (10 W. R., 347), has refused to give effect to it, considering that particular prohibition to be imperative.

Their Lordships feel that it would be highly objectionable on any but the strongest grounds to subject the natives of India in this matter to a rule more stringent than that enunciated by such text-writers as Sir William MacNaghten and Sir Thomas Strange. Their treatises have long been treated as of high [602] authority by the Courts of India, and to overrule the propositions in question might disturb many titles.

Upon a careful review of the authorities, their Lordships cannot find any which would constrain them to invalidate the adoption of the defendant, even if it were more clearly proved than it is, that Hulloodhur Dass could have adopted Dinobundhoo, the only son of his brother. They will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss this appeal with costs.

Appeal dismissed.

Agents for the Appellants: Messrs. *Watkins and Lattey*.

Agent for the Respondent: Mr. *T. L. Wilson*

NOTES.

[HINDU LAW—ADOPTION—STRIDHAN.]

I. ADOPTION—WHO MAY BE ADOPTED—

(a) The texts of a positive character on this point have not the force of law :—

The fact that there are nearer kinsmen and the adopter is related remotely does not matter :—(1878) 3 Cal., 587 ; (1886) 9 All., 253.

i. Adoption of an *asagotra* valid :—(1885) 10 Bom., 80.

ii. Even if there be nearer kinsmen :—(1885) 10 Bom., 80.

(b) Even in respect of negative prohibitions, the following have been declared merely recommendatory :—

i. Adoption of an only son :—(1899) 22 Mad., 398 P. C.

ii. Adoption of the eldest son :—(1883) 7 Bom., 221 ; 2 Cal., 365. See cases *infra* under heading *Adoption, Factum Valet*.

II. ADOPTION—FACTUM VALET—^f

- (a) The maxim of *factum valet* is applicable except as to rules prescribing the capacity to
(1) take in adoption, (2) to give in adoption, and (3) to be given in adoption.

Adoption in violation of these excepted rules is void :—(1881) 9 All., 253 at 296 ;
• (1879) 3 Bom., 273.

- (b) The maxim has been applied to uphold

- i. the adoption of an only son :—(1899) 22 Mad., 398 ; 21 All., 460 affirming (1892) 14 All., 67 F. B. ; (1894) 19 Bom., 428 ; (1886) 11 Mad., 43 ;
- ii. the adoption of a son whose father the adoptive mother could not have married (Extension of Nanda Pandita) :—
(1897) 22 Bom., 973—adoptive mother's brother's son ;
(1904) 27 All., 417—2 A. L. J., 36—adoptive mother's brother's grandson ;
- iii. the adoption even when the mother of the boy was daughter of a *gotraja sapinda* six degrees removed (and could not have been married) :—(1899) 24 Bom., 473 ;
- iv. the adoption of other than nearest kinsman or sapinda :—(1878) 3 Cal., 537 ; (1885) 10 Bom., 80 ;
- v. the adoption of the eldest son :—(1883) 7 Bom., 221 ; (1877) 2 Cal., 365 ;
- vi. inquiry into motives of the adopting widow have accordingly been held irrelevant :—(1896) 22 Bom., 558.

- (c) The maxim has not been applied to relax the test of marriageability of the adopter with the natural mother of the boy :—

- i. (1899) 21 All., 412 reversing (1895) 17 All., 294—mother's sister's son.
- ii. (1879) 3 Bom., 273—daughter's son.

iii. *But* (1899) 24 Bom., 473—is *opposed* to this exception.

III. HINDU LAW—THE MAXIM OF FACTUM VALET—

On the scope and limits of applicability of this maxim, see in addition to this case :—(1899) 22 Mad., 368 ; 21 All., 460 at 497 ; (1899) 21 All., 412 reversing (1895) 17 All., 294 ; (1886) 9 All., 253 (296) ; (1896) 11 Mad., 43 ; (1885) 10 Bom., 85 (36) ; (1879) 3 Bom., 273* (293) ; (1875) 12 B. H. C., 362 (398).

IV. AUTHORITY OF TEXT-WRITERS—

In addition to this case, see

- i. (1899) 24 Bom., 473 (Nanda Pandita).
- ii. (1899) 21 All., 412.
- iii. (1892) 17 Bom., 114 (Smriti Chandrika).

V. DWAMUSHYAYANA FORM OF ADOPTION—

- (a) Not obsolete :—(1895) 21 Bom., 105 ; answering *query* in (1894) 19 Bom., 428 at 454.
- (b) Whether the brother is divided or not :—(1895) 21 Bom., 105.
- (c) Widows also may exercise the power :—(1901) 25 Bom., 537.
- (d) For form and consequences of such adoption :—See (1904) 26 All., 472.

VI. SUCCESSION—COMPETITION OF DAUGHTERS—

- (a) Competition in respect of daughter's succession in the Benares school has regard *not* to *spiritual benefit* (as in Bengal, whereby childless widows are excluded) but to *indigence* :—3 B. H. C., 5 ; (1878) 3 Cal., 587 ; (1880) 8 Mad., 265.
- (b) Consequent on spiritual benefit playing no part in daughter's succession, unchastity has been held no bar to her taking : (1879) 4 Bom., 104.

As for the heritable rights of a prostitute in this competition: See (1907) 31 Bom., 495.

- (c) The fact that, at the first opening of succession, certain daughters were excluded is no bar to their taking on the decease of those that took :—(1910) 32 All., 814.
- (d) The daughter's son is not the heir after the daughter but such other daughters as there may be :—(1896) 8 All., 365.
- (e) As to the nature of the estate taken by the daughters :—See (1871) 6 M. K. C., 310 ; (1875) 15 B. L. R., 10 (24).]

[8 Cal. 602]

The 14th February and 12th March, 1878.

PRESENT :

SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, AND
SIR R. P. COLLIER.

Seth Gokul Dass Gopal Dass.....Plaintiff
versus

Murli and Zalim, Heirs of Tarapat.....Defendants.

[— 8 I. A. 78 2 C. L. R. 186]

[On Appeal from the Court of the Judicial Commissioner, Central Provinces.]

Interest on Decrees—Indian Contract Act, s. 20 and s. 23, cl. 2, Mistake of Fact and of Law—Error in Statement of Account.

Where a decree is silent as to future interest, interest cannot be recovered by proceedings in execution of the decree, but it may be recovered as damages by a separate suit.

Where the property of a judgment-debtor had been attached in execution for a sum claimed to be due under a decree but which sum in fact included interest not awarded by the decree, *held*, that an agreement, whereby the debtor obtained the release of his property on condition of paying by instalments the entire amount claimed inclusive of the interest, was not unlawful and void under cl. 2, s. 23* of the Indian Contract Act; and that the mistaken belief of the parties to the agreement that interest could be recovered by proceedings in execution was not a mistake of fact rendering the agreement voidable under s. 20† of that Act.

In a written agreement by a debtor to pay his debt by instalments, securing the payment by a mortgage of land, the amount of the debts was erroneously stated to be greater than it actually was. In a suit on the agreement, *held*, that such an error was ground for reforming the account, but not for setting aside the agreement.

[603] THIS was an appeal from a decree of the Judicial Commissioner of the Central Provinces dated the 7th September 1875, affirming a decree of the Commissioner of Jubbulpore dated the 12th March 1875, which in turn affirmed a decree of the Deputy Commissioner of Jubbulpore dated the 24th November 1874, which dismissed the suit brought by the present appellant as plaintiff.

*[Sec. 23 :—The consideration or object of an agreement is lawful, unless—

What considerations and objects are lawful and what not.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.]

Agreement void where both parties are under mistake as to matter of fact. †[Sec. 20 :— Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.]

The whole facts of the case and the questions raised for decision are fully disclosed in their Lordships' judgment.

Mr. *Leith*, Q. C., and Mr. *T. B. Norton* appeared for the Appellant.

The Respondents were not represented.

The judgment of their Lordships was delivered by

Sir B. Peacock.— This is an appeal from a decree of the Judicial Commissioner of the Central Provinces of India, in a suit instituted by the appellant against the respondents in the Court of the Deputy Commissioner of Jubbulpore, for the foreclosure of a mortgage.

The following are the circumstances under which the mortgage was executed :—On the 27th June 1859, the appellant obtained a decree in the Court of the Sudder Ameen of Jubbulpore against Tarapat Patel, malguzar of Khairi, the father of the defendants, for the sum of 9,413 rupees, 15 annas and 3 pies, being the balance of principal and interest due upon a bond executed by Tarapat, and the costs of suit. The decree was silent as to the payment of future interest on the amount decreed. By the bond upon which the decree was obtained, it was expressly stipulated that interest should be paid at the rate of 1 per cent. a month.

Between the date of the decree and the 27th June 1865, the plaintiff endeavoured, on several occasions, to obtain payment of the amount decreed, and did in fact realize portions of the amount under two several executions. It is unnecessary to enter into any details of the proceedings adopted by the plaintiff, or of the litigation which ensued upon them. It is sufficient to state that, in their Lordships' opinion, no laches can be imputed to the plaintiff in endeavouring to enforce the decree.

[604] In February 1865, the plaintiff applied to the Court of the Deputy Commissioner of Jubbulpore against the defendants and their father, Tarapat, for an attachment and sale of their rights in the village of Khairi in execution for the sum of Rs. 13,498-9-9 claimed to be due under the decree.

That sum included interest on the amount of the decree calculated up to the 14th October 1863, after giving credit for payments made on account. Upon that application the defendants and their father were ordered to be summoned, and upon their non-appearance an order was made on the 25th July 1865, for the attachment of their proprietary rights in the village, and for the sale thereof by public auction, after due notice according to ss. 248 and 249 of Act VIII of 1859.

On the 3rd August in the same year, orders were issued that the requisite notifications, according to s. 249, be issued, and that the sale of the right and interest of defendants in the village of Khairi should take place on the fortieth day from that date.

On the 4th, the present defendants presented a petition to the Deputy Commissioner praying to be relieved from liability for the plaintiff's claim, and that the attachment might be removed from the village. Upon that petition an order was passed refusing to alter the order already made, and stating that as the defendants had failed to appear on the date appointed for hearing, the case had been disposed of in their absence, the reason why they had absented themselves not having been explained. From that order they appealed to the Commissioner, and their appeal was rejected.

On the 18th September 1865, the mortgage upon which the suit was brought was executed. It was by conditional sale, and is in the following words :—

"Seth Khusalchand and Gokuldass, of Jubbulpore, plaintiffs v. (1) Tarapat, (2) Murlidhar, (3) Zalim Singh, patels, residents, and malguzars of the village Khairi, Pergunnah Patan, defendants.

Claim.

Execution of decree for Rs. 13,498-9-9.

"We, Tarapat, Murlidhar, and Zalim Singh, patels and residents of Mouza Khairi, defendants, are the writers of this agreement.

"[605] "The plaintiffs above-named having taken out execution of a decree for the sum above-mentioned, and applied for attachment and sale of the village Khairi, the 13th September 1865 was first appointed as the date for the sale of the village in accordance with orders from the Judicial Commissioner. Subsequently the 18th of the said month had been fixed as the date for sale, in liquidation of a sum of Rs. 16,498-9-8.

"We have now brought the plaintiffs to terms, and having gone into the accounts, we agree to pay plaintiffs as principal, interests, costs, and future interests on the decree, in all 19,000 Government sicca rupees.

"Of this we have caused 5,000 rupees to be paid by Naraindas and Raghoonath. This leaves a balance of 14,000 Government rupees, which we agree to liquidate, paying no interest, by yearly instalments as detailed below; and until the liquidation of the whole amount due, we hereby mortgage or conditionally sell the village in question, the condition being that, in the event of our failing to pay any one of the instalments agreed upon, the sale of the village shall become absolute; we and our heirs would then forfeit all proprietary rights in the village, and such rights would be transferred to plaintiffs, to be thenceforward enjoyed by them and their descendants. Should, however, the failure on our part to pay the instalment in arrears be attributable to unfavourable seasons, &c., the said instalments will be payable next year, and will bear interest at 1 per cent.

"Should the payment in arrears be not made in the next year along with the one due for that year, the sale of the village will be considered absolute. The terms of this deed of sale would be binding on our heirs and representatives also, and so long as the money due to plaintiffs remains unpaid, the village shall not be transferred by us to any one else; any such transfer, if made, shall be held to be illegal.

"We relinquish all claims to any money which the plaintiffs may have recovered at the time of the sale becoming absolute."

The details of the instalments were for the payment on the 15th Aghhan, Sambat 1922, corresponding with the year 1865, of the sum of 2,000 rupees, and on Jeth 15th in each of the following twenty years, of the sum of 600 rupees, making a total of 14,000 rupees.

[606] On the same 18th September 1865, Tarapat, the father, each of the defendants and the plaintiff respectively, made the following statements, viz. :—

"Tarapat, defendant, son of Mahadeo, caste Koormee, aged 50 years, malguzar, resident of Khairi, states on solemn affirmation :—

"We have effected a settlement of his claim with the plaintiff by hypothecating our village, and fixing instalments for the liquidation of the same, and beg that our village be released from attachment.' 18th September 1865.

"Murli, defendant, son of Tarapat, caste Koormee, aged 28 years, resident of Khairi-malguzar, states on solemn affirmation :—

"Having effected a settlement of his claim with the plaintiff by fixing instalments for its liquidation, I beg that the village be released from attachment. We have hypothecated our village as a guarantee for the liquidation of plaintiff's claim.' 18th September 1865.

"Zalim, defendant, son of Tarapat, caste Koormec, aged 21 years, resident of Khairi malguzar, states on solemn affirmation :—

" 'We have fixed instalments for the payment of the plaintiff's claim, and beg that our village be released from attachment. We have mortgaged our village to plaintiff.' 18th September 1865.

"Seth Khusalchand, son of Sawarm, aged 62 years, caste Maheshree, resident of Jubbul, and a mahajun by profession, states on solemn affirmation :—

" 'I have taken out execution of a decree against Tarapat, Murli, and Zalini, and their village was about to be sold. The defendants have, however, made an amicable arrangement for the liquidation of my claim by agreeing to pay instalments, which I have approved. I have no objection whatever, and I beg that the arrangements be sanctioned by the Court, and the village released from attachment. The defendants have hypothecated the village, and I wish that it should remain so hypothecated and the case be struck off the file.' 18th September 1865."

The mortgage was on the same day presented by the defendants to the Extra Assistant Commissioner, who forwarded the case to the Court of the Deputy Commissioner, who thereupon, on the 19th September 1865, ordered that the kistbandi be sanctioned and the case struck off the file as completely disposed of.

The defendants continued to pay the instalments under the mortgage up to 15th Jeth, 1929, but failed to pay the instalments which fell due in Sampat 1930 and 1931, whereupon the plaintiff, [607] on the 24th October 1874, filed his plaint and prayed for a decree for 7,800 rupees, the amount of the instalments remaining unpaid, with a proviso that in the event of the same not being paid up within one year, the rights and interests of the defendants and their deceased father in the village in question be transferred to plaintiff, the transaction being then considered as one of an absolute sale.

The defendants in their written statement alleged, amongst other things, that in June 1859 a money-decree for Rs. 9,413-15-3 was passed against Tarapat, their father, and that future interest on the decree was not allowed; that the plaintiff, however, fraudulently went on executing the decree with interest, and eventually, in September 1865, induced Tarapat and the defendants to execute the deed sued on, by dishonestly concealing the fact that future interest had not been decreed.

They also stated that they were ignorant people, and that they executed the deed under a mistake of fact, *i. e.*, under the impression that future interest had been decreed as represented by the plaintiff; that, at the time when the deed was executed, only Rs. 3,798-4-9 was due under the decree, and that the defendants were minors at the time of the execution of the deed.

The plea of minority was found against the defendants, but the Deputy Commissioner dismissed the plaintiff's suit with costs, upon the ground that the claim was based on an illegal contract. He held that even if the plaintiff had a right to demand the sum of Rs. 13,498-9-9 for which execution had been awarded, there was not sufficient explanation as to how that amount was increased to 16,498 rupees; and further, that even if, as the plaintiff's counsel had suggested, the plaintiff, in making up the accounts with defendants, added interest for the period from October 1863 to the day fixed for the sale of the village in execution, that alone was sufficient to vitiate the contract, for in the view of the Deputy Commissioner, it was evident that the plaintiff was well aware that he had no real claim to interest. But he went further, and held that the plaintiff was not entitled to any interest on the decree; that 4,320 rupees

only were due; and that the plaintiff by concealment of facts regarding the amount due, and by [608] misrepresentation of facts, as shown by the proceedings in the original case, and the application for execution for 3,000 rupees in addition to the 13,498 rupees, were sufficient grounds for considering that the transactions out of which the contract grew were unlawful.

Upon appeal, the Commissioner was of opinion that there was no sufficient evidence of concealment, but that there was misrepresentation with regard to defendant's liability to interest within the meaning of definition 1, s. 18*, of the Indian Contract Act, IX of 1872. He further held that the bond was nothing more than a kistbandi; that no new consideration for it was given; that if the parties had arranged that effect should be given to it by the executing Court, it would have been pronounced invalid, as it altered the terms of the decree by the addition of interest, which could not be done even with consent of the parties. He therefore held that the contract was illegal and void under cl. 2, s. 23, of the Indian Contract Act, and dismissed the appeal with costs.

A special appeal was preferred to the Judicial Commissioner, who dismissed it with costs, on the ground that the deed was voidable under s. 20 of the Indian Contract Act, inasmuch as both parties were under a mistake of fact essential to the agreement expressed in it. Their Lordships are of opinion that there was no sufficient evidence to prove a fraudulent misrepresentation or concealment of facts on the part of the plaintiff. There was, no doubt, a mistake of law on the part of the defendants in supposing that execution could be issued for interest upon the amount decreed from the date of the decree to the date of realization, no such interest having been awarded by the decree. But that mistake appears to have been common not only to the plaintiff and the defendants, but also to the Assistant Commissioner by whom the order of the 25th July 1865 was made for the attachment and sale of the village in execution for the sum of Rs. 13,468-9-9. Indeed, until the Full Bench ruling of the High Court of Bengal in September 1866 in the case of *Mosoodun Lall v. Bekaree Singh* (B. L. R., Sup. Vol., 602; s. c., 6 W. R., Mis. App., 109), the principle of which was upheld by the Judicial Committee in the [609] case of *Pillai v. Pillai* (15 B. L. R., 383; s. c., L. R., 2 Ind. App., 219), there were conflicting rulings upon the point whether interest upon a decree could be levied in execution when the decree was silent as to subsequent interest on the amount decreed.

In that uncertain state of the law, the defendants not having appeared to show cause, an order was in fact made for the attachment and sale of the village in execution for the sum of Rs. 13,498-9-9, which included interest on the decree. No appeal was preferred against that order, nor were any other proceedings adopted to set it aside. It remained in force up to the time of the mortgage, and the village had been actually attached, and was liable to be sold under it if the compromise had not been effected and the mortgage executed. Their Lordships are of opinion that the mortgage was not invalid either upon the

"Misrepresentation" defined.

*[Sec. 18:—Misrepresentation means and includes—

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;
- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing, which is the subject of the agreement.]

grounds stated by the Commissioner or upon that stated by the Judicial Commissioner. It appears to have been executed by way of compromise, after an examination of the accounts at which the father Tarapat was present; and it does not appear to their Lordships that, subject to what will hereafter be said as to a sum of 3,000 rupees, part of the money secured, the plaintiff gained any unconscionable advantage by the transaction; for although he was not strictly entitled to an execution for interest calculated for a period subsequent to the date of the decree, there seems to be no reason why he should not have recovered interest as damages in an action upon the decree if he and the Court which issued the attachment had not mistaken his remedy. It is not necessary to refer to the English decisions bearing upon the subject of recovering by action interest upon a judgment which cannot be levied by execution. In the case of *Pillai v. Pillai* (15 B. L. R., 383; s.c., L. R., 2 Ind. App., 219), to which reference has already been made, the Judicial Committee, in reference to the question of levying interest upon a decree where the decree was silent as to future interest, stated expressly that questions of that nature might be raised by separate suit.

It may be remarked that the rate at which interest was calculated for the period between the execution of the mortgage [610] and the times fixed for the payment of the instalments was extremely low.

It appears, however, to have been assumed that the sum for which the village was liable to be sold in execution was not Rs. 13,498-9-9, but Rs. 16,498-9-8.

* The recital in the mortgage is, "Subsequently the 18th of the said month had been fixed as the date for sale in liquidation of a sum of Rs. 16,498-9-8." As to this the Judicial Commissioner says: "In the first Court's judgment the larger sum of Rs. 16,498-9-8 is referred to as entered in one of the processes of execution, viz., 'the notice of sale,' but the extant record of proceedings nowhere mentions such a sum. If such a sum was ever entered in such a process it must apparently have been only through a clerical error." Although there does not appear to have been any wilful misrepresentation in this respect by the plaintiff, their Lordships are of opinion that there was no authority under s. 249 of Act VIII of 1859 for increasing the amount for which the village was ordered to be sold in execution from 13,498 rupees to 16,498 rupees; that the addition has not been satisfactorily explained; and that the deed ought to be reformed by disallowing the additional sum of 3,000 rupees. This will reduce the sum secured by the mortgage by 3,000 rupees, and a proportionate part of the sum allowed for future interest during the period stipulated for payment by instalments, which may be taken in round numbers as together amounting to 3,480 rupees. Deducting 3,480 rupees, and the eight instalments of the 14,000 rupees which have been paid, amounting to 6,200 rupees, from the total amount of 14,000 rupees secured, there remains the sum of 4,320 rupees to be paid by the defendants to the plaintiff in order to redeem the above-mentioned village.

Their Lordships will, therefore, humbly advise Her Majesty that the decrees of the three lower Courts be reversed; that in the event of the defendants paying to the plaintiff the sum of 4,320 rupees, together with the costs of the plaintiff in the three lower Courts, within one year from the time of the service upon them of notice of such order of Her Majesty in Council as shall be made in this appeal, or in the event of their paying into the Court of the Deputy Commissioner of Jubbulpore within that [611] period the said sum of 4,320 rupees, together with such costs as aforesaid for the use of the plaintiff, the said village shall be freed and discharged from the said mortgage; but that in the event of the said sum of 4,320 rupees

together with such costs as aforesaid, not being paid to the plaintiff by the defendants, or paid by them into the said Court for the use of the plaintiff within the period aforesaid, the said mortgage and conditional sale shall become absolute, and all the right, title and interest of the defendants in the said village shall be transferred to and vested in the plaintiff; and in order that due notice of such order in Council shall be given to the defendants, their Lordships will further advise Her Majesty that the plaintiff be ordered to lodge the said decree of Her Majesty in Council in the Court of the Deputy Commissioner of Jubbulpore, in order that notice thereof may be given to the defendants in due course, and that the plaintiff do also deposit in the said Court such an amount as may be required to defray the costs of serving upon the defendants notice of the said order.

Considering the peculiar circumstances of this case, and also the fact that the plaintiff has not succeeded to the full extent of his claim, their Lordships are of opinion that the respondents ought not to be ordered to pay the costs of this appeal.

Agents for the Appellant: Messrs. *Merriman, Pike and Merriman*.

NOTES.

[I. WHERE THE DECREE IS SILENT—

- (a) Where the decree expressly reserves the ascertainment of mesne profits in execution, an amount in excess of prayer in plaint can be awarded:—(1882) 9 Cal., 112 (115).
See also our Notes to 3 Cal., 161.
- (b) Where a stipulation was made for interest after suit, it was enforced as not proceeding on any mistake:—(1884) 7 Mad., 400.
- (c) A new agreement with judgment debt as consideration may be enforced even if satisfaction of that decree had not been certified:—(1884) 7 All., 124 (133).

II. CONTRACT ACT—MISTAKE OF FACT AND OF LAW—

- (a) Mistaken belief of forfeiture of occupancy rights on remarriage is a mistake of law and not relieved:—(1907) A. W. N., 197.
 - (b) Contract under mistaken belief that under decree interest was liable to be paid, relieved against "as the mistake was as to the private rights of the parties and as such a mistake of fact":—(1904) 6 Bom. L.R., 417.
- N. B.*—But it is thus directly opposed to this decision of the Privy Council, and cannot be regarded as authoritative.]

[612] APPELLATE CIVIL.

The 11th January, 1878.

PRESENT :

•MR. JUSTICE L. S. JACKSON AND MR. JUSTICE KENNEDY. •

Poran Sookh Chunder and others.....Defendants

versus

Parbutty Dossee.....Plaintiff.

[- 1 C. L. R. 404]

Suit by person in possession of land to establish title—Declaratory decree—

Act VIII of 1859, s. 15¹—Practice—Grounds of appeal taken in

Argument—Specific Relief Act, I of 1877.

The plaintiff in a suit to establish her lakheraj right to lakheraj land, stated in her plaint that she was in possession of certain land by virtue of the will of her husband; that while in possession of the land, a suit was brought against her in the Small Cause Court for rent by the defendants, who obtained a decree; and that there being no appeal against the decision, the lakheraj rights in respect of the lands were consequently injured; she therefore brought the present suit.

Held, that such a suit was not maintainable, as the claim which the defendants set up was no longer in the condition of a mere assertion or a claim for right, but had passed into a decree.

Held, further, that in this case the plaintiff was not without a remedy, for if a further suit for rent be brought, she might file a suit and apply for an injunction to prevent the other party from proceeding so long as her suit was not disposed of and an absolute relief given her.

Held, further, that although, as a rule, the Court will not permit grounds of appeal to be taken in argument which have not been taken in the memorandum of appeal, yet where a decree comes before it which is upon its very face illegal, the Court is bound to take up the point itself and rectify the mistake.

Semle per JACKSON, J.—That the plaintiff might, if a fresh suit for rent be brought, again raise the question of her lakheraj title, because the Small Cause Court has no power to determine finally a question of right.

THE facts of this case were, as follows : —

The defendants brought a suit in the Munsif's Court against the plaintiff to recover rent on certain lands in the plaintiff's occupation, and the amount sued for being less than Rs. 50, and the land being situated within the limits of the Katwa Municipality, the Munsif tried the suit in his jurisdiction of Small [612] Cause Court Judge, with which he was vested by Government, and gave judgment for the plaintiffs in that suit, the now defendants. The plaintiff then brought the present suit, alleging that she was entitled to the land in question

* Special Appeal, No. 647 of 1877, against the decree of Baboo Nobin Chunder Gangooly, Additional Subordinate Judge of Zilla East Burdwan, dated the 18th February 1876, reversing the decree of Baboo Promothonath Banerjee, Munsif of Katwa, dated the 28th March 1876.

• † [Sec. 15 :—No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right, without granting consequential relief.]

under the will of her husband who had purchased it as lakheraj or rent-free land; and after setting out the proceedings in the Munsif's Court, she concluded her plaint in these words:—"There being no appeal against the said decision, no measures have been taken; consequently the lakheraj right in respect to the lakheraj land mentioned in the schedule has been injured, and therefore I have brought this suit for establishment of lakheraj right to the lakheraj land, and laid the claim at Rs. 94, the price thereof."

The defendants, amongst other things, contended that the suit would not lie, in that it indirectly sought to impeach the previous Small Cause Court decree which was final.

The Court of First Instance overruled this objection, but upon the merits he found against the plaintiff and dismissed the suit. On appeal by the plaintiff this judgment was reversed, and the present appeal was thereupon preferred by the defendant.

Baboo Mohini Mohun Roy for the Appellants.—This suit cannot be maintained. It seeks a declaratory order in respect of the title to land in the possession of the plaintiff. It is also an illegal attempt to set aside a decree of the Small Cause Court which is final, and cannot therefore be impeached. [JACKSON, J.—You do not take this objection in your grounds of special appeal.] That is so, but this is an objection which, if valid, goes to the jurisdiction of the Court which entertained the suit. This Court is therefore bound to give it effect.

Baboo Sreenath Doss with him *Baboo Hemchunder Banerjee* for the Respondent.

The following judgments were delivered by

JACKSON, J.—It appears to us that the objection taken during the argument of this special appeal, although it was not taken in the memorandum of appeal, is a valid objection to the decision. The facts of this case are shortly these: (The learned Judge [614] stated the facts of the case as set out above, and having remarked that the particular question before the Court might not have been discussed by the defendants in the Court of First Instance continued).—The defendants appeal specially to this Court, and of course we are not only entitled, but bound to consider an objection which raises the question whether the plaintiff was entitled to maintain the suit and to obtain the decree which she asked for. It has been constantly ruled in this Court and in the other High Courts, and the law is stated in the case noticed by Mr. Broughton in his edition of Act VIII of 1859—*Padayalingam Pillay v. Shanmugham Pillay* (2 Mad. H.C.R., 333)—that a suit ought not to be maintained where "the plaintiff who merely seeks for a declaration of title is in possession." In the present case the plaintiff was and is in possession of the land to which she says she is entitled. But she says, "inasmuch as the defendants claim to be entitled to take rent from me in respect of these lands, and inasmuch as I claim to hold the land lakheraj, free from payment of any rent, by that claim of the defendants, and by the fact that under such a claim they recovered a decree against me in the Small Cause Court, a cloud has been thrown on my title." And she alleges that as a justification for this suit. There are no doubt cases—I am speaking now of the state of the law before the Specific Relief Act was passed—in which a plaintiff has been allowed to say:—"The defendant sets up a title, a mortgage or any other title, embodied in a certain document. I have accordingly brought the document into Court, and I call upon the Court to look into that document, the alleged mortgage, or whatever it might be, and to determine whether that is a

valid mortgage." And if the Court held that the mortgage was not valid, then the mere invalidation of the document relied upon by the defendant has been considered such relief as the plaintiff might properly ask for.* [615] In the present instance the claim which the defendants have set up is no longer in the condition of a mere assertion or a claim for right; it has passed into a decree. Consequently the plaintiff could not bring this suit for the purpose of setting aside the judgment of the Small Cause Court, and therefore no relief could be had in respect of that. It appears to me, therefore, that under the law as it stood before the Specific Relief Act was passed, the plaintiff could not maintain the present suit. It was suggested that in such circumstances, unless such a suit as the present is allowed to be maintained, the plaintiff will be without a remedy. That, in the first place, is not a reason for allowing a suit to be maintained which the law does not allow. But in the next place, it does not seem that the plaintiff is without a remedy, for it is quite conceivable that if a further suit for rent be brought, she might immediately file a suit in the Munsif's Court and apply for an injunction to prevent the other party from proceeding so long as her own suit is not disposed of and an absolute relief given her. It may also be, although I do not wish to express any positive opinion on the point, that the plaintiff before us may, if a fresh suit for rent be brought, again raise the same question, because the Small Cause Court has no power to determine finally a question of right. But it is unnecessary to decide that point. All that I say is that the present suit is not maintainable. I have the satisfaction of seeing that in addition to this ground there were other good grounds of defence which the defendants had in the present suit and which the Munsif found in their favour, so that if possibly the suit might come before us for trial on the merits, we might be inclined to reverse the judgment of the Lower Appellate Court also on other grounds. In both these appeals, therefore, the decrees of the Lower Appellate Court will be reversed and the decrees of the Court of First Instance dismissing the suit will be restored with costs.

Kennedy, J.—I entirely concur. As a rule, this Court will not permit grounds of appeal to be taken in argument which [616] have not been taken in the memorandum: but where a decree comes before it which upon its very face is illegal,—a decree which goes beyond the power of the Court which passed it under circumstances of this sort,—I take it that this Court is bound to take up the point itself and rectify the mistake, and not allow itself to become an instrument to the commission of further mistakes.

Appeal allowed.

NOTES.

[I. RES JUDICATA—DECISION WHERE NO APPEAL PROVIDED BY LAW—

(a) Question of title in Small Causes Court, being incidental, not operative as *res judicata*:—(1880) 2 All., 97; (1878) 3 Mad., 192; (1892) 2 M. L. J., 36; (1893) 17 Mad., 168; (1900) 4 C. W. N., 470; (1895) 18 Mad., 189.

(b) Even where subject-matter was the same, appealability was thought the test:—(1884) 9 Bom., 75 (the leading case); (1890) 15 Bom., 104; (1891) 15 Mad., 111; (1891) P. R. No. 20; (1892) 2 M. L. J., 36; (1894) 18 Mad., 189; (1900) 24 Bom., 456; (1905) 29 Mad., 195; *contra* (1898) 25 Cal., 571; (1900) 28 Cal., 78.

* See *Fakir Chand v. Thakur Singh*, 7 B. L. R., 614; *Prasanna Kumar Sandyal v. Mathuranath Banerjee*, 8 B. L. R., App., 26. The words in s. 15 of Act VIII of 1859 are to be interpreted as giving a right to obtain a declaration of title only in those cases in which the Court could have granted relief, if relief had been prayed for—*Nilmoy Singh Deo v. Khlee Churn Bhuttacharjee*, 14 B. L. R., 382; see also *Strimathoo Natchiar v. Dorasinga Tevar*, 15 B. L. R., 83. The power of the Court to pass declaratory decrees is now to be found in s. 42 of the Specific Relief Act (I of 1877).

(c) But see, now, the legislative provision in the Civil Procedure Code, s. 11, expln. II;—"For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court."

II. GROUNDS OF APPEAL NOT IN MEMORANDUM—

See (1880) 2 All., 884; (1891) 13 All., 381.

III. DECLARATORY DECREE—

may be refused where other convenient remedies available :—

(1900) 28 Cal., 492; (1889) 13 All., 17 F.B.; (1904) 27 All., 138; (1891) 14 Mad., 167.
See also (1882) 8 Cal., 483.]

[3 Cal. 616]

The 24th January, 1878.

PRESENT :

MR. JUSTICE KEMP AND MR. JUSTICE MORRIS.

Koonj Behary Chowdhry and othersObjectors

versus

Gocool Chunder Chowdhry and another.....Petitioners.

Certificate to collect debts—Questions of validity of alleged adoption - Title—Act XXVII of 1860.

The Court will refuse to grant an application for certificate to collect the debts of an intestate who has been dead forty years at the time of making the application, the presumption being that, owing to the operation of the law of limitation, there could be now no debts due to him which could be recovered.

A question of title cannot be judicially determined between parties, in an application under Act XXVII of 1860. Therefore, where the object of such an application was to obtain a judicial determination as to the validity of an alleged adoption, *Held*, that such a question could only be decided in a Civil Court.

THE appellants in this case, representing themselves as the *gyantees* (cognates) of one Gournath Chowdhry, deceased, applied, on the 26th of February 1875, for a certificate under Act XXVII of 1860, empowering them to collect the debts due to the estate of the intestate. At the time of making this application Gournath Chowdhry had been dead forty years. On the 30th March 1875, a cross-application for a similar certificate was made by Tripura Sundari and Kheema Sundari, being the widows of one Gobind Chunder Chowdhry, the alleged adopted son of the widow of the intestate. The two widows, on the 3rd May 1875, also presented a formal petition of objection to the [617] application made by the appellants. The District Judge, after a protracted hearing, refused to grant the appellants' application on the ground that a *prima facie* case had been made out to show that Gobind Chunder Chowdhry had been adopted by Kalee Sundari Chowdrain, the widow of the intestate.

In the application made by the two widows, Tripura Sundari and Kheema Sundari, the Court made an order granting them certificates under Act XXVII of 1860. The *gyantee* applicants appealed in both cases to the High Court.

*Miscellaneous Regular Appeals, Nos. 86 and 87 of 1877, against the order of J. B. Worgan, Esq., Judge of Zilla Rajshahye, dated the 30th June 1876.

Bahoo Grija Sunker Mookerjee for the Appellants.—The lower Court should have finally determined the question of adoption raised on this case and not rested content with finding that only a *prima facie* case had been made out; see *Mussamut Anundee Koer v. Bacheo Singh* (20 W. R., 476).

Baboo Sasibhooson Dutt for the Respondents.—The appellants' application was really meant to raise the question of the validity of the adoption, and this could not be entered into in the present master.

The judgment of the Court was delivered by

Kemp, J.—This is an application, not as the Judge states for a certificate to collect debts due to the estate of Kalee Sundari Chowdrain, who had no interest beyond a lifeinterest, but it is an application for a certificate under Act XXVII of 1860, to collect debts due to the estate of the late Gournath Chowdhry. Now it is admitted that Gournath Chowdhry died in Aughran 1245, or some forty years ago. The application for a certificate on the part of the appellants before us is on the footing that they are the *gyantees* of Gournath Chowdhry, and there was a counter-application by two ladies, Tripura Sundari and Kheema Sundari, who allege that they are the widows of Gobind Chunder Chowdhry, the adopted son of Gournath Chowdhry, and that they represent the interest of his two minor sons as their guardians. The Judge has examined a large [618] number of witnesses in this case. Their examination appears to have lasted over twelve days; it was then postponed for a considerable period and resumed again. The examination of the witnesses extends over no less than 114 pages of foolscap paper. Upwards of a 100 exhibits were filed, and the Judge, after entering into considerable argument as to whether certain sections of the Evidence Act applied, as regards the admissibility or otherwise of certain documents, has come to the conclusion that a *prima facie* case has been made out in this case as to the alleged adoption of Gobind Chunder Chowdhry under an onoomuttee puttro granted by Gournath Chowdhry to his widow, the late Kalee Sundari Chowdrain. The application for a certificate on the part of the *gyantees* was therefore rejected.

We think that this application might have been rejected on a very simple ground and without entering into this protracted investigation. It is an application made for the purpose of representing the estate and collecting the debts of Gournath Chowdhry, who died more than forty years prior to this application, and therefore on this ground alone we think that this application should not have been entertained.

In a case of this description under Act XXVII of 1860, although under the ruling in *Mussamut Anunda Koer v. Bacheo Singh* (20 W. R., 476), referred to by the pleader for the appellant in the course of the argument, the Judge was bound to inquire which title was made out for the purposes of the legal requirements of the Act, those learned Judges also observe that no title can be judicially determined between the parties as the result of the inquiry made under Act XXVII of 1860. Now it appears to us clear that the object of the application in this case was to obtain a judicial determination of the question whether Gobind Chunder Chowdhry was the adopted son of the Gournath Chowdhry or not, a question which can only be decided in a civil suit.

We therefore dismiss this appeal.

Appeal dismissed.

[619] In appeal No. 37 we are of opinion that the application of the two ladies, Tripura Sundari Chowdrain and Kheema Sundari Chowdrain, must

also be dismissed. Gournath Chowdhry died forty years ago, and they now ask for a certificate under the provisions of Act XXVII of 1860 to collect the debts due to him which they assess at Rs. 1,000, without, however, setting out in their application from whom these debts are due. Looking to the time which has elapsed since the death of Gournath Chowdhry, we think that there could be now no debts due to him which could be recovered owing to the operation of the law of limitation, and these ladies are therefore not entitled to a certificate under Act XXVII of 1860.

This appeal will be decreed, but under the circumstances we will give no costs in either appeal.

Appeal decreed.

NOTES.

[CERTIFICATE TO COLLECT DEBTS—QUESTION OF TITLE —

Where the question is as between one who is entitled on a certain state of facts and an entire stranger, title may be gone into :—(1888) 15 Cal., 574 ; (1880) 6 Cal., 303.

On this point generally :—See (1888) 15 Cal., 574.]

[3 Cal. 619]

The 4th April, 1878.

PRESENT :

MR. JUSTICE L. S. JACKSON AND MR. JUSTICE CUNNINGHAM.

Koylash Chunder Dass.....Plaintiff

versus

Boykoonto Nath Chundra and others.....Defendants.

[-- 2 C. L. R. 467]

Limitation—Oral Agreement—Debt payable by Instalment—Act XV of 1877, Schedule II, Article 75.

A entered into a verbal agreement with B to pay a debt due in monthly instalments, B reserving to himself the right to claim payment of the whole sum due on default of three successive instalments. A failed to pay any instalment. Four years after the first instalment was due, B sued A to recover the sum due on the various instalments not barred by limitation. *Held*, that B was not bound to sue for the whole amount due directly on A's failure to pay the three successive instalments.

Semle.—Article 75,† Schedule II of Act XV of 1877, does not apply according to its strict terms to a suit brought upon a verbal contract.

* Small Cause Court Reference No. 412 of 1878, from an order of Baboo Ram Doyal Ghose, Munsif and Judge of Small Cause Court of Bishenpore, dated the 26th January 1878.

† [Art. 75 :—

Description of Suit.	Period of limitation.	Time from which period begins to run.
On a promissory note or bond payable by instalments which provides that, if default be made in payment of one instalment, the whole shall be due.	Three years.	When the first default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.]

CASE referred for the opinion of the High Court by the Judge of the Small Cause Court of Bishenpore, under s. 617* of Act X of 1877.

The plaintiff's case is, that, in execution of a decree, the defendant adjusted the decretal debt, and verbally contracted to pay Rs. 68, by instalments at Rs. 3 per mensem, from Pous 1280 (December [620] 1873) to Augran 1281 (November 1874); and at Rs. 2 per mensem from Pous 1281 (December 1874) to Choitro 1282 (March 1875); and on default in payment of three successive instalments the whole should be due. The defendants had not paid for any instalment, hence that portion which has been barred was relinquished, and the present suit is to recover the sum due for instalments from Pous 1281 (December 1874) to Cheyt 1282 (March 1875), being Rs. 35, and it was instituted on the 13th December 1877.

The defendants contend that, under the contract as alleged by the plaintiff, the whole sum became due on the default in payment of three successive instalments from Pous to Falgoon 1280 (December 1873 to February 1874), and the plaintiff's cause of action to recover the whole sum accrued in Cheyt 1280 (March 1874); and as this suit has been brought after the expiration of three years from the said date, so the claim is barred, as the provision of art. 75, second schedule, in Act XV of 1877, is not applicable to suit for money due under oral contract.

The plaintiff, in reply, contended that the said rule is general and equally applicable to oral contract.

Both parties applied to refer the case, under s. 617 of the Civil Procedure Code, Act X of 1877, for the decision of the following point by the Honourable High Court:—

The point referred for decision was, whether the provision of art. 75, second schedule, Act XV of 1877, is applicable to oral contracts or to written instruments only?

Baboo Gopal Chunder Sirkar for the Plaintiff.

Baboo Sreenath Banerjee for the Defendants.

Jackson, J. (CUNNINGHAM, J., concurring).— Answering simply the question put to us, we think we are bound to say that art. 75 of the Indian Limitation Act of 1877 does not apply, according to its strict terms, to a suit brought upon a verbal contract. But it appears to us that the question does not really arise in the present suit, because we think plaintiff was not bound, but only had the option, to avail himself [621] of the clause enabling him to sue at once for the whole amount due on the failure to pay the particular instalments, and in point of fact, the money did not otherwise become due except on the falling due or arrival of the date of the successive instalments.

* [Sec. 617 :—If before or on the hearing of a suit or appeal in which the decree is final, or if in the execution of any such decree, any question of law or usage having the force of law, or the construction of a document which construction may affect the merits, arises, on which the Court trying the suit or appeal or executing the decree entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.]

[3 Cal. 621]
APPELLATE CRIMINAL.

The 14th December, 1877.

PRESENT:

MR. JUSTICE MARKBY AND MR. JUSTICE MITTER.

In the matter of Bhoobuneshwar Dutt..... Petitioner.*

[2 C. L. R. 80]

Refusal to give Receipt for Summons—Indian Penal Code
(Act XLV of 1860), s. 173.

A refusal to give a receipt for a summons is not an offence under s. 173 † of the Indian Penal Code.

Reg. v. Kalya bin Fakir (5 Bom. H. C. Rep. Cr. Cases, 34) followed.

IN this case the prisoner was charged with refusing to give a receipt for a summons. The prisoner appealed on the ground that the conviction was not warranted by law, inasmuch as refusing to acknowledge the receipt of a summons, either personally or by another person, does not constitute the offence under s. 173 of the Indian Penal Code.

Baboo Amarendra Nath Chatterjee for the petitioner.

Markby, J.—It appears to us that this conviction must be set aside. The charge against the petitioner was, that he had refused to give a receipt for a summons. This has been held by the High Court of Bombay in *Reg. v. Kalya bin Fakir* (5 Bom. H. C. Rep., Cr. Cases, 34) not to be an offence under s. 173 of the Indian Penal Code, which is the section under which this conviction has been made. We concur in that decision.

This conviction will, therefore, be set aside; and the fine, if paid, will be refunded. If the petitioner is in jail, he will be released.

NOTES.

[REFUSAL TO GIVE RECEIPT FOR SUMMONS is not an offence within s. 173, I.P.C.—

In addition to this case, See 31 All., 608 6 A. L. J., 777; (1892) 20 Cal., 358; 5 Mad., 199 (refusal to receive summons).]

* Criminal Motion, No. 232 of 1877, against the conviction and sentence of H. A. D. Phillips, Esq., Officiating Joint Magistrate of Sub-division Sewan, Zilla Sarun, dated 18th September 1877.

† [Sec. 173:—Whoever in any manner intentionally prevents the serving on himself, on any other person, of any summons, notice, or order proceeding from any public servant legally competent as such public servant to issue such summons, notice, or order, or intentionally prevents the lawful affixing to any place of any such summons, notice, or order, or intentionally removes any such summons, notice, or order from any place to which it is lawfully affixed, or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made, shall be punished with simple imprisonment for a term which may extend to one month, or with fine, which may extend to five hundred rupees, or with both; or if, the summons, notice, order, or proclamation is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.]

[622] APPELLATE CRIMINAL

The 16th April, 1878.

PRESENT:

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

The Empress

versus

Gangadhur Bhunjo and others.

[= 2 C. L. R. 179]

Stamp Act (XVIII of 1869), ss. 29, 43—Procedure—Magistrate authorized to prosecute.

A Magistrate who has been authorized by the Collector of a district, under s. 43 of the Stamp Act, to prosecute offenders against the stamp laws, is not competent also to try persons whom he prosecutes. The Collector should appoint some person other than a Magistrate to conduct the prosecutions.

THE petitioners were convicted by the Assistant Magistrate of Contai, under s. 29† of Act XVIII of 1869, for evasion of the stamp law, and were fined Rs. 18.

Prinsep J.—These cases have been submitted to us by the Sessions Judge of Midnapore, because sentences of fine have been imposed by the Magistrate of the Division of Contai for breaches of the stamp law contrary to the rule laid down in the case of the *Queen v. Nadi Chand Poddar* (24 W. R., Cr. Rul., 1).

It appears that the Collector authorized this officer, under s. 43‡ of the Stamp Act, to institute and conduct the prosecution in these cases. Under these circumstances we think that he was not competent also to try them. Any possible inconvenience might have been obviated by the Collector's employing the Government pleader or some other person to conduct the prosecution under s. 43. We quash the convictions and sentences, and direct that the fines, if paid, be refunded.

* Criminal Reference, No. 43 of 1878, from an order of W. Cornell, Esq., Officiating Sessions Judge of Midnapore, dated the 8th April 1878.

† [Sec. 29 :—Any person or firm making, signing, or issuing or, except as provided in section twenty-six, accepting, endorsing, paying, or receiving payment of any bill of exchange, promissory note, cheque, or other similar instrument liable to any of the duties hereby imposed, without the same being duly stamped,

and any person making, executing, or signing otherwise than as a witness any other instrument liable to any of such duties without the same being duly stamped, shall for every such offence, be liable to fine not exceeding one hundred rupees, or, if ten times the value of the proper stamp exceeds one hundred rupees, to fine not exceeding ten times such value, or, where an insufficient stamp has been used, if ten times the deficient amount exceeds one hundred rupees, to fine not exceeding ten times such amount.]

‡ [Sec. 43.—All prosecutions in respect of any offence punishable by this Act, shall be instituted and conducted by the Collector or such other officer as the Local Government generally or [the Collector specially authorizes in that behalf.]

[623] APPELLATE CRIMINAL.

The 18th April, 1878.

PRESENT:

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

In re The Empress

versus

Sahae Rao.

[2 C. L. R. 304]

Criminal Procedure Code (Act X of 1872), s. 263 - Verdict—Disagreement in finding of Jurors—Dissent of Judge from Verdict of Majority—High Court, Power of.

An accused struck a woman, carrying an infant in her arms, violently over head and shoulders. One of the blows fell on the child's head causing death. *Held*, that the accused had committed hurt on the infant under circumstances of sufficient aggravation to bring the offence within the definition of grievous hurt.

Where a jury are not unanimous in their finding, and the Judge dissents from the opinions expressed by them, on the case being referred under s. 263 of Act X of 1872, the High Court is competent to find the prisoner guilty notwithstanding an acquittal by the majority of the jury.

It is the duty of a Judge in sending up a case to the High Court under ss. 263 and 464 of the Criminal Procedure Code, when he disagrees with a verdict of acquittal, to state the offence which in his opinion, has been committed.

THIS was a reference to the High Court under s. 263 of the Criminal Procedure Code. The prisoner had assaulted a woman, who, at the time of the assault, had a child in her arms, and one of the blows which the prisoner was aiming at the woman fell on the child's head and caused its death.

The prisoner was thereupon charged with (i) culpable homicide not amounting to murder; (ii) of causing death by a rash and negligent act; (iii) grievous hurt; (iv) hurt. No charge was made with reference to the assault upon the mother.

The jury unanimously found that the prisoner had been guilty of an assault upon the woman Chetya; but made no mention of the infant. On being told to reconsider their verdict, three of them announced that they did not believe the child had been killed by the prisoner; but the remaining two were of opinion that the prisoner was guilty of culpable homicide not amounting to murder of the child.

[624] On account of this finding of the jury, the Officiating Sessions Judge of Patna, differing from the verdict of the majority, sent up the case, on the 29th March 1878, to the High Court.

Baboo Juggodamund Mookerjee for the Prosecution.

Mr. Twidale for the Prisoner.

The judgment of the Court was delivered by

Markby, J.—The facts of this case do not appear to be susceptible of any doubt. The prisoner was employer of a man, named Behary, his wife Chetya, and his sister Foolcoomareo. Some disagreement appears to have arisen as to the payment of the wages due to this family. In the morning in question

* Criminal Reference, No. 318 of 1878, from an order of J. F. Browne, Esq., Officiating Sessions Judge of Patna, dated the 29th March 1878.

the prisoner went to the house of Behary, and called Chetya, the wife of Behary, and Fooleoomaree his sister, to execute some work on his behalf. They refused and made use of language which, no doubt, was disrespectful. Therefore, the prisoner, with the shoes which he was wearing, commenced striking Chetya about the head and shoulders. Chetya had at that time a child of a few months old in her arms, the head of the child, as she describes it, being either upon or close to her shoulder. One of the blows delivered by the prisoner fell upon the child's head, and, as was almost certain to happen, the child died in consequence.

The prisoner was charged with culpable homicide not amounting to murder of the child, of causing the death of the child by a rash and negligent act, of grievous hurt to the child, and of hurt to the child. The last two charges being added by the Sessions Judge. There was no charge made with reference to the assault upon the mother.

The result of the trial was, that three of the jury thought that the prisoner should be acquitted altogether, the other two jurors seem to have thought that the accused was guilty of culpable homicide of the child.

The Judge has told us that he differs from the verdict of the majority, who have acquitted the prisoner altogether, but we feel somewhat embarrassed in the matter by this, that he has not told us of what crime in his opinion the prisoner was guilty. Reading ss. 263 and 464 of the Criminal Procedure Code together, we think that it is the duty of the Judge in cases like [625] this to give us his own opinion, if he disagrees with the verdict of acquittal, as to the exact offence of which he considers the prisoner guilty. We think that this Court has a right to expect from the Sessions Judge his opinion in a case of this kind. Nevertheless, we think we are still competent to deal with the matter, and the *Government Pleader*, who has appeared before us has very properly not pressed for a conviction of culpable homicide. We are extremely doubtful whether technically the charge of culpable homicide could be supported. But we think we are justified upon the facts proved in finding the prisoner guilty of grievous hurt under s. 322. There being no doubt whatever as to the facts of the case, we have no hesitation in finding the prisoner guilty under that section, notwithstanding that he was acquitted altogether by three of the jury, probably, because they did not fully understand the law upon the subject. No doubt, what the prisoner intended was to inflict some injury upon the mother: and in one sense, he did not intend to inflict any injury upon the child at all, but it seems to me, that the language of s. 321 covers a case in which a man intending to aim a blow at one person strikes another. That section says:—"Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said voluntarily to cause hurt to such person." The very general language of that section was, I think, used expressly for the purpose of covering a case of this kind. I also think that the prisoner is also liable for causing grievous hurt. Section 322 provides that "whoever voluntarily causes hurt, if the hurt which he intends to cause, or knows himself to be likely to cause, is grievous hurt, and if the hurt which he causes is grievous hurt, is said voluntarily to cause grievous hurt." I think, that it is impossible to say, when a man strikes a woman with a child in her arms, and strikes her on that part of her person which is close to the head of the child, that he does not know that he is likely to cause grievous hurt to the child. He must, as a reasonable being, know that nothing is more probable than that

the blow which he aims at the woman would fall on the child, and that any blow which would fall [626] upon the child's head would be likely to cause such hurt as would endanger the child's life. This is one of the definitions of grievous hurt, and, therefore, in my opinion the prisoner ought to be convicted under s. 322.

Of course, the most important matter in this case is, what is the punishment which the prisoner ought to undergo. The evidence certainly shows that the prisoner's conduct was very violent. There was nothing which could justify his conduct even as regards the mother; and to strike a woman with a child of tender age in her arms is certainly a most unjustifiable act. No doubt, the prisoner never intended to do any injury to the child, but still he has done an act which deserves severe punishment. Under s. 322 of the Indian Penal Code he will be sentenced to rigorous imprisonment for two years.

NOTES.

[Disagreement between Judge and Jury:—See 29 Mad., 91; 11 C. W. N., 715]

[3 Cal. 626]

PRIVY COUNCIL.

The 20th, 21st and 22nd June and 19th July, 1877.

PRESENT:

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH AND
SIR R. P. COLLIER.

Maharajah Pertab Narain Singh.....Plaintiff

versus

Maharane Subhao Kooer and others.....Defendants.

[—4 I. A. 2281—C. L. R. 113]

[On appeal from the Court of the Commissioner of Fyzabad, Oudh.]

*Act I of 1869, s. 22, cl. 4—Talukdar—Treatment of Son of
Daughter as a Son—Revocation of Hindu Will.*

Where an Oudh talukdar, not having male issue, is shown to have so exceptionally treated the son of a daughter, as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son of his own if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment of the 4th clause of s. 22*, Act I of 1869.

Circumstances affording evidence of such an intention considered.

The will of a Hindu may be revoked by parol, and where definite authority is given by him to destroy his will, with the intention of revoking it, that is in law a sufficient revocation, although the instrument is not in fact destroyed.

Special rules of succession shall be inserted in the second, third, or fifth of the lists mentioned in section eight, or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows, *viz.*:—

Cl. 4 :—Or in default of such son or descendants, then to such son (if any) of a daughter of such talukdar or grantee, heir or legatee, as has been treated by him in all respects as his own son, and to the male lineal descendants of such son, subject as aforesaid.]

THIS was an appeal from a decree of the Commissioner of Fyzabad in Oudh, dated the 24th December 1873, confirming a decree of the Deputy Commissioner of that district, dated the 28th July of the same year.

The suit in which the appeal arises was instituted on the 21st November 1872 on behalf of the present appellant by his mother Brij Raj Koor. The plaintiff's claim was for a declaration of his title to succeed to the whole of the estate of the late Maharajah Man Singh, his maternal grandfather, who was a Hindu.

The facts of the case and the issues raised between the parties are set forth in their Lordships' judgment.

The Courts below differed as to whether the treatment of the appellant by the Maharajah was such as was contemplated by Act I of 1869, s. 22, cl. 4, the Deputy Commissioner deciding that it was, and the Commissioner that it was not; but they were agreed in holding that the Maharajah's will was valid and had not been revoked by him at the time of his death.

Mr. Leith, Q. C., and Mr. Joseph Graham, for the appellant, contended that the object of the Maharajah in executing the instrument of the 22nd April 1864 was merely temporary, and that, assuming the view of the lower Courts that it constituted a valid devise, it was liable to revocation, and had in fact been revoked and superseded by subsequent declarations and acts on his part, and finally by his express direction. The circumstance of its not having been destroyed in accordance with these directions was immaterial, and it was not necessary that these instructions should be in writing. Any declaration from which an intention to revoke could be collected was sufficient. *Ex parte The Earl of Ilchester* (7 Vesey, 348, at p. 370); *Walcott v. Ochterlony* (1 Curteis, 580); *Doc. & Reed v. Harris* (8 Ad. and El., 1); and see the cases collected in 1 William Saunders, pp. 278b and 279b. On the evidence, the Deputy Commissioner was right in holding that the appellant came within the provisions of cl. 4, s. 22 of Act I of 1869.

Mr. Cowie, Q. C., and Mr. Doyne (Mr. Thomas with them) for the respondents.—It, as had been found by both Courts [628] below, the Maharajah died testate, cl. 4, s. 22, Act I of 1869 does not apply, since that only relates to cases of intestacy. Assuming the question of evidence to be open, there was no evidence of subsequent conduct or acts on the part of Man Singh from which it could be collected that he revoked or altered the will of the 22nd April 1864. The lower Courts were warranted in rejecting the evidence that verbal instructions were given by Man Singh for the destruction of that will, and the mere expression on his part of a wish that the power of appointment therein given might be limited to the appointment of the appellant would not amount to a revocation. Where a written will is alleged to be revoked by parol, the evidence ought to be strict and stringent; *Lemann v. Bonsall* (1 Addams, 389). Here there were no facts on which an inference of an intention to revoke could be made in face of the finding of the lower Courts that there was no direction to destroy. If, however, Man Singh died intestate, the Commissioner was right in holding that no such exceptional treatment of the appellant had been proved, as would entitle him to set aside the rights of the Maharanee as her husband's widow under the ordinary Hindu law.

Mr. Leith replied.

Cur. adv. vult.

Their Lordships' judgment was delivered by

Sir J.-W. Colville.—The question raised by this appeal is the right of succession to the taluq of the late Maharajah Sir Man Singh, one of the most considerable, if not the most considerable, of the great landholders of Oudh, whose status and rights are the subject of Act I of 1869.

The Maharajah died on the 11th October 1870. He had no male issue. His nearest surviving relatives were his widow, the Maharanee Subhao Kooer, a daughter by a deceased wife, and the appellant, the son of that daughter. The Maharajah had also brothers, and brothers' sons, of whom some survived him. His grandson, the appellant, was known in the family [629] as "Dadwa Sahib," by which name he will be generally designated in this judgment.

The property which is the subject of this litigation belonged to Man Singh before the annexation of Oudh. He was one of the first who made their peace with Government on the restoration of the British power in 1858, and his title as taluqdar was duly confirmed by sanad. The estate is said to have been originally one which, according to the custom of the family, was descendible to a single heir, not necessarily determined by the strict rule of primogeniture. It had certainly passed from Buktowar Singh, the preceding proprietor, to his nephew, Man Singh, though the youngest of three brothers. Accordingly, when the lists prescribed by s. 1 of Act I of 1869 were made up, the name of Man Singh, as taluqdar, was inserted in the first and second of those lists.

Some years before the passing of this Act, and on the 22nd April 1864, Man Singh, under the circumstances which will be afterwards considered, executed and delivered to the Commissioner of the district a document, of which the following is a translation :

"I, Maharajah Man Singh, &c., taluqdar of Shahgunge, Gonda, &c., do hereby declare that, as I have not yet come to any determination as to what boy is to become my successor, I, for the present, declare my wife to become my successor, and inherit the whole of my property, whether moveable or immoveable. She will, until she nominates a successor, have the same power over the property as myself, except that she will not be authorized to make a transfer. There is no partner of mine in my moveable or immoveable property. I have, therefore, executed this will, and deposited it in a public office, that it may serve as a document, and prove of use when required."

Mr. Simson, the then Commissioner, made the following indorsement on the will :—"April 22, 1864. Maharajah Man Singh this day in person signed this document in my presence, and then delivered it to me as his last will and testament." And wrote on the envelope within which it was inclosed—"within this sealed envelope is Maharajah Man Singh's will. I forward [630] the envelope to the Deputy Commissioner of Fyzabad, with instructions to lodge it, sealed as it is, in the treasury ; and each treasury officer will note it in his receipt on giving or receiving charge. Of course the Maharajah may reclaim this on a written application properly authenticated at any time."

After the death of the Maharajah, and in November 1870, this will was opened, and under it the Maharanee was put into possession of the taluq. She afterwards, by a document dated August 16, 1872, exercised the power which the will gave her of "nominating a successor" in favour of the respondent, Triloki Nath, who was a son, then under age, of one of the late Maharajah's brothers, and had married her own niece.

Shortly after this transaction, the appellant, Dadwa Sahib, instituted this suit, praying for a declaration of his title to the succession to the Maharajah's estate, and for the cancellation of the document of April 22, 1864 (the will); that of August 16, 1872 (the appointment); and the order of the revenue authorities of November 11, 1870, whereby the Maharanee was put in possession.

It is now admitted on all sides, if it were ever seriously disputed, that the appellant can only succeed in his suit by establishing both the following propositions:—

1. That the testamentary disposition which the Maharajah unquestionably had power to make, and did make in April 1864, was revoked or became inoperative in his lifetime.

2. That the appellant is entitled to succeed to the taluq as the son of a daughter of the Maharajah, who had "been treated by him in all respects as his own son" within the meaning of the 4th clause of s. 22 of Act I of 1869; it being clear that as a mere grandson by a daughter he would not be the heir *ab intestato* to the taluq under the special canon of succession to intestate taluqdars established by that section of the Statute.

The Court of First Instance and the Appellate Court in Oudh have concurred in determining the first of these issues against the appellant. The second of them was found in his favour by the Court of First Instance; but that decision was reversed by the Appellate Court.

[631] In dealing with this appeal, their Lordships propose to consider, in the first instance, whether the appellant has established that he was treated by the late Maharajah "in all respects as his own son" within the meaning of the enactment in question, and is consequently the person entitled to inherit the taluq if the Maharajah died intestate.

The clause is perhaps not very clearly or happily expressed, and considerable doubt appears to prevail in Oudh as to the construction to be put upon it. One passage in the Commissioner's (Mr. Capper's) judgment almost implies that, inasmuch as the actual treatment of a son by his father varies in all countries according to the characters of the parent and the child, it is impossible to say what the Legislature meant by the treatment of a grandson "in all respects as a son." Other passages of the same judgment seem to assume that the treatment must in some way be tantamount to an adoption under the Hindu Law, involving the legal consequences of such an adoption as, e.g., the subjection of the grandson to prohibitions as to marriage which would not otherwise attach to him. And the appellant's own plaint affords some colour to such a construction, by describing his mother and guardian as his "sister."

Their Lordships are disposed to think that the clause must be construed irrespectively of the spiritual and legal consequences of an adoption under the Hindu Law. They apprehend that a Hindu grandfather could not, in the ordinary and proper sense of the term, adopt his grandson as a son. Nor do they suppose that, in passing the clause in question, the Legislature intended to point to the practice (almost, if not wholly obsolete) of constituting in the person of a daughter's son a "patricaputra," or son of an appointed daughter. Such an act, if it can now be done, would be strong evidence of an intention to bring the grandson within the 4th clause, but is not, therefore, essential in order to do so. Moreover, it is to be observed, that the 4th, like every other clause in the 22nd section, applies to all the taluqdars whose names are included in the second or

third of the lists prepared under the Act, whether they are Hindus, Mahomedans, or of any other religion; and it is not until all the heirs defined by the ten first clauses are exhausted, that, under the 11th clause, the person entitled to [632] succeed becomes determinable by the law of his religion and tribe.

It is necessary then to put a general as well as a rational construction upon the provision advisedly introduced by the Legislature into this statutory law of succession. And, taking the whole section together, their Lordships are of opinion that wherever it is shown by sufficient evidence that a taluqdar not having male issue has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment in question.*

Their Lordships will now proceed to consider the effect of the evidence as to the treatment of the appellant by the Maharajah.

It is unquestionable that the appellant was from the first brought up in the house of his grandfather, and not in that of his father. This circumstance, of itself, does not go far to prove his case. It may be accounted for by the fact that the social position of the father, though respectable, was very inferior to that of the Maharajah. But, whatever may be its value as evidence, this is a circumstance in the treatment of the boy which involved a departure from the ordinary usages of Hindus. On the other hand it must be admitted on the evidence that the Maharajah had not, in 1864, formed a clear intention that Dada Sahib, who was then between seven and eight years old, should be his successor.

It has been said that the making of his will was the result of pressure on the part of the authorities. However that may be, the act was a natural one. At that time nothing was definitively fixed as to the course of succession to the newly constituted taluqs, except that the taluqdars had an absolute power of disposition over them. The family custom which had previously regulated the succession to the Maharajah's taluk was one which implied selection. It was, therefore, in every way desirable that the Maharajah should make

* [The Privy Council in *Umrao Begum v. Irshad Husain* (1894) 21 Cal., 997 at 1002, 1003, explained this passage as follows:—

"It appears to have been pressed upon the Committee that the treatment required by the Oudh Estates Act must be something of the nature of adoption. In answer to that suggestion their Lordships pointed out that the section applies, not to Hindus alone, but to all religions and they continue as follows:—(Then quoting the whole of this paragraph from, 'It is necessary, then, to put a general as well as a rational construction,' to, 'brought within the enactment in question,' they state as follows):—

"Upon this passage, Mr. Finlay argued that the Committee intended to lay down an authoritative interpretation of the language of sub-section 4 of universal application; that treatment, which does not conform to the description there given, cannot rightly be held to fall within the sub-section; and that the Committee meant to indicate that the acts of treatment must be absolutely unequivocal and not by possibility referable to any other relationship than that of a son. But this argument puts a strained and unnatural construction on the words of the Committee. Their expression 'general construction' clearly refers to the propriety of so construing the Act that it may apply to Mahomedans and others as well as Hindus. The rest of the passage is only a statement in abstract form of circumstances which will clearly bring a case within sub-section 4. In the sequel of the judgment they show that those circumstances exist in the case before them. There is nothing to show that the Committee intended to set up a standard to which all cases must conform, or that they demanded more demonstrative proof for this kind of question than for any other."]

[633] some provision as to his successor. The will, which was clearly his own act, indicates that he intended his successor to be a male, though he had not yet made up his mind as to the person. His words are: "As I have not yet come to a determination as to what boy is to become my successor." He, therefore, made his wife provisionally his heir, delegating to her the power of selection, which, in his then state of mind, he did not feel able to exercise himself.

That state of mind is the more conceivable if we suppose that he had then begun to entertain the notion that Dadwa Sahib should ultimately succeed him. Had he then resolved that the successor should be taken from his male relations *ex parte paterna*, it would have been comparatively easy to nominate a brother or brother's son. In that case his only reason for delaying his choice would have been the desire to be more fully assured of the fitness of the person selected. But a predilection for his grandson would introduce fresh and more serious grounds for hesitation and delay. Independently of his affection for the boy, he might feel that the estate, being separate property, would, according to the *Shasters*, devolve upon him in preference to collaterals, though in the male line. On the other hand, he may have felt reluctant to depart from the family custom and offend his relations by allowing the estate to pass out of his own *gotra*. And if, as is stated on the record, he were a man apt to prefer an indirect to a direct course, he might well determine to shift the responsibility of selection to his widow, to whom he might confide his real and final intentions, trusting to her for the performance of them. That the above was really the state of mind and feeling of the Maharajah when he made his will appears in some measure from the evidence of Anunt Ram, his dewan, whom the Deputy Commissioner considered to be a trustworthy witness.

In 1867 the ceremony of the *Janeo*, or investiture of the appellant with the Brahminical thread, took place. That this was done with considerable pomp in the Maharajah's house; that the Maharajah took that part in the ceremony which, in the ordinary course of things, would be assumed by the [634] boy's natural father, seems to be established. That what was done operated either in law or in fact as a transfer of the boy from his own into the Maharajah's *gotra*, their Lordships, upon the conflicting evidence in the cause, and against the opinion of Mr. Capper, are unable to affirm.

The next important event in Dadwa Sahib's history was his marriage in 1868 to the daughter of Darogha Ramdhan. It seems to be clearly established that on that occasion the Maharajah wrote the two following letters to the father of the bride. The first is in these words:—

"Lallah Tulsiram came to me and verbally mentioned to me all the facts. I have in my former letter already stated what I wished to communicate to you, and you should attach great weight to that statement. I had fully weighed all the ups and downs before I embarked in this affair. In short, when I have candidly declared Dadwa to be my heir, and am about to celebrate his marriage, with a view that he may stop here, you can have no cause to entertain any apprehension.

"The will contains no such derogatory clause as you have heard. Every sentence in it has a peculiar meaning. Moreover, I have made my intentions known to Colonel Barrow, which you should consider quite correct; you should be quite satisfied."

The other letter is as follows :—

" I have received your letter and become acquainted with its contents. You have some doubt regarding the marriage of Dadwa, but you know very well that I have declared no one to be my heir except Dadwa, and this is known to the authorities. This is the reason that my brothers are displeased with me. You are entirely in fault. As I have made him my heir, and am about to celebrate his marriage here, how is it possible that any other person can become my successor? Dadwa has no reason to go to his native place. You should rest satisfied, and consider what I write to you to be of great weight. I have fully made my views known to my wife. So you should be satisfied, and make preparations for the marriage."

These letters, no doubt, are no legal revocation of the will. They seem rather to recognize the continued existence of a will. [635] But they are pregnant evidence to show that the Maharajah's inclinations in favour of his grandson had then ripened into a confirmed intention to make him his successor. They are consistent with the hypothesis that the Maharajah at that time either thought that he had named Dadwa Sahib in the will as his successor, or had instructed his wife to exercise her power of appointment in Dadwa's favour. They are inconsistent with the hypothesis that at that time he was in doubt as to the person who should succeed him; or intended to leave to the Maharanee a discretionary power to name any other successor.

There remains, no doubt, the possibility that these letters, written to remove the apprehensions of his correspondent, and in order to bring about the proposed marriage, were written with a dishonest intention to deceive. But nobody has sought to cast upon the Maharajah's character the imputation which such a supposition implies.

These letters hardly require the confirmation supposed to be afforded by what has been called the "red letter," being the invitation to attend the marriage, which was addressed by the Maharajah to the late Nowring Singh, and containing the words: "Do not regard this as a customary invitation. Dadwa Sahib is the light of my eyes, and heir to my property." Their Lordships, however, think it right to state that they see no reasons to doubt the genuineness of that document. The original is produced by the widow of the person to whom it was addressed, and it corresponds with a copy of it in the Maharajah's letter book.

The documentary evidence which has just been considered is far more important as direct evidence of this intention of the Maharajah than any parol testimony touching the manner in which the marriage ceremony was conducted. It also goes far to corroborate the testimony of the plaintiff's witnesses on this point, when that is in conflict with the testimony adduced by the defendants.

There is, again, some conflict of evidence as to the fact whether the appellant bore the title of Kowar. There is, however, some evidence that the title was often conceded to him, though he is [636] not uniformly so designated in the Maharajah's own letters. He is so designated in the "red letter." There is also evidence, which their Lordships see no reason to doubt, as to his having on important occasions sat on the guddee with the Maharajah; of his having been introduced by the Maharajah to European officers high in authority; of his having been taken to the Durbar of the Governor-General and put prominently forward there; and it cannot be doubted that the effect

of the Maharajah's treatment of him was to produce a strong impression on the minds of the officials that he was the intended successor.

So matters stood when the Maharajah, as one of the leading members of the British Indian Association of Taluqdars, went down to Calcutta in order to take part in the discussions and negotiations which resulted in the passing of Act I of 1869. This must have been in the latter half of 1868.

Intiaz Ali, the Vakil concerned in the drafting and preparation of this Act on the part of the taluqdars, has sworn that cl. 4 of the 22nd section originated with the Maharajah; that it was opposed by some of the taluqdars, but finally approved of by the Select Committee of the Governor-General's Legislative Council on the Bill, and passed into law. He also says that he was told by the Maharajah that his object in pressing this clause was to provide for the Dadwa Sahib.

There is some contradictory evidence on this point on the part of the defendants. One of their witnesses, however, Chowdree Niamut Khan, seems to admit that the Maharajah was the author of the clause in question, though he represents that it was inserted for the benefit of Mahomedan rather than for that of Hindu taluqdars. He says, "I asked Maharajah Man Singh what the object was of the clause in question, and he informed me that, in the absence of a near relation, grandsons on the daughter's side can have no claim under the Hindu law, but under the Mahomedan law they have, and that the clause in question was inserted with the view that the followers of neither religion might suffer, and that the provisions of the Hindu law might not be contravened." It is not easy to see why the Maharajah should have been thus anxious to originate [637] a clause that was to enure only for the benefit of Mussulman taluqdars.

The scale, however, is conclusively turned in favour of the testimony of Intiaz Ali on this point by the evidence of Mr. Carnegie.

Mr. Carnegie, whatever may be the effect of his evidence upon the questions of revocation, which will be hereafter considered, cannot, their Lordships think, be disbelieved as to the facts that a conversation did take place between him and the Maharajah in January 1870, and that in the course of that conversation the Maharajah did make a statement to the effect that he had had a clause inserted in Act I of 1869 to suit the identical case of the Dadwa. That statement is very material, inasmuch as it shows that the Maharajah considered that he had treated his grandson in all respects as a son.

The Deputy Commissioner (Mr. King), speaking possibly in some measure from personal knowledge, says:—"It is not saying too much, the Court believes, to say that if the plaintiff had not existed, the clause as it stands would never have been enacted." Their Lordships, weighing the evidence in the cause, and proceeding on that alone, would come to the same conclusion.

It appears, then, to their Lordships that, however uncertain, it may be when the notion of making the Dadwa Sahib his successor was first conceived, or when that notion first became a fixed intention, it is established that the Maharajah had that intention, as early as the date of the Dadwa Sahib's marriage; that, with that intention, he continually treated his grandson in fact as the son of the house would be treated, and not as a mere grandson by a daughter; and that, in order to effectuate his intention by operation of law, rather than by will, he caused the clause in question to be inserted in the Statute.

They are further satisfied that the treatment in point of fact was such as the words of the clause upon the true construction of it must be held to contemplate, and that, in the events that had happened, the appellant was the statutory heir to the taluq if the Maharajah is to be held to have died intestate.

[638] They now approach the more difficult question, whether there was a revocation of the will.

If the finding of their Lordships upon the question of "treatment" is correct, it follows that the Maharajah, from the time of his return from Calcutta, would presumably have, with regard to his will, the *animus revocandi*. It is unreasonable to suppose that, having been at so much pains to make Dadwa Sahib his heir *ab intestato*, he would wish to leave that arrangement liable to be defeated at the will, and by the act, of the Maharanee. Moreover, his conduct, and what we are told of his character, make it probable that, even if he thought the succession of Dadwa was secured either by the terms of the will or by further instructions given to the Maharanee, he would now desire it to be effected by operation of law, rather than by a voluntary disposition, certain to offend his relatives in the male line, likely to provoke criticism and censure, and not unlikely to cause dissension and litigation in the family.

Nor have we, in this instance, as in ordinary cases of revocation, to account for a change in the testator's intentions, whereby his bounty is diverted from one object to another. The disposition by this will was, on the face of the instrument, only provisional. It argued no fixed intention to benefit the Maharanee, for it provided for the substitution of a male successor in her place. The Maharajah had since made up his mind who that successor should be, and believed that he had provided for effecting his intention by operation of law. In these circumstances, the provisional disposition by this will, if not an obstacle to the carrying out of his wishes, had at least become useless and superfluous. These considerations render it highly probable that the conversation to which Mr. Carnegie has deposed did pass between him and the Maharajah. Their Lordships will now consider that gentleman's testimony and the objections that have been taken to it.

The passages material to the question of revocation in Mr. Carnegie's deposition are the following:—

"He spoke to me about having it (the will) withdrawn from the treasury on the eve of my departure on tour across the Gogra (Mr. Sparks' evidence fixes the date of this as some [639] time in January 1870), and expressed a wish that I should examine the deed and see what provisions he had made for the adoption of an heir. He said he had authorized the Maharanee to name an heir, and it was his wish that the power to adopt or name an heir should be limited to the Dadwa Sahib; that he was apprehensive that he had given her a personal power to adopt any one of the lads of the family; and that if, on examination of the document, I found that his apprehensions were just, he wished me to destroy it, because his intention was, and always had been, that the Dadwa should succeed him; and he had had a special clause inserted in Act I of 1869 to suit the identical case of the Dadwa; so his wishes would be fully met by the document being destroyed and the law being allowed to take its course. Next morning I crossed the Gogra on tour, and was absent several weeks. I wrote demi-officially to Mr. Sparks, the Deputy Commissioner, to get out the will and send it to me, and I also discussed the subject with the Chief Commissioner, Mr. Davies, who, I remember, said that if the will was sealed up and deposited by the Commissioner, I, as Officiating Commissioner, might open it; but, if sealed and deposited

under order of the Chief Commissioner, I had better not open it myself. Mr. Sparks unfortunately overlooked the matter, and it escaped my memory during the rest of my tour, and when I returned to Fyzabad I found the Maharajah's health, physical and mental, to be such that I deemed it expedient to take no further steps in the matter, and there it remained. This was in the cold weather of 1869-70."

And in cross-examination he said: "The Maharajah wished his will to be destroyed that the Dadwa Sahib might get the benefit of the 22nd section of Act I of 1869. He said there was no need of the document, as the clause secured his wishes."

The first objection to Mr. Carnegy's evidence is, that it is not corroborated by that of Mr. Sparks, which is also given in the cause. He says, touching this point, "To the best of my recollection, Mr. Carnegy never wrote to me to send him the will. Mr. Carnegy, either verbally or by note, asked me to get out the will and see by whom it was deposited. I requested the Treasury Officer to get out the will and see by whom it was [640] deposited, which copy I despatched to Mr. Carnegy. I did not receive any letter, official or demi-official, to return the will to the Maharajah. I did not receive any letter from Mr. Carnegy asking me to return the will, nor did I receive any *khutt* from the Maharajah. I don't remember receiving any."

Upon this testimony it is to be remarked, that it confirms that of Mr. Carnegy as to the fact that at the time in question he made some communication to Mr. Sparks touching the Maharajah's will, though there is a material discrepancy between the two depositions as to the precise terms and nature of that communication. To that extent then it corroborates Mr. Carnegy's general statement that he had had a conversation with, and some instructions from, the Maharajah about the will, for otherwise there would be no apparent reason for any correspondence between the two officers on the subject. Mr. Carnegy was examined on the 19th April 1873, when on the eve of his departure for Europe. Mr. Sparks was examined on the 2nd of the following July, and there was no opportunity of recalling Mr. Carnegy and getting him to explain, if he could, the before-mentioned discrepancy. It is conceivable that the deposition of each officer may be partially accurate and partially defective; that Mr. Carnegy, after the discussion with Mr. Davies to which he deposes, may have written to Mr. Sparks to the effect deposed to by the latter, and may on another and possibly subsequent occasion have written to the effect to which he himself deposes. The letter or letters (if any) that did pass are not in evidence, and the question of what really passed rests on the accuracy of the recollection of the two witnesses. It may further be observed, as bearing on the general credibility of Mr. Carnegy, that he has expressly sworn to a discussion on this subject with the Chief Commissioner, Mr. Davies. He has, therefore, vouched that gentleman, who might have been called to contradict him, and the discussion, if it took place, presupposes that Mr. Carnegy had some instructions from the Maharajah concerning the will.

Other objections to the testimony of Mr. Carnegy are founded on his conduct. It has been asked why, if he had this alleged authority to destroy the will, he did not exercise it; why, after [641] his return from his official tour, he did not even inform the Maharajah (who lived until the following October, and, notwithstanding frequent attacks of epilepsy, was occasionally equal to the transaction of business) that the will was still in existence; and above all, why, after the death of the Maharajah, he allowed the widow to be

put into possession of the taluq under the will, upon the assumption that the disposition made by it was still in force.

It is impossible to deny that these objections have more or less weight. The following is the explanation which may be set against them. It is clear that the will, from one cause or another, did not reach Mr. Carnegie whilst on his tour; that, according to his own account, he allowed the matter, though of such great importance, to escape his memory, and omitted to press for the despatch of the document; that after his return he found the Maharajah on the occasion of his visit to him in a deplorable state of health, and wholly unfit for business. So far Mr. Carnegie is confirmed by Mr. Sparks. Mr. Carnegie seems then to have jumped to the conclusion that the Maharajah's health, physical and mental, was such as to make it inexpedient to take further action in the matter. If this were Mr. Carnegie's sincere conviction, it may well account for his not acting after his return, on the antecedent authority, by destroying the will. To destroy a will on the parol authority of the testator would in any case be an extremely delicate matter. A man who would have done the act if assured that it would be confirmed if necessary by a person in the full possession of his faculties, would naturally abstain from doing it if he felt that the confirmation (if obtained) might be questioned as proceeding from one of enfeebled capacity, if not of absolute incapacity for business. His conviction of the Maharajah's continuous incapacity for business, though erroneous in point of fact, might also account for his omission to renew the subject, or to inform the Maharajah that the will was still in existence. His conduct after the Maharajah's death seems to be explicable only on the assumption that he may have thought the actual destruction of the instrument was essential to his legal revocation, and that, if he objected to the Maharanees's title on the ground of what [642] had passed between himself and her late husband, he would expose himself to criticism and censure without benefiting the Dadwa Sahib, whose interests he may have supposed, in common with other officials, and many of the dependants of the family, would be secured by the Maharanees's exercise of her power in accordance with her husband's intentions.

Their Lordships do not say that this explanation is wholly satisfactory. But the question which they have to determine is not whether Mr. Carnegie's conduct can be completely explained, but whether it be such as renders his evidence untrustworthy. Their Lordships, considering the position and general character of the witness, are of opinion that this is not the case. Upon his general truthfulness neither the Commissioner nor the Deputy Commissioner has cast any suspicion. The former was of opinion that, considering all the circumstances, he could not depend on the accuracy of Mr. Carnegie's recollections of the conversation with the Maharajah. The other Judge says expressly "that the conversation, such as related by Carnegie, passed between him and the Maharajah I have no doubt." Reviewing, however, Mr. Carnegie's subsequent conduct, he came to the conclusion that "Man Singh only expressed an intention that the Dadwa Sahib should succeed him, and of inspecting his will for the purpose of seeing what he had actually written in it regarding his wife's power to adopt, but did nothing more." He also expresses a doubt "whether, supposing revocation had been clearly proved, it would be proper to let this outweigh the existence of the will," implying that something in the nature of cancellation was necessary. Upon these judgments their Lordships observe that, if Mr. Carnegie be accepted as a truthful witness, the more important portion of his testimony can hardly thus be explained away. His recollection may possibly deceive him as to the terms and nature of his communication with Mr. Sparks: but mere imperfection of memory can

hardly account for his imagining that the Maharajah gave him authority to destroy the will if no such authority was given. The authority was in itself a thing so unusual and so important, that the words which conveyed it were likely to stamp themselves on the memory. Nor is it easy to see how [643] such an authority, if not clearly expressed, could be honestly inferred from other words imperfectly remembered. Their Lordships have, therefore, come to the conclusion that Mr. Carnegie's statement of what passed between him and the Maharajah may be accepted as substantially accurate.

If this be so, their Lordships are of opinion that what so passed amounted to a revocation of the will. It cannot, they think, be doubted that the will of a Hindu may be revoked by parol. The cases cited at the Bar show that this was the law of England before the Statute of Frauds was passed. Their Lordships are very sensible of the danger of acting upon such evidence as is ordinarily produced in the Courts in India in order to establish such a revocation, and they desire to say nothing which may induce those Courts to apply the law in such cases otherwise than with extreme caution. Even in the present case their Lordships have come to the conclusion upon which they are about to act with some hesitation, not because they are not perfectly satisfied that the Maharajah had the *animus revocandi*, but because the testimony of Mr. Carnegie is open to the objections which have been considered. It was hardly disputed at the Bar that, if definitive authority to destroy the will was given to him by the Maharajah, that would be sufficient in law to constitute a revocation, although the instrument was not in fact destroyed. In truth, the case would then be almost on all fours with that of *Walcott v. Ochterlony* (1 Curteis, 580), the only difference being that the authority was given here by words, and there by a writing sufficient to satisfy the Statute of Frauds. In that case, as in this, the authority was not exercised by the actual destruction of the will.

Their Lordships see no grounds for not accepting that part of Mr. Carnegie's testimony which says that the Maharajah gave him authority to destroy the will, if on examination he should find that it contained a certain disposition. Nor do they think that this qualification of an absolute order to destroy is material, because the will, being what it was, the authority would have clearly justified its destruction. And they are [644] disposed to think that even if the direction to destroy were not, as, upon the whole, they think it is, satisfactorily established, the declaration made by the Maharajah to the principal officer of the district in whose custody the will was, of his desire and intention that the Dadwa Sahib should succeed him by virtue of the newly-passed Statute, and in supersession of the will, would have been in law a sufficient parol revocation.

Upon the whole, then, their Lordships are of opinion that the Maharajah died, as he intended to die, intestate; that the appellant is the person who, under cl. 4 of s. 22 of Act I of 1869, was entitled to succeed to the taluq; and that he has made out his claim for a declaratory decree to that effect.

The declaration, however, must, their Lordships think, be limited to the taluq and what passes with it. If the Maharajah had personal or other property, not property parcel of the taluqdari estate, that would seem to be descendible according to the ordinary law of succession.

They will, therefore, humbly advise Her Majesty to reverse the decree of the Commissioner of Fyzabad, dated December 24, 1873, and that of the Deputy Commissioner of Fyzabad, dated July 28, 1873; and to declare that the will of the late Maharajah Man Singh of April 22, 1864, was duly revoked by him in his life-time; and that the plaintiff, Maharajah Pertab Narain Singh, *alias* Dadwa Sahib, was and is entitled, under cl. 4, s. 22 of Act I of 1869, to succeed, as

ab intestato, to the taluqdari estate of the late Maharajah, including whatever is descendible according to the provisions of the said Statute. Their Lordships are of opinion that, under the peculiar circumstances of this case, the Commissioner exercised a sound discretion in making the costs of the litigation payable out of the taluqdari estate; and that the costs of both parties of this appeal ought to be taxed as between solicitor and client, and similarly dealt with. And they will advise Her Majesty accordingly.

Agents for the Appellant: Messrs. *Watkins and Lattey*.

Agent for the Respondents: Mr. *T. L. Wilson*.

NOTES.

[I. HINDU WILLS—REVOCATION—

Actual destruction or formal revocation in writing not essential to constitute revocation where the Hindu Wills Act does not apply:—Re-affirmed (1902) 25 Mad. 678—29 I. A. 156.

II. OUDH ESTATES ACT I OF 1869—

Upon what treatment is sufficient, see (1894) 21 Cal. 997 P. C., where an explanation is given of the passage at 3 Cal. 632. See the footnote there.

See also (1904) 26 All. 393.

III. SUBSEQUENT LITIGATION—

In respect of this estate, is reported in (1884) 11 Cal. 186 P. C., where a *resume* of this judgment is given.]

[645] *The 10th November, 1877.*

PRESENT:

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH AND
SIR R. P. COLLIER.

Thakur Shere Bahadur Singh.....Plaintiff

versus

Thakurain Dariao Kuar.....Defendant.

[—5 I. A. 31—1 C. L. R. 499]

[On Appeal from the Court of the Commissioner of the Roy Bareilly
Division of Oudh.]

Estate in Oudh—Title under sanad from Government—Trust.

Although a sanad granted by the Government of India subsequent to the proclamation of March 1858, of an estate in Oudh, confers an absolute legal title on the grantee, such grantee may, nevertheless, by an express declaration of trust, or by an agreement to hold in trust, constitute himself a trustee of the estate for a third party.

Where the lower Courts, on the ground that the defendant's title under a sanad was absolute, declined to consider evidence which the plaintiff relied on as showing that the defendant really held for him as a trustee, the case was remanded by the Judicial Committee in order that such evidence might be received and considered.

THE suit in which this appeal arises was instituted on the 1st September 1873 in the Court of the Deputy Commissioner of Roy Bareilly. The allegations made in the plaint were in substance as follows:—That Basant Singh,

the husband of the defendant Thakurain Dariao Kuar, died without issue on the 12th November 1857; that shortly before his death, he directed the defendant to adopt the plaintiff as his son, and that, in pursuance of such direction the plaintiff was so adopted by the defendant on the 25th April 1858; that the defendant, on her husband's death, took possession of his estate, and that after the confiscation by the British Government of proprietary rights in Oudh, a summary settlement of the estate was made with her; that the plaintiff, who was then a minor, becoming cognizant of these circumstances, was about to take proceedings for the protection of his interests, but was induced to refrain from doing so by the representations made to him by the defendant in the following letter:—

"You should not be misled by others; now the estate and everything is yours. Now I have no more concern than to take my food and clothing. But you are yet a boy; you should [646] therefore allow the *kabuliat* of the *illaka* to remain in my name. When you become of age, I will cause the *kabuliat* to be executed in your name: you may depend upon it, I will not in the least deviate from what I say. But in the event of my not adhering to my promise, you will be at liberty to lay the case before the Court and get the *kabuliat* of the *illaka* executed in your name, and then if I make any objection at all it would be inadmissible: now you may do as you deem proper. I can do no more than write to you."

That, subsequently, on the 8th May 1861, while the plaintiff was still under age, a *sanad* was granted to the defendant in the following terms:—

"Know all men that, whereas by the proclamation of March 1858, by His Excellency the Right Honourable the Viceroy and Governor-General of India, all proprietary rights in the soil of Oudh, with a few special exceptions, were confiscated and passed to the British Government, which became free to dispose of them as it pleased, I, George Udney Yule, Officiating Chief Commissioner of Oudh, under the authority of His Excellency the Governor-General of India in Council, do hereby confer on you the full proprietary right, title, and possession of the estate of Somerpaha, consisting of the villages as per list attached to the *kabuliat* you have executed, of which the present Government revenue in rupees is 35,959.

"Therefore this *sanad* is given you in order that it may be known to all whom it may concern, that the above estate has been conferred upon you and your heirs for ever, subject to the payment of such annual revenue as may from time to time be imposed, and to the conditions of surrendering all arms, destroying all forts, preventing and reporting crime, rendering any service you may be called upon to perform, and of showing constant good faith, loyalty, zeal and attachment to the British Government, according to the provisions of the engagement which you have executed, the breach of any one of which at any time shall be held to annul the right and title now conferred on you and your heirs.

"It is another condition of this grant, that in the event of your dying, intestate, or of any of your successors dying intestate, [647] the whole estate shall descend to the nearest male heir, such as sons, nephews, etc., according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate either in whole or in part by sale, mortgage, gift, bequest or adoption, to whomsoever you please.

"It is also a condition of this grant that you will, so far as is in your power, promote the agricultural prosperity of your estate, and that all holding under you shall be secured in the possession of all the subordinate rights they

formerly enjoyed. As long as the above obligations are observed by you and your heirs, in good faith, so long will the British Government maintain you and your heirs as proprietors of the above-mentioned estate, in confirmation of which I herewith attach my seal and signature."

That, shortly after obtaining the said sanad, the defendant entered into negotiations for the marriage of the plaintiff to the daughter of one Umrez Singh, who, discovering that the sanad of Somerpaha stood in the name of the defendant, withheld his consent. That, thereupon, in the month of July 1861, the defendant wrote the following letter to Umrez Singh :—

"My good wishes to you. May God make you happy. You hesitate in going through the work. But you should have no hesitation, as I have already adopted Shere Bahadur, who will succeed me. With regard to the entry of his name in the Government register, I will have it done as soon as Shere Bahadur arrives at the age of majority. What I have written is, I think, quite enough."

That the said Umrez Singh, relying upon the representation made in the above letter, consented to the proposed marriage, which was subsequently celebrated. That the plaintiff attained majority on the 12th May 1863, but that the defendant did not then make over to him the said estate, but wasted and alienated parts thereof.

The plaintiff therefore prayed that the defendant might be declared to be a trustee on his behalf of Basant Singh's estate, and that an account might be taken, and the defendant be directed to make good the waste, and pay what should be found due on the account; and "he ordered forthwith to transfer and give [648] possession to the plaintiff of the said estate, and in the meantime be restrained from alienating, disposing of, or dealing with, managing, or in any way intermeddling with the said estate and property, or the affairs thereof."

The defendant, by her written statement, denied that her husband had given her any authority to adopt the plaintiff, or that she had done so; but stated that she had entertained the intention of making the plaintiff her heir, and had executed a will in his favour, which she afterwards, being dissatisfied with his conduct, revoked; and she denied that the letters put forward by the plaintiff were genuine. She further contended that the effect of the proclamation of the 15th March 1858 was to confiscate all the previous proprietary rights of Basant Singh, and that the effect of the summary settlement made with, and the sanad granted to her, and of s. 3, Act I of 1869, was to confer on her "complete proprietary rights in the estate of Somerpaha, without any regard to previous rights."

The Deputy Commissioner, on the 15th November 1873, without taking evidence, dismissed the suit on the ground that the sanad was not granted subject to the provisions of the Hindu law; and that therefore it was needless to enquire whether plaintiff is or is not the adopted son of Basant Singh deceased.

The plaintiff appealed from this judgment to the Commissioner of Roy Bareilly, on the ground that the Deputy Commissioner was wrong in supposing that the plaintiff's claim rested on his allegation that he was the adopted son of Basant Singh; and because the Deputy Commissioner should have taken evidence as to the declarations alleged in the plaint to have been made by the defendant in respect of the plaintiff's rights, and if these were found to have been made, should have declared the defendant to have constituted herself a trustee for the plaintiff.

The Commissioner dismissed the appeal in the following judgment, dated the 22nd April 1874 :—

“ On reconsideration of the proceedings in this case, I find that the suit is really one for possession of the estate on the ground that the defendant holds the estate only as trustee for the plaintiff, who had been adopted by defendant in compliance [649] with the wishes of her deceased husband. Defendant, however, holds the estate under an unassailable title conferred on her by the British Government, and her possession cannot be disturbed on the grounds urged on behalf of the plaintiff.

“ Whether the alleged adoption of the plaintiff took place, and is binding on the defendant, and what effect such adoption would take, whether as simply constituting the plaintiff heir to Basant Singh, or creating a title to succeed to the estate on defendant's death, are questions which have not been directly raised, and need not be decided in this suit, since plaintiff at best could obtain but a declaratory decree.

“ The appeal is dismissed with costs.”

An application for a review of his judgment was rejected by the Commissioner on the 12th August 1874. The material part of the order passed by the Commissioner in refusing the review is set forth in their Lordships' judgment.

The plaintiff subsequently obtained leave to bring the present appeal to Her Majesty in Council.

Mr. *Joseph Graham* appeared for the Appellant.

Mr. *Leith*, Q. C., and Mr. *Doyne* for the Respondent.

Mr. *Graham*.—The lower Courts ought to have fixed the issues raised by the pleadings, and to have tried these issues on evidence. If the allegations of the appellant in his plaint had been proved, he ought to have been declared entitled to the relief he sought. The decisions of the Courts below proceeded upon an erroneous view of the rights of the respondent under the sanad as against the claims of the defendant. We contend that the respondent took under the sanad in trust for the appellant, her adopted son. The Courts below refuse to look behind the sanad. In so deciding they overlook the bearing of the defendant's acts and declarations, and more especially her two letters, one written to the plaintiff before, and the other to Umrez Singh after, she obtained the sanad. In these we find a clear admission by the defendant of her position in relation to the plaintiff. The case resembles those [650] of *Thukrain Sookraj Koowar v. The Government* (14 Moore's I. A., 112), *Hardeo Bux v. Jawahir Singh* (see post ; s. c., L. R., 4 Ind. Ap., 178), and *The Widow of Shankar Sahai v. Bajakt Kashi Pershad* (see post ; s. c., L. R., 4 Ind. Ap., 198), in all of which their Lordships had held that the grantee under a sanad might be a trustee for a third person. [Mr. *Leith*.—] I cannot contend in the face of these cases that if a trust is shown the sanad is to exclude the trust. SIR B. PEACOCK.—Do any of these cases go the length of declaring that by virtue of an agreement made beforehand the sanad is to enure to the benefit of another than the grantee? There seems to be a distinction between an agreement made before and one made after the grant. The Government might be disposed to grant to A, but not to A as trustee of B, who is a rebel. SIR M. SMITH.—No question of that kind arises here. There is no reason why Government should not have granted to B if he had come forward. We say a trust arrangement is disclosed in the letter to Umrez Singh, which is of a date subsequent to the sanad, as well as in the letter to the plaintiff, which is of an earlier date. The point raised by His Lordship SIR B. PEACOCK does not apply

to anything done after the sanad had been obtained. The defendant might then alienate as she pleased. She was bound by the representations made by her in her letter to Umrez Singh. See the case referred to by Lord ST. LEONARD in *Jorden v. Money* (5. House of Lords' Ca., 185, see at pp. 251-255). [SIR R. COLLIER.—When do you say your right of action accrued? We cannot send back the case if your right is barred by limitation.] The defence of limitation is not raised in the respondent's case.

Mr. *Leith*, Q. C., and Mr. *Doyne* for the Respondent.—Assuming the letters to be genuine, we cannot maintain the defence of limitation. So far as the plaintiff's case rests on the letters, his cause of action must be taken to have accrued when he attained majority. [SIR B. PEACOCK.—If the letters amount to a contract to put the plaintiff in possession on his coming of age, the [651] period of limitation would be six years. He came of age in 1863.] If the letters express a trust, there can be no limitation. If the letters be set aside, limitation clearly applies. The plaintiff's case is rested on two grounds,—his rights under an adoption, and his rights under a trust. The Courts below have rightly held that the plaintiff's adoption, assuming it to be proved, would give him no right to the estate of Basant Singh which had been confiscated before the adoption took place, and which was afterwards settled with the respondent and granted to her in full ownership. [SIR R. COLLIER.—The only reason for considering the adoption is that it may throw light on the meaning of the letters and the general truth of the plaintiff's case.] We deny that the letters are genuine, and at any rate they do not come within the methods of alienation provided by s. 13, Act I of 1869. [SIR J. COLVILLE.—That Act is not retrospective. SIR B. PEACOCK.—Under s. 22, the grantee may alienate to certain persons without the formality of writing.]

Mr. *Graham* replied.

Their Lordships' judgment was delivered by

Sir R. P. Collier.—This case has not been tried in a manner altogether satisfactory. Without, however, referring to the previous proceedings, their Lordships think it enough to advert to the final judgment appealed against. The learned Commissioner gave his judgment in these terms:—"Basant Singh died during the Rebellion of 1857, and the alleged adoption of the plaintiff is said to have taken place in April 1858. Before this the general confiscation of the land of Oudh had been declared by the British Government, and it was only in May 1858 that a summary settlement was made with the defendant. At the time, therefore, of the alleged adoption, the title to the estate vested neither in the deceased Basant Singh nor in the plaintiff, nor in the defendant, but in the British Government. Even if it be allowed that there was adoption of plaintiff, and that this, in accordance with Hindu law, conferred upon him all the right of a [612] posthumous son of Basant Singh, still neither he nor Basant Singh himself, if he were to rise from the dead, can assail the title under which the defendant holds." So far their Lordships agree with the learned Commissioner, but they are not able to agree with him in the view which he expresses in the second paragraph of his judgment. The learned Commissioner appears not to have been sufficiently acquainted with the tenor of some recent decisions, whereby, although undoubtedly the doctrine is affirmed that the title conferred by the Government is absolute and overrides all other titles, nevertheless it has been held that the grantee under the Government may, by an express declaration of trust, or by an agreement to hold in trust, constitute himself a trustee. The learned Commissioner proceeds in these terms:—"It has, however, been held by the Courts on various occasions that

a free gift was made by the Government, and I am entirely of this opinion. The adoption of two letters, said to have been written by the defendant, both of which are set forth in the plaint, place, it is contended, the defendant in the position of trustee. One letter addressed to the plaintiff implies nothing more than a promise to put him in possession of the estate on his becoming of age. The second letter, addressed to Babu Umrez Singh, between whose daughter and plaintiff a marriage was arranged, is to the same effect as the letter addressed to the plaintiff. I can see nothing in these letters to place the plaintiff and defendant in the position respectively of beneficiary or *cestui que trust* and trustee."

Their Lordships are of opinion that the letters here referred to, if proved, (and as far as they are at present informed, they do not seem to have been proved or disproved), may, coupled with surrounding circumstances, constitute sufficient evidence on which the Court would be justified in holding that the defendant had declared herself or had agreed to be a trustee on behalf of the plaintiff. They think it desirable, therefore, that the suit should be sent back to the Courts in Oudh for the purpose of determining this question. Those Courts will inquire, in the first place, whether the letters are genuine, in the next place, as to the date on which they were written; and [653] thirdly, as to the circumstances under which they were written and other surrounding circumstances; and among those circumstances undoubtedly will be the question of the adoption or non-adoption by the defendant of the plaintiff under the will of her husband;—this question being, as before explained, material only as a circumstance bearing upon the question of whether or not she has agreed to be or declared herself to be a trustee, but not in itself constituting any title on the part of the plaintiff.

Their Lordships, in the imperfect acquaintance which they have at present with the facts of the case, think it more convenient to remand the case in these general terms than to settle issues themselves. Either party will be at liberty to propose for the consideration of the Court any issues which they may think material to raise the questions which have been just indicated, and the Court will doubtless raise the proper issues, and determine the questions according to the law as now laid down.

Their Lordships think it right to add that the delay of the plaintiff in not having brought the action until ten years had passed after he had become of age, and his laches in this respect will not entitle him to an account for a period before the commencement of this suit.

Their Lordships will therefore humbly recommend Her Majesty to discharge the decree and orders appealed from, and to remand the suit to the Court of the Commissioner of Roy Bareilly for him to re-try and determine the same, each party being at liberty to propose such issues as they may think material to be settled for trial by the Commissioner.

The costs of both parties of the appeal will be taxed, and a certificate sent, with a direction to the Court below to deal with them as costs in the cause.

Agent for the Appellant: Mr. J. Hopgood.

Agent for the Respondent: Mr. T. L. Wilson.

NOTES.

[On point as to trust, see our notes to 3 Cal., 522 *supra*. For subsequent litigation, see (1906) 28 All. 7273=3 I. A. 156 P. C.]

[684] *The 15th, 16th and 19th January, 1878.*

PRESENT :

SIR W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH AND
SIR R. P. COLLIER.

Hurropersaud Roy and anotherPlaintiffs

versus

Shamapersaud Roy and others.....Defendants.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Interest on Mesne Profits—Act XXXII of 1839.

By the law and practice in India, independently of the provisions of Act XXXII of 1839, a decree might award interest, as of course, on mesne profits from the date of the institution of the suit in which they were claimed. Such interest is not forbidden by the terms of the Act referred to.

THIS was an appeal from a decree of the Calcutta High Court, dated the 15th August 1863 (The decision of the High Court will be found reported in 2 Sev. Rep., p. 60a), modifying a decree of the Principal Sudder Ameen of the 24-Parganas, dated the 18th February 1861.

The facts of the case and the contentions of the parties are fully stated in their Lordships' judgment.

Mr. Doyne appeared for the Appellants.

Mr. Leith, Q. C., and Mr. A. Souttar, for the Respondents.

The following cases were referred to :—

Rungmala Chowdhrao, petitioner (Carran's Summary Decisions of Calcutta S. D. A., 195), *Asman Singh v. Purmessuree Suhace* (4 Sel., Cas., 176), *Bamun Das Mookerjee v. Tarinee* (S. D. A., 1850, p. 533; and on appeal, 7 Moo. I. A., 169), *Ramruttun Roy v. Bhoobhmesur Debea* (S. D. A., 1855, p. 404), *Tekayet Jugmohun Singh v. Rajah Neelanund Singh* (S. D. A., 1857, p. 1812), *Muneeram Acharjee v. Sreemutty Turungo* (7 W. R., 173).

Their Lordships' judgment was delivered by

Sir R. P. Collier.—The transaction out of which this suit arose occurred nearly half a century ago, and from it has flowed [633] a continuous stream of litigation, not in all respects creditable to the earlier tribunals of India down to the present day. A history of that litigation, given shortly and clearly, will be found in a report, in the 8th volume of Moore's Indian Appeals, of a judgment of this Committee, which was delivered on the occasion to be hereafter mentioned.* Their Lordships deem it enough to refer to that case without recapitulating the history, inasmuch as the facts necessary to the determination of the points now before them need no very lengthened statement.

Two brothers, Doorgapersaud Chowdhry and Tarapersaud Chowdhry, of whom Doorga was the elder, entered into an agreement of compromise for the purpose of settling disputes then pending between them on the 4th of April 1829. That agreement of compromise may be sufficiently described for the present purpose as one whereby in substance the elder brother took ten-sixteenths of the ancestral property, and the younger brother six-sixteenths. Tara,

* [Doorgapersaud Roy Chowdhry v. Tarapersaud Roy Chowdhry, 8 Moo. I. A., 308.]

the younger brother, disputed this compromise upon various grounds; but it was affirmed by the Court, which was then called the Provincial Court on the 2nd of September 1829. Tara appealed from that decision to the Court of Sudder Dewanny Adawlut, and the Court of Sudder Dewanny Adawlut affirmed the decision of the Provincial Court and directed possession to be given to Tara of his portion of the property. Tara accepted this decision and endeavoured to obtain his rights under it, and his first step for that purpose was to apply to Mr. ROSS, one of the Judges of the Court of Sudder Dewanny Adawlut, who, in concurrence with Mr. WALPOLE, each sitting alone, had given the judgment affirming the decree of the Provincial Court, to order, *wasilat* to be given him. The decree had only decreed possession. The application was made under a circular order, which empowered the Court in such cases to award *wasilat* to be recovered by proceedings in execution; and it claimed *wasilat* from the date of the decision of the Provincial Court. Mr. ROSS so far complied with this request as to order *wasilat*, not from the date when it was claimed, [666] but from the 4th July 1832, the date at which the decision of the Sudder Dewanny Adawlut Court had been given.

The history of the litigation during the next twenty years may be thus summarised. Tara pursued every legal means in his power to obtain his rights under that decree; that is to say, to obtain possession of the property and *wasilat* or the mesne profits for the period during which possession of it had been withheld. The elder brother Doorga endeavoured to defeat his claims by a variety of excuses and pretences, all of which have been found to be false. Tara succeeded in obtaining from time to time possession of certain portions of the property, but he never appears to have succeeded in obtaining any *wasilat*. It may be enough, however, to pass on to the year 1853, when Tara obtained an order from Mr. MONEY for a sum of Rs. 40,000 *wasilat*, and a considerable amount of interest. Doorga appealed against that order, on the ground, which he appears to have raised then for the first time, that Mr. ROSS, who made the original order in respect of the *wasilat* in 1832, had acted without jurisdiction, inasmuch as he could not make the order without the concurrence of his colleague Mr. WALPOLE, and the Court of Sudder Dewanny Adawlut gave effect to this objection. So that the Court of Sudder Dewanny Adawlut in effect ruled that all the litigation which had gone on for twenty years was absolutely fruitless.

Under those circumstances Tara instituted the present suit in December 1853. Tara and Doorga have long since died, and this appeal is now prosecuted and defended on behalf of their representatives.

The suit came on to be heard before the Principal Sudder Ameen of the day, and he decided that the Statute of Limitations was a bar to the claim of Tara to *wasilat* for more than twelve years before the commencement of the suit. But for those twelve years he gave him *wasilat*, calculated upon the footing of certain *hustabood* papers which were put in by the plaintiff. The plaintiff contended that he was entitled to avail himself of those *hustabood* papers on this ground: he said "the *hustabood* is my rent-roll of a certain portion of "lands which have been made over to me by my brother. This is some evidence "in the [637] absence of contradictory evidence of what the rent was before it "was handed over, and therefore of the *wasilat* or mesne profits to which I am entitled." These *hustabood* papers had been received in the abortive proceedings which have been referred to, and were received in this case by the Principal Sudder Ameen. There were cross-appeals from this judgment and the case came before the Sudder Dewanny Adawlut in the year 1857, whereupon that Court

reversed the decision of the Principal Sudder Ameen, holding that the Statute of Limitations was not a bar to any portion of the claim, and remanded the case to be re-tried *ab initio*, as they expressed it. This judgment of the Sudder Dewanny Adawlut, was, on appeal, affirmed by this Board in the judgment before referred to; their Lordships holding that the Statute of Limitations did not apply to Tara's demand, because he had instituted *bona fide*, though ineffectual, proceedings for the purpose of obtaining his rights,—not, as they expressed it, under the agreement alone, but under the judgment enforcing it.

The case was then tried on the remand by another Principal Sudder Ameen. He found that the plaintiff was entitled to *wasilat* from the date of the first judicial decision, in September 1829, of the Provincial Court. On the question of the amount of *wasilat* he rejected the *hustabood* papers, and valued the land at one rupee per bigah. With reference to the question of interest, he decreed interest to the plaintiff from the date of the decree, holding that the claim of *wasilat* must be considered as then for the first time settled and liquidated.

From that decree there was an appeal to the High Court, which varied the decision of the Principal Sudder Ameen as to the time from which the right of the plaintiff to *wasilat* commenced, decreeing that it commenced not from the decision of the Provincial Court in 1829, but from the decision of the Sudder Dewanny Adawlut Court in 1832: they affirmed the decree in other respects. From that judgment of the High Court the present appeal is preferred.

The questions now before their Lordships are—first, from what time the right to *wasilat* commenced; secondly, what should be the amount of *wasilat*; and thirdly, what the amount [638] of interest, if any, upon the *wasilat*. Upon the first question it is desirable to look to the terms of the two judgments that have been referred to. The first judgment affirming the compromise is to be found recited (it is nowhere found separately) in the judgment of the Court of Sudder Dewanny Adawlut in these terms: "It is ordered that the deed of compromise and release be admitted, that the case be struck off the file of this Court, and that the parties conform to these stipulations. The Court on becoming acquainted with it shall enforce the observance of the same on the refusing party."

Now one of the stipulations was that Doorga, the elder brother, who was in possession of the property, should relinquish to his younger brothers six-sixteenths. It, therefore, appears to their Lordships that the direction to conform to these stipulations is a direction, though possibly an informal one, that Tara should be put in possession of that property. This decision was confirmed in these terms by the Court of Sudder Dewanny Adawlut: "Therefore, in concurrence with the aforesaid gentleman"—that is the Judge of the previous Court—"Ordered, that the appeal preferred by the appellant be dismissed, and that the decision passed in the Provincial Court of Appeal, dated the 2nd of September 1829, be affirmed; that should the appellant agreeably to the deeds of compromise, not have received possession of his share, he be put in possession of the same on the execution of decree." It appears to their Lordships that this decree of the Sudder Dewanny Adawlut must not be taken as establishing for the first time any new right of either of these parties, but as simply affirming, with an explanation, for it is nothing more, the former decree. The rights of the parties, therefore, depend upon the former decree, and it is the former decree which is effective, and which had to be executed. It appears to their Lordships, therefore, that Doorga, after the first decree, receiving as he did all the

rents and profits of the property, received the rent of six-sixteenths of it for the use of his brother, and that he is bound to account to his brother for those rents and profits. They, therefore, agree with the view taken by the Principal Sudder Ameen upon this question, and disagree with that taken by the High Court. . . .

[659] The second question is as to the amount of *wasilat*. It has been contended that the Principal Sudder Ameen was bound to accept these *hustabood* papers as fixing the rate of *wasilat*, which undoubtedly was a good deal higher than the rate which he allowed. He was bound to do so, it is said, because they had been accepted by the previous Sudder Ameen, and by the Courts in former proceedings. But their Lordships do not concur in this view. It may be well here to read the terms in which the judgment of the Court remanding the case is couched: "As this judgment re-opens the question of "*wasilat* from the date of the deeds of adjustment, the whole evidence on that "matter will require reconsideration. We therefore remand the case that the "whole question of *wasilat* may be taken up and considered *ab initio*."

If the Court had expressed themselves satisfied with the award of *wasilat* within the last twelve years, and only directed an inquiry as to the additional *wasilat* accruing before that time, they might have so expressed themselves; but their Lordships think it probable that they expressed themselves as they have because there was a cross-appeal, in which the validity of these *hustabood* papers would have been disputed, abstaining from giving judgment upon that question, and remitting the whole matter to the Principal Sudder Ameen. The Principal Sudder Ameen expressed himself as dissatisfied with those *hustabood* papers, which appear to have been put in, but of which, as far as it appears, there does not seem to have been any proof given to him, although some proof seems to have been given of them on former occasions. He describes them as concocted at home by the plaintiff, and questions their genuineness chiefly on the ground that they give an annual value to the property greater than that which it bore at the time of his judgment; the value of land having notoriously very much increased since the *wasilat* claimed had accrued. He also observes that he directed, for the benefit of the plaintiff, an inquiry before an Ameen as to the value, which the plaintiff declined. Under these circumstances he forms, undoubtedly, a somewhat rough estimate of the annual value of the property as one rupee per beegah. It may be that, under the circumstances, the Principal Sudder Ameen might [660] have been justified in accepting and acting upon these *hustabood* papers, but it is quite another question whether their Lordships are to say that he was bound to act upon them. It appears to their Lordships that this is a decision upon questions of fact, namely, the genuineness of these *hustabood* papers, and the actual value of the land, and that decision having been affirmed by the High Court, they see no sufficient reason to take this case out of the ordinary rule, whereby they affirm a decision on a question of fact come to by two Courts.

The remaining question is that of interest. And here it may be as well to refer to the terms of the Statute, Act XXXII of 1839, very much in accordance with the Statute of 3 & 4 Will. IV in this country, which has given rise to a great number of decisions, all of which are not easily reconcilable. The words of the section are: "It is, therefore, hereby enacted that, upon all debts "or sums certain, payable at a certain time or otherwise, the Court before "which such debts or sums may be recovered may, if it shall think fit, allow "interest to the creditor at a rate not exceeding the current rate of interest "from the time when such debts or sums certain were payable, if such debts or

"sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment." If the Statute had stopped here, it might be that the Principal Sudder Ameen and the Court were right in saying that there was no actual ascertained or liquidated demand until the *wasilat* was determined by the decree. But these words follow: "Provided that interest shall be payable in all cases in which it is now payable by law." And that refers their Lordships to the state of the law and the practice in India independently of the Statute. They have taken some pains to ascertain what that law and practice has been, and have been referred to a number of cases upon the subject. It may be enough now to quote a case (*Rungmala Chowdhraim, petitioner*, Rep. Sum. Cas., 195), which is to be found reported in Carrau's Report of [661] Summary Cases in the Presidency Sudder Court, of the date of October 1st, 1850, where certain resolutions were come to at a sitting of all the Judges of the Court, and among those resolutions was this: "Interest on mesne profits may be awarded as of course from date of suit in a decree; when, however, interest is awarded from an earlier, or from a later date than of suit, special reasons should be assigned in the decree." Their Lordships find that this resolution has been, to a great degree, acted upon in subsequent cases; indeed there have been subsequent cases in which interest has been given at a date prior to the institution of a suit, and their Lordships are far from saying that such cases have been wrongly decided. But having regard to the circumstances of this case, and among them may be stated the very great delay, which has not been thoroughly explained, in the prosecution of this appeal, their Lordships think it enough that the plaintiff should have a decree for interest upon the mesne profits decreed to be calculated from the commencement of the suit up to the date of the decree. The decree will carry interest on the whole amount decreed from its date, at the usual rate of 12 per cent.

They will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that the decree of the Principal Sudder Ameen be affirmed as to the amount decreed to the plaintiff for mesne profits, and reversed as to the residue; and that it be ordered that the defendant pay to the plaintiff interest on the amount decreed for mesne profits at the rate of 6 per cent. per annum, to be calculated from the date of the commencement of the suit to the date of the decree of the 19th February 1861, and that the costs in the first Court be ascertained and be paid by the parties respectively in proportion to the amount to be decreed and disallowed by the decree so to be amended, and that the defendant do pay interest at the rate of 12 per cent. per annum upon the total amount to be decreed by the decree so to be amended as aforesaid, from the date of the decree of the 18th February 1861 to the date of realization; that the costs of the appeal in the High Court be assessed and ordered to be paid by the parties to that appeal respectively in proportion to the amounts to be decreed and disallowed by the decree to be [662] amended as aforesaid. And it will be ordered that the respondents do pay the costs of this appeal.

Agents for the Appellants: Messrs. *Barrow and Barton*.

Agents for the Respondents: Messrs. *Young, Jackson, and Beard*.

As to allowing interest on mesne profits prior to date of suit the following cases may be noted:—*Protap Chunder Borooah v. Ranee Surno Moyee*, 14 W. R., 151; *Chowdhry Wahed Ali v. Musst. Jumaye* 19 W. R., 87; *Bibee Budhun v. Syud Fasloor Ruhman*, 23 W. R., 449.

NOTES.

[LEGISLATION—INTEREST ON MESNE PROFITS—

The Civil Procedure Code defines mesne profits thus—' *Mesne profits* ' of property means those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received therefrom (*Code of 1877*) ; together with interest on such profits (*Code of 1882*) ; but shall not include profits due to improvements made by the person in wrongful possession (*Code of 1908*), O. 20, r. 12 :—

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—

(a) for the possession of the property ;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits ;

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until,

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court or,

(iii) the expiration of three years from the date of the decree whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

II. CASES—

Followed in (1880) 6 C. L. R. 357 ; (1879) 4 Cal. 882.

III. INTEREST BY WAY OF DAMAGES PRIOR TO SUIT—

See (1907) 31 Bom. 354.]

FULL BENCH.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE JACKSON,
MR. JUSTICE MARKBY, MR. JUSTICE MITTER, AND MR. JUSTICE AINSLIE.

[= 2 C.L.R. 391]

*Practice—Appeals to High Court—“ Decree ”—“ Judicial proceedings ”—
“ Procedure ”—Saving of right of appeal—Act XXIII of 1861—General
Clauses Act (Act I of 1868), s. 6—Act VI of 1871—Act VIII of 1859—
Act X of 1877, ss. 3, 540, 588, 591, 647—24 and 25 Vict., c. 104, s. 9—
Letters Patent, 1865, cl. 16.*

In all suits instituted before Act X of 1877 came into force, in which an appeal lay to the High Court under Act VIII of 1859, an appeal still lies notwithstanding the repeal of that Act by Act X of 1877.

Per GARTH, C.J.—A suit is a “judicial proceeding,” and the words “any proceeding” in s. 6^o of Act I of 1868 include all proceedings in any suit from the date of its institution to its

Matters done under an enactment before its repeal to be unaffected.

[Sec. 6 :—The repeal of any Statute, Act, or Regulation shall not affect anything done or any offence committed, or any fine or penalty incurred, or any proceedings commenced before the repealing Act shall have come into operation.]

final disposal, and therefore include proceedings in appeal. The word "procedure" in s. 3, Act X of 1877 has not the same meaning as the word "proceedings" in the above-mentioned section.

The proceedings in a suit instituted before Act X of 1877 came into force, including a special appeal if the old Code allowed one, go on to the end of the suit notwithstanding the repeal of the old Code. The "procedure", that is to say, the machinery by which those proceedings are conducted, is, after decree, to be that provided by the new Code.

Per JACKSON, J.—The word "decree," as defined in Act X of 1877, does not include "orders," either original or appellate, upon matters arising in the course of a suit or in execution of a decree.

• The power of the High Court to hear appeals from the Civil Courts in the interior is regulated by Act VI of 1871.

[663] Section 6 of Act I of 1868 covers proceedings taken in execution of decree which have been commenced before Act X of 1877 came into force.

Per MARKBY, MITTER and AINSLIE, JJ.—Clause 16 of the Letters Patent of 1865 empowers the High Court to hear appeals in all cases in which an appeal lay under Act VIII of 1859.

THE facts of these cases, so far as they are material, appear from the referring orders.

No. 360 OF 1877.

The 14th May, 1878.

Runjit Singh and others.....Judgment-debtors
versus
 Meherban Koer.....Decree-holder.†

Bahoo *Nogendro Nath Roy* for the Appellants.

Baboos *Kali Kishen Sen* and *Joy Gopal Ghose* for the Respondent.

THIS is an appeal against an order of a District Judge made in an appeal arising out of the execution of a decree. The decision of the Lower Appellate Court refusing to allow execution to proceed on account of limitation was made on 23rd August 1877. The second appeal was filed in this Court on the 19th November. The Code of Civil Procedure came into force on the 7th October, [*this is wrong, it should be the 1st October*] and objection is taken that the appeal does not lie. The 3rd clause of s. 3 is in these words:—"Nothing

Enactments repealed.

• [Sec. 3.—The enactments specified in the first schedule hereto annexed are hereby repealed to the extent mentioned in the 3rd column of the same schedule.

But when in any Act, Regulation or Notification passed or issued prior to the day on which this Code comes into force, reference is made to Act 8 of 1859, Act 23 of 1861 or the "Code of Civil Procedure" or to any other Act hereby repealed, such reference shall, so far as may be practicable, be read as applying to this Code or the corresponding part thereof;

References in previous Acts.

• Saving of procedure in suits instituted before 1st October 1877.

Nothing herein contained shall affect the procedure prior to decree in any suit instituted or appeal presented before this Code comes into force.]

• † Appeal from an order of J. M. Lewis, Esq., Judge of Bhagulpore, dated the 23rd August 1877, reversing a decree of Moulvi Mahomed Nuru Hosain, Munsif of Begusarai, dated the 17th March 1877.

herein contained shall affect the procedure prior to decree in any suit instituted or appeal presented before this Code comes into force." This not being an appeal presented before the Code came into force, the exception does not apply. There is no provision in the Code that we can discover like s. 387 of the repealed Act, VIII of 1859, which expressly saves any right of appeal which any party would have had but for the passing of the Act. Section 588, Code of Civil Procedure, is not relevant, because the order made either in the first or in the second Court was not an order under the Code. Any authority of law for such an appeal, which rested on [664] Act VIII of 1859, has disappeared with the repeal of the Act. The appeal is, therefore, clearly inadmissible unless it can be supported by s. 584. This section can only apply if the order complained of comes within the category of "decrees." It apparently is not a decree. The point is one of considerable importance, and we think it should be argued before a larger number of Judges.

L. S. JACKSON.

L. R. TOTTENHAM.

No. 2 OF 1878.

Raj Kumari Dabi Chowdhurani.....Judgment-debtor

versus

Missuram Mundol.....Decree-holder.*

Baboo Srinath Das for the Appellant.

Baboo Gurudas Banerji for the Respondent.

THIS is an appeal against an order passed under s. 202, Act VIII of 1859, on 15th September 1877. The appeal was presented in November, when Act VIII of 1859 had ceased to be law, and was replaced by Act X of 1877.

It is objected that no appeal lies, since s. 588 (*b*), on which the appellant relies, refers to orders passed under the Act of 1877, and not to those under Act VIII of 1859; and that even if the latter Code of Procedure conferred the right of appeal, that right has gone with the repeal of that Act.

We think it right to refer this matter to be decided by a Full Bench to which many similar matters have already been referred.

W. MARKBY.

H. T. PRINSEP.

* Appeal from an order of Batoo Mothura Nath Gupto, Subordinate Judge of Moorsheadabad, dated the 15th September 1877.

[665] No. 26 OF 1878.

Haran Chunder Chuckerbutti.....Appellant

versus

Rakhal Chunder Chowdhry and others.....Respondents.*

Baboo *Troyluckho Nath Mitter* for the Appellant.Baboo *Durga Mohun Das* for the Respondents.

A preliminary objection is raised to the hearing of this second appeal, that it is not allowed by the Code of Civil Procedure of 1877, under which it has been preferred; and as we understand that other cases involving the same point have been referred for decision to a Full Bench, we think it right that this case should also be referred.

The plaintiff obtained a decree against the defendant, the holder of a saleable undertenure, for arrears of rent, and, in execution of that decree, applied for the sale of the defendant's moveable property. The defendant objected, insisting that the undertenure should first be sold.

The Court of First Instance held that the undertenure should first be sold, and refused to sell the defendant's moveable property.

On an appeal preferred under the now repealed Code of Civil Procedure, the District Judge set aside this order, holding that the decree-holder could not be compelled "to execute his decree otherwise than as he wishes, and as in fact the law tells him, he should".

The point which we refer to the Full Bench is, whether, under the Code of 1877, a second appeal lies against this order.

W. MARKBY.

H. T. PRINSEP.

[666] No. 27 OF 1878.*

Omur Ali Khan and others.....Judgment-debtors

versus

Mohamed Sabari.....Decree-holder.†

Baboo *Nogendro Nath Roy* for the Appellants.Baboo *Juggut Durlabh Basak* for the Respondent.

* Appeal from an order of H. T. Sutherland, Esq., Officiating Judge of Backergunj, dated the 5th October 1877, reversing an order of Baboo Durga Churn Sen, Officiating Munsif of that district, dated the 17th March 1878.

† Appeal from an order passed by E. S. Mosely, Esq., Judge of Mymensingh, dated the 27th September 1877, affirming an order of Baboo Mohendro Nath Roy, Munsif of Bazitpore, dated the 19th June 1877.

No. 30 OF 1878.

Khundkar Mohamed Fousical Islam..... Judgment-debtor
versus

Amirunnessa Bibi.....Decree-holder.*

Baboo *Rajendro Nath Bose* for the Appellant.

Baboo *Kishori Mohun Roy* for the Respondent.

THESE appeals are preferred against orders passed on appeal by the District Judge under the provisions of Act VIII of 1859, and the appeals have been preferred after the new Code, Act X of 1877, came into operation.

The orders confirm the decision of the first Court rejecting applications to set aside *ex parte* decrees under s. 119, Act VIII of 1859.

The new Code contains no provisions for appeals against orders rejecting such application, and no appeal will now lie (1 Cal. Rep., 402), but if the Judge's orders on appeal are considered to be decrees, an appeal will lie under s. 584, Act X of 1877.

The question is one with respect to which we have considerable doubt, and as somewhat similar questions as to the scope of s. 584 are to come under consideration of a Full Bench, we are desirous of submitting this point to it also.

[667] Whether s. 584, Act X of 1877, gives this Court jurisdiction to hear appeals from orders passed in appeals, respecting applications for setting aside *ex parte* judgments, such orders having been passed under the provisions of Act VIII of 1859?

R. C. MITTER.

A. T. MACLEAN,

No. 33 OF 1878.

Loharam Roy.....Judgment-debtor

versus

Srimonto Chuckerbutt.....Decree-holder.†

Baboo *Bhowani Churn Dutt* for the Appellant.

Baboo *Grish Chunder Chowdhry* for the Respondent.

THIS appeal was filed on the 24th January 1878 under the new Code of Civil Procedure.

The appellant in this Court is a judgment-debtor.

* Appeal from an order passed by the Officiating Additional Judge of Rajshahye, dated the 3rd October 1877, affirming an order of the First Subordinate Judge of that place, dated the 19th March 1876.

† Appeal from an order of H. B. Lawford, Esq., Judge of Nuddea, dated the 30th November 1877, affirming a decree of Baboo Mohendro Nath Bose, Subordinate Judge of that district, dated the 5th August 1876.

The decree-holder sued out execution for possession, mesne profits, and costs. The Subordinate Judge found that he had already received the rents of the lands covered by the decree from 1281. He, accordingly, directed an enquiry to be made as to the amount of mesne profits recoverable for the period extending from Srahun 1269 to the end of 1280.

In respect of costs he decided that the claim of the decree-holder was correct except in respect of Rs. 57-7-4, costs incurred in the High Court, which had been paid into Court on the 30th March 1875.

The judgment-debtor appealed to the District Court.

In respect of mesne profits, the Judge states that the decree is silent as to the date from which mesne profits are to be calculated; he holds that as the decree provides that the amount shall be determined in execution of decree, it is competent to the Court executing the decree to fix the period over which the calculation is to extend. He gives a further reason for dismissing [668] the appeal on this head, --namely, that the appellant had not raised the question in the Court below.

In respect of costs, the Judge, after setting out the facts, decided that the decree-holder is entitled to the costs claimed and allowed by the first Court.

The decree-holder was plaintiff in the suit; he succeeded in the Court of First Instance and in the first Appellate Court. On special appeal by the defendant, the judgment of the Lower Appellate Court was cancelled, and the case remanded. On the remand the Lower Appellate Court came to a different conclusion, and dismissed the suit. There was then a special appeal by plaintiff, and the High Court reversed the second judgment of the Lower Appellate Court, and treating the case as remanded, proceeded to try the regular appeal by the defendant as called up from the Court below.

The original appeal so brought before the High Court was dismissed, and the judgment of the first Court was affirmed.

The decree contains no reference to the costs of the first hearing in the High Court, nor to the costs incurred in the Lower Appellate Court after remand; but the Judge is of opinion that as this Court confirmed the original decree in favour of the plaintiff, and gave him his costs, it was its intention that the plaintiff should recover all the costs of the litigation.

The first question to be determined is, whether any second appeal will lie in this case, or whether the order of the first Court is one falling under cl. (j), s. 588, in which consequently a second appeal is barred by the last clause of that section.

As the question of the construction of cl. (j), s. 588, has been referred to a Full Bench for consideration, we think this case ought to go up at the same time.

W. AINSLIE.

H. T. PRINSEP.

[669] No. 48 OF 1878.

Srinath Banerji..... Judgment-debtor
versus

Troilokho Nath Biswas.....Decree-holder*

Baboo Jugut Chunder Banerjee for the Appellant.

Baboo Srinath Das for the Respondent.

We think it right to refer this case to be considered by the Full Bench together with many cases now before it involving the right of appeal under the present Code of Procedure.

The first Court held that execution was barred by limitation. On appeal made under Act VIII of 1859, the District Judge of Nuddea set aside this order as erroneous.

The point for consideration is:—Is there the right of a second appeal?

It is contended before us that this order does not fall within s. 588, Act X of 1877; but that it is a "decree" within the definition given in s. 2, and that, therefore, a second appeal lies under s. 584.

W. MARKBY.

H. T. PRINSEP.

No. 323 OF 1877.

Surendro Nath Pal Chowdhury and others.....Decree-holders
versus

Chunder Cumar Roy and others.....Judgment-debtors.†

Bahoos Bhowani Churn Dutt and Kali Mohan Das for the Appellants.

Mr. H. Bell and Bahoos Unnoda Pershad Banerjee and Bungshee Dhur Sen for the Respondents.

THE appellants, as assignees of a decree, applied under s. 208, Act VIII of 1859, to execute that decree; but, on 17th August last, that application was rejected by the District Judge of Jessore.

[670] They have now appealed against that order, but between the date of the Judge's order and the filing of this appeal the law has changed. Act VIII of 1859, under s. 208 of which that order was passed, has been repealed with the rest of that Act, and is now replaced by s. 232, Act X of 1877.

A preliminary objection is taken that there is no right of appeal.

Now, as the law stood when the order under appeal was passed, we have no doubt that there was no appeal, and this has been repeatedly held by this

* Appeal from an order of H. B. Lawford, Esq., Judge of Nuddea, dated the 15th December 1877, reversing an order of Baboo Troilokho Nath Mitter, First Munsif of Bongony.

† Appeal from an order of C. A. Kelly, Esq., Judge of Jessore, dated the 17th August 1877.

Court; but it is doubtful whether the appeal being presented under the new Code, an appeal lies (1) by reason of there being no appeal under the law in force when the order was passed, and (2) supposing that this is no bar, whether there is any appeal allowed by the Code of 1877.

The first point requires no explanation, but as regards the second point we think it right, in referring this case to the Full Bench to be considered with numerous other cases of a similar nature, to state the provisions of law bearing on it, and which require authoritative explanation.

Section 244, Act X of 1877, which corresponds to s. 11, Act XXIII of 1861 (now repealed), by introducing in (c) the words "or their representatives," seems to contemplate making parties to a decree or their representatives (which would include an assignee) identical in such matters with which a Court is competent to deal when executing a decree. And in s. 588 (j) an appeal is allowed against "all orders under s. 244 as to questions relating to the execution of decrees of the same nature with appealable orders made in the course of a suit."

Therefore, supposing in the first point the answer of the Full Bench is, that this case is governed entirely by the present Code with regard to the right of appeal, and quite irrespective of there being no appeal under the law in force when the order appealed was passed, then it will be necessary to determine the effect of these concluding words in s. 588 (j), which we have italicised, and whether they would allow an appeal in the present case.

W. MARKBY.

H. T. PRINSEP.

[671] Baboo Nagendra Nath Roy for the Appellant in No. 360 of 1877.—From s. 244 of the Civil Procedure Code, it appears that certain questions arising between the parties to a suit and relating to the execution of decrees are to be determined by the Court executing the decree, and not by a separate suit. This case comes under cl. (c): "any other questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution of the decree." The first part of the section says, that "the following questions shall be determined by the order of the Court executing a decree." But notwithstanding I contend that this order, from which we appeal, is an order under s. 584, and is defined in s. 2. Section 584 says, "Unless when otherwise provided in this Code or by any other law, from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court." If I can satisfy the Court that the order in this case was a decree, the question is at an end. Clause (c) of

Question to be decided by Court executing decree. * [Sec. 244 :—The following questions shall be determined by order of the Court executing a decree and not by separate suit (namely):—

- (a) questions regarding the amount of any mesne profits as to which the decree has directed inquiry;
- (b) questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit between the date of institution and the execution of the decree, or the expiration of three years from the date of the decree;
- (c) any other questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution of the decree.

Nothing in this section shall be deemed to bar a separate suit* for mesne profits accruing between the institution of the first suit and the execution of the decree therein where such profits are not dealt with by such decree.]

s. 584 says, that, "an appeal may lie if there has been a substantial error or defect in the procedure as prescribed by this Code or any other law, which may have produced error or defect in the decision of the case upon the merits." The word "case" is used in s. 372 of the old Code. The 2nd section defines "decree" to mean "the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied." "Other judicial proceeding" in this definition would, *prima facie*, include proceedings in execution arising between the parties to a suit in executing the decree. [GARTH, C.J.—An order merely ascertaining the amount which the judgment says shall be given to the plaintiff is not part of the decree.] My contention is, that all orders under s. 244 are decrees. The formal order of the Court embodying the determination by the Court of questions arising under that section is a decree within the meaning of the Code. That appears from s. 588. Appeals lie from the orders mentioned in cls. (a) to (i) which are interlocutory orders made in the course of a suit. Then cl. (j) says that appeals shall lie from "orders under s. 244 as to questions relating to the execution of decrees of the same nature with [672] appealable orders made in the course of a suit." [JACKSON, J.—Do not the framers of the Code intend to distinguish between "orders" and "decrees"? They say that a person having an order capable of execution shall be considered a decree-holder. That would have been unnecessary if an order was a "decree". It appears that all persons who have orders in their favour entitled to execution are decree-holders. The word "decree-holder" is defined to mean "any person in whose favour a decree or any order capable of execution has been made." That means something more than the holder of a decree. The intention of the Legislature evidently was, that "decrees," as defined in s. 2, should include orders under s. 244. I contend that whenever a question arising between parties in the course of execution proceedings is determined, such order is appealable. There were appeals under the old Code. If the order of the lower Court was a decree, then, even if the order of the Lower Appellate Court is taken as a remanding order, there is an appeal under cl. (w) of s. 588.

Many important points arise in the course of execution proceedings, and it must have been the intention of the Legislature to allow an appeal. Act VIII of 1859, s. 372, was not very clear, but in *Mahomed Hossein v. Sherkh Afzul Ally* (Marsh, 296), it was held that an appeal would lie. Sir B. PEACOCK says:—"It has been very properly urged by the vakeel in support to the special appeal, that, unless a special appeal will lie, there is no remedy against errors or defects in law in decisions passed by the first Appellate Court, inasmuch as s. 11 (of Act XXIII of 1861) expressly provides that the questions therein mentioned shall be determined by the Court executing the decree and not by regular suit, and allows an appeal from the order passed. Now, difficult points of law may arise in the execution of a decree." Section 11 of Act XXIII of 1861 has been re-enacted in s. 244, and the same reasons are now applicable. Even if it is held that this order is not a decree within the Code, an appeal will lie under the last clause of s. 589, which provides, that "when an appeal from any other order is allowed by this [673] chapter, it shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made, or when such order is passed by a Court (not being a High Court), in the exercise of appellate jurisdiction, then to the High Court." These words are wide enough to include orders made for the first time in appeal as in this case.* Even if there is no appeal under the new law, there has been a sufficient saving under the last clause of s. 3, corresponding with s. 307 of Act VIII of 1859.

Baboo *Kali Kishen and Jyogopal Ghose* for the Respondents.—In the Code there are distinct provisions as to when decrees are to be recorded; there are also provisions applicable to framing appeals from the first Court and second Court. Sections 205 and 206 show that, in a suit after judgment has been pronounced, a formal decree is to be drawn up. There is no provision for framing decrees with respect to execution-proceedings; they are dealt with as applications. Section 647 refers to miscellaneous proceedings. In these cases no formal decree is recorded; judgment is given, and a certificate granted. JACKSON, J.—The final order in a certificate case would be the decree; the proceedings are to be conducted as nearly as possible according to the Code. AINSLIE, J.—Can you execute an order? A holder of a decree applies to the Court to enforce it under the Code; there is no provision for executing an order. The order of the District Judge is not a decree. The provisions as to execution-proceedings up to final execution are contained in the first part of the Code. Appeals come under a different part; there is no provision for recording decrees in matters of execution, and the distinction between decrees and orders is preserved throughout the Code. Section 230 provides that execution shall be taken out by the decree-holder, and orders are then passed. Sections 212 and 244 show that the distinction between decrees and orders is kept up. The Act provides for appeals from decrees and appeals from orders. There is no provision for an appeal from an order of this nature, and unless it is held to be a decree, no appeal lies. It has been contended that the last clause of s. 3 re-enacted s. 387 of the old Code. We submit [674] that the Legislature intended to give only one appeal, and did not intend to give a special appeal in miscellaneous matters; and therefore that the provisions of s. 387 as to special appeals were omitted intentionally. This intention is further shown by s. 538, which provides that the orders passed in appeal under it shall be final.

Baboo *Bhowani Churn Dutt and Kali Mohun Das* for the Appellants in Suit No. 323 of 1877 contended, that an appeal lay under ss. 540 and 588, cl. (j), of Act X of 1877; and that the appellants were "parties to the suit," and therefore had the same rights of appeal as their vendors. They referred to *Abidunnissa Khatoon v. Amirunnissa Khatoon* (I. L. R., 2 Cal., 327; s. c., L. R. 4 I. A., 66) and *Huro Lall Dass v. Soorajut Ali* (8 W. R., 197).

Mr. H. Bell for the Respondents.—The case is concluded by *Sooba Bebee v. Fukurunnissa Begum* (1 Cal. Rep., 331), where it was decided that the alleged, but not proved, transfer of a decree does not constitute the alleged transferee a party to the suit merely by his applying for execution of the decree.

The other cases were not argued.

The Opinions of the Full Bench were delivered by

No. 360 OF 1877.

Garth, C. J.—I think that the special appeal in this case is preserved to the appellant by s. 6 of Act I of 1868, which is in these words:—"The repeal of any Statute, Act, or Regulation shall not affect any proceedings commenced before the Repealing Act shall have come into operation."

* [Sec. 647:—The procedure herein prescribed shall be followed, as far as it can be made applicable in all proceedings in any Court of civil jurisdiction other than suits and appeals.

The High Court may, from time to time, make rules to provide for the admission, in such proceedings, of affidavits as evidence of the matters to which such affidavits respectively relate; and such rules, on being published in the local official Gazette, shall have the force of law.]

It was held by a Full Bench of the Bombay High Court in the case of *Ratanchand Shrichand v. Hanmantrav Shrivakas* (6 Bom. H. C. Rep., 166) that a suit is a judicial proceeding, and that the words "any proceedings" in the above section included all proceedings in any suit from the date of its institution to its final disposal; and, therefore, included proceedings in appeal.

[673] I quite agree in that view of the section. This suit was instituted before the new Civil Procedure Code came into operation; and I consider that, by force of the above section, the proceedings in this suit, including the special appeal, which is an essential part of those proceedings, are to go on to the final end of the suit, notwithstanding the repeal of the old Code.

There is nothing in the new Code, as far as I can see, which militates against this view.

Section 3 certainly provides that "nothing contained in the new Code shall affect the procedure prior to decree in any suit instituted before that Code comes into force", and the reasonable inference from those words is, that the new Code is to affect the procedure *after decree* in any such suit.

But I do not read the word "procedure" in this section as meaning the same thing as the word "proceedings" in s. 6, Act I of 1868.

The proceedings in any suit commenced before the new Code comes into operation are to go on as before, including a special appeal, if the old Code allowed one; but the "procedure," which I understand to mean the machinery by which those proceedings are conducted, is, after decree, to be that which is provided by the new Code.

If there is no machinery provided by the new Code in case of a special appeal like the present, the old machinery must be used.

I am aware that, in the case of *Framji Bomunji v. Hornasji Barjorji* (3 Bom. H. C. Rep., 49), the word "procedure" is used by Sir R. COUCH in a more extended sense; but the decision in that case did not depend, as it seems to me, upon the meaning of the word "procedure."

The question there was whether, by the Charter of 1865, the right of appeal to the High Court, which was given by the previous Charter of 1862, was taken away; and (whether that was or was not properly called an alteration in the procedure) the Court held, and I think very properly, that the right of appeal to the High Court was taken away by the Charter of 1865.

[676] At the time when that case was decided, Act I of 1868, the General Clauses Act, had not been passed; and, therefore, the effect which s. 6 of that Act might have upon proceedings in any pending suit was not considered.

The only other provision in the new Code to which I think it necessary to refer is s. 591, which enacts that, "except as provided in Chapter XLIII, no appeal shall lie from any order passed by any Court in the exercise of its original or appellate jurisdiction." But this provision appears to be clearly prospective. The appeals allowed by Chapter XLIII are only appeals from orders made *under the new Code*; and the whole of the chapter, as it seems to me, is intended to apply only to *future orders* to be made under the new Code.

I am, therefore, of opinion that this appeal should be admitted.

This decision will govern the other cases numbered 2, 26, 27, 33, and 48 of 1878, which are also referred to us, and which depend upon the same principle.

In all the above cases, therefore, I consider that the appeals should be admitted.

In No. 323 of 1877 no appeal would have been allowed under the old Code; and as the new Code does not confer any right of appeal in such a case, the appeal must be dismissed with costs.

Jackson, J.—The difficulty in these cases generally has arisen from the repeal of the Act, under which they would have been cognizable, without the simultaneous enactment of any provision saving the right of appeal; and it has been proposed to get over the difficulty by putting some force on the word "decree" as defined in the Code. A good deal of discussion has also arisen upon the terms of the last clause of s. 3.

The appeal given by s. 588 of the present Code applies to orders made under the Code and to no others, and the finality given by the same section to appellate decisions of that nature is confined to orders passed in appeals under that section.

The word "decree" cannot, in my opinion, include orders, either original or appellate, upon matters arising in the course of a suit or in execution of the decree.

[677] The decision of the Appellate Court on an appeal from the original decree is, in truth, the result of the decision of the suit by that Court, and, therefore, comes at once within the definition of a "decree."

The judicial proceedings referred to in the same definition are, I think, those provided for in s. 647, and are altogether outside regular suits.

To adopt any other interpretation, and to hold that judicial proceedings in the definition clause include proceedings in a suit before or after decree, would be, in my opinion, to introduce needless and extreme confusion into the provisions of the Code.

The difficulty created by s. 3 arises mainly from the use of the ambiguous word "procedure," which evidently has two senses, and is employed in this very Code sometimes in one and sometimes in the other sense. In one of the two it includes all the remedies or modes of relief to which a suitor is entitled; and in the other it denotes merely the steps which are to be taken by the Court or its officers in ascertaining the rights of litigants, in putting them into possession of that which is found to be their due, in conducting its own proceedings or enforcing its own decisions. The embarrassment which has arisen entirely disappears if we limit the word "procedure" to that meaning which, I apprehend, it was intended to bear, and generally does bear in most places where it occurs in the Code, viz., the rules of practice whereby "rights are effectuated through the successful application of the proper remedies." I conceive that the Code is chiefly meant to contain as complete a collection as possible of those rules, and that, although we find in it here and there declarations as to those cases in which appeals shall or shall not lie, this is done for the sake of convenience and not because those provisions form a part of procedure strictly so called. Those declarations govern the cases to which they are expressly applicable, and as to other cases they will depend either on the words of actual preservative enactments, or on the general principles applicable to the retrospective force of Statutes. If this be so, it follows that the last clause of s. 3 taken by itself has really no effect upon this question, but relates only to the application of the rules of

* [Sec. 647 :—p. v. *supra* I.L.R. 3 Cal. 673.]

practice [678] contained in the Code. We cannot, I think, nor is it necessary that we should, rely for the purposes of this case on cl. 16 of the Letters Patent of 1865. In the first place, it seems to me that the 16th clause only gave jurisdiction in the sense of enabling the High Court to try the appeals lawfully coming before it, which is, in my opinion, a very different thing from an enactment conferring on the subject a right of appeal. But in the second place, by the 44th clause, the Letters Patent are expressly made subject in all particulars to the legislative powers of the Governor-General in Council, and subsequently the Indian Legislature has, by Act VI of 1871, declared in s. 21, that "appeals from the decrees and orders of District Judges and Additional Judges shall, when such appeals are allowed by law, lie to the High Court." And by s. 22, that "appeals from the decrees and orders of Subordinate Judges and Munsifs shall, when such appeals are allowed by law, lie to the District Judge, except where the amount or value of the subject-matter in dispute exceeds Rs. 5,000, in which case the appeal shall lie to the High Court." That the limiting words "when such appeals are allowed by law" extend to the latter part of the sentence, I cannot doubt, either on grounds of grammatical construction, or with reference to the reason of the thing; and thus, by the enactment of a competent Legislature, the power of hearing appeals given to the High Court is expressly restricted to those cases in which an appeal is allowed by any law in force. But even without this express enactment the result, in my opinion, would have been the same. I have already observed on what seems to me the distinction between enabling a Court to hear appeals and conferring on parties the right of appeal. But with reference to my second reason for thinking the clause inoperative, it has been pointed out that the Court is there directed to exercise "appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations *now in force*," and it is suggested that these latter words validly confer an appellate jurisdiction in such cases till the jurisdiction is expressly taken away. I attach no weight to the word "*now*," as it seems to me purely descriptive, having reference to the jurisdiction to be exercised [679] at the moment when the new Letters Patent were published. I presume that if any Act allowing appeals to the High Court had been repealed on the 1st January 1866, this Court could not have heard such appeals if presented after the publication of the Letters Patent, although the case had been subject to appeal by a law in force on the 28th of December 1865, the date which the Letters Patent bear. My opinion, therefore, is, that the power of this Court to hear appeals from the Civil Courts in the interior (inseparable from the rights of parties to prefer the appeals) is now regulated by Act VI of 1871.

In my opinion, however, we may safely adopt, and for the sake of obviating hardship and injustice we ought to adopt, the construction which the High Court of Bombay has put on s. 6, Act I of 1868, in *Ratanchand Shrichand v. Hanmantrav Shivbakas* (6 Bom. H. C. Rep., 166, 168), and we ought also to hold that it will cover specific proceedings taken in execution of a decree which have been commenced before the Code came into force,—that is, before the repeal of Act VIII of 1859 became operative. By making this use of the 6th section of the General Clauses Act and by taking the view which I have taken of the effect of s. 3, it seems to me that all difficulty is avoided. The provisions of the Code will then have no retrospective effect so as to injure any right of action or right of appeal existing at the time when the Code came into effect; at the same time that the procedure as intended by the Legislature, will come into force with all its incidents in every case at the time indicated,—that is to say, (1) the procedure in suits instituted after the Code came into force will be wholly subject to its provisions; (2) the procedure in

suits commenced before it came into force and pending at that time will be regulated by the previous law up to decree, and by the Code after decree; and (3) the procedure after decree in suits determined before the Code came into force would thereafter be governed entirely by the Code as to new proceedings, but not as to proceedings already commenced, which, according to the view now suggested, are specially [680] protected by Act I of 1868. With these indications of my own reasons, I concur in the proposed decision in the several appeals before us.

No. 323 OF 1877.

Markby, J. (MITTER J., concurring).—This was an application under s. 208 of Act VIII of 1859 by the purchaser of a decree to be allowed to execute the decree. The application was rejected by the District Judge on the 17th August 1877.

The appeal to this Court was presented on the 12th of November 1877, that is, after the new Code came into force.

No appeal will lie against this order under s. 588, which only applies to orders made under the new Code, which this order certainly was not.

If, therefore, the appeal lies under the new Code at all, it must lie as an appeal from an original decree under s. 540, which applies to decrees made under the old Code as well as to decrees made under the new.

The question, therefore, is, whether the order of the lower Court was a "decree" within the meaning of s. 540.

By a decree means the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied."

By "the result of the decision of the suit" we understand to be meant the order of the Court granting or refusing that, or some part of that which the suit was brought to obtain.

By "other judicial proceeding" we understand to be meant not the result of a judicial proceeding of any other kind whatsoever, but of a judicial proceeding which does not arise out of a suit such, for example, as proceedings other than suits to which by s. 647 the Procedure Code is made, as far as it can be, applicable.

No doubt, the words "any other judicial proceeding" are capable of receiving a wider construction. Almost every order of a Court of Justice embodies the result of a judicial proceeding; and an order made on appeal always does so. Moreover, in ordinary language, an order made on appeal is called a decree.

But in the definition itself, we have an indication that this was not the intention in the fact that "an order on appeal [681] remanding a suit for re-trial" is declared to be not within the definition. This we take to be an example or illustration, not an exception. If the wider construction of the words "any other judicial proceedings" were intended by the Legislature, a remand would have come within the definition, because it cannot be denied that an order of that nature, though it does not embody the results of the decision of the suit, clearly embodies the result of the decision of the appeal. It declares that the result of the appeal is that the suit must be remanded for re-trial.

Again, it is evident from a comparison of Chapters XLI and XLII with Chapter XLIII that the Legislature intended in the last-mentioned chapter to provide for appeals against "orders" which are not "decrees." But many of these "orders" would be "decrees" if we were to adopt the wider construction of the words "any other judicial proceedings" as mentioned above. Because, under this wider construction, an execution-proceeding, or a proceeding taken under s. 258 to compel a decree-holder to certify, or under ss. 311 and 312 to set aside a sale, or in an insolvency matter under ss. 351, 352, 353, or 357, or proceedings under Chapters XXXIV and XXXV, would be included within the words "any other judicial proceedings;" and orders referred to in clauses (j), (k), (m), (n), and (r) of s. 588 would be "decrees" within the definition of that word as given in s. 2 of the Act. But a comparison of the chapters mentioned above clearly shows that that was not the intention of the Legislature.

Furthermore, if we were to adopt the wider construction of the words "other judicial proceeding" in s. 2, we should have to give the same construction to the words "proceedings other than suits and appeals" in s. 647 of the Code. In this view of s. 647, the provisions of ss. 649 and 650 would be wholly unnecessary, for the matter dealt with by the last two sections would have then been already provided for by s. 647.

These are some of the considerations which lead us to adopt the construction of the words "any other judicial proceeding" which we have adopted.

The appeal in this case, therefore, does not lie either under s. 540, or s. 588 of Act X of 1877, and there is no provision [632] in any other Act,

* [Sec. 540:—Unless when otherwise expressly provided in this Code or by any other law for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorised to hear appeals from the decisions of those Courts.]

Appeal to lie from all original decrees, except when expressly prohibited.

† [Sec. 588:—An appeal shall lie from the following orders under this Code and from no other such orders,]—

Orders appealable.

- (a) Orders under section 20, staying proceedings in a suit,
- (b) Orders under section 32, striking out or adding the name of any person as plaintiff or defendant,
- (c) Orders under section 44, adding a cause of action,
- (d) Orders under section 47, excluding a cause of action,
- (e) Orders rejecting or returning plaints under section 53 clause (d), or section 54, clauses (b) and (d), or section 57, clauses (b) & (c),
- (f) Orders rejecting applications under section 102 (in cases open to appeal) for an order to set aside the dismissal of a suit,
- (g) Orders under section 120 where a party fails to appear in person,
- (h) Orders under section 168 for attachment of property,
- (i) Orders under section 176 where a party refuses to give evidence or produce a document called for by the Court,
- (j) Orders under section 244, as to questions relating to the execution of decrees, of the same nature with appealable orders made in the course of a suit,
- (k) Orders under section 258 compelling decree-holders to certify,
- (l) Orders under section 261 as to objections to draft-conveyances or draft-endorsements,
- (m) Orders under section 312 for confirming or setting aside a sale,
- (n) Orders in insolvency matters under section 351, 352, 353, or 357,
- (o) Orders rejecting applications under section 370 for dismissal of the suit,
- (p) Orders disallowing objections under section 372,

of which we are aware, under which it can be brought. There is no provision of Act VIII of 1859, or of Act XXIII of 1861, applicable to such a case. Section 11 of Act XXIII of 1861 comes nearest to it, but it has been frequently held that this section does not apply to a proceeding under s. 208 of Act VIII of 1859. Nor can the appeal lie under cl. 16 of the Letters Patent of 1865. The clause only empowers this Court to hear appeals in such cases as were subject to appeal to the High Court by virtue of any laws or regulations then in force. But this only throws us back again upon the old law, which, as we have said, does not provide for an appeal in such cases as this.

• In our opinion, therefore, no appeal lies in this case.

No. 360 OF 1877.

This was an application to execute a decree for possession of land and costs. The Subordinate Judge, on the 7th March 1877 held that the execution was barred by limitation, and rejected the application. The District Judge, on the 23rd August 1877, held that the execution was not barred, and ordered execution to issue.

On the 19th November 1877, the judgment-debtor presented an appeal to this Court.

For reasons already stated, no appeal can lie against the order of the Lower Appellate Court either under s. 588 of the new Code, or under s. 584.

There was, however, a right of appeal to this Court against the order of the Lower Appellate Court at the time when that order was made under Act XXIII of 1861, s. 11, which had not then been repealed; and though this Act was repealed when this appeal was presented, and though there is no provision in the new Code under which an appeal can lie in this case, there is still nothing in the new Code which expressly prohibits such an appeal. The prohibitory words in the first and last clauses of s. 588 do not apply to the order of the Lower Appellate Court in this case, inasmuch as that order was made before the new Code came into force; and those prohibitions are not retrospective.

[683] If the appeal in this case is taken away at all, it is taken away by the repeal of Act XXIII of 1861, which formerly gave an appeal in this case. But we think that, notwithstanding the repeal of Act XXIII of 1861, this Court is empowered to hear, and ought to hear, this appeal under the provisions of cl. 16 of the Letters Patent of 1865.

That section provides that this Court "shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appel-

(g) Orders as to inter-pleader suits under sections 473, 475, or 476,

(r) Orders under sections 479, 480, 481, 485, 492, 493, 496, 503,

(s) Orders under section 514 superseding an arbitration,

(t) Orders under section 518 modifying an award,

(u) Orders under any of the provisions of this Code imposing fines, or for the imprisonment of any person, except when such imprisonment is in execution of a decree,

(v) Refusals under section 558 to re-admit or under section 560 to re-hear an appeal.

(w) Orders under section 562 remanding a case.

The orders passed in appeals under this section shall be final.]

late jurisdiction in such cases as are subject to the appeal to the said High Court by virtue of any laws or regulations now in force."

We think this clause is in itself a sufficient authority to this Court to hear this appeal. It is not probable that the Legislature intended to take away a right of appeal which existed, though it had not been exercised, when Act X of 1877 was passed. Had they intended this, they would, we think, have used express words for the purpose.

No doubt, the Supreme Legislature has power under s. 9 of the 24 and 25 Vict., c. 104, to take away from this Court the powers conferred by cl. 16 of the Letters Patent; and by s. 588 of the new Code it has taken away a large portion of those powers, but, in our opinion, not in this instance.

It is said that cl. 16 of the Letters Patent only gives the power to hear appeals, whereas Act XXIII of 1861, which gives the right of appeal, is repealed, and that, therefore, the appeal no longer lies.

With great deference, it seems to us that so long as the power to hear the appeal remains, that is sufficient; and that the power of a Court to hear an appeal carries with it, as a necessary consequence, the right to an appellant to present to that Court a petition of appeal.

If, as very often happens, the power to hear the appeal and the right of appeal is given by one and the same provision, then the repeal of that provision would destroy the appeal altogether; but here there are two wholly independent provisions, one of which is untouched, and which is alone sufficient to enable us to hear this appeal.

We think, therefore, that this appeal should be heard.

[684] No. 2 OF 1878.

This was an application to execute a decree by which it was ordered that the judgment-debtor should execute a lease. The judgment-debtor objected that she ought not to be made to execute the lease, and that execution of the decree was barred by limitation. The Subordinate Judge, on the 15th September 1877, overruled these objections and ordered the lease to be executed. An appeal to this Court was presented on the 2nd January 1878.

For reasons already stated in Miscellaneous Regular Appeal No. 323 of 1877, no appeal lies to this Court against that order under Act X of 1877. But as the law stood when the order of the Lower Appellate Court was made, an appeal against it lay to this Court under Act XXIII of 1861, s. 11. In our opinion this Court is still empowered to hear this appeal under cl. 16 of the Letters Patent of 1865. We have given our reasons for this conclusion in the case No. 360 of 1877. That reasoning is applicable to this case; and we think this appeal ought to be heard.

No. 26 OF 1878.

In this case the decree-holder had obtained a decree for rent; the decree-holder desired to attach the moveable property of the judgment-debtor. The judgment-debtor insisted that the decree-holder was bound first to execute the decree against the tenure. The Munsif thought the decree-holder was

bound to take that course, and on 17th March 1877 refused to execute the decree against the moveable property of the judgment-debtor. The decree-holder, on the 6th of April 1877, appealed to the District Judge, who, on the 5th October 1877, set aside the Munsif's order, and ordered execution against the moveable property to issue. On the 4th January 1878, the judgment-debtor presented a petition of appeal to this Court.

For reasons already stated in Miscellaneous Regular Appeal No. 323 of 1877, no appeal can lie to this Court in this case under Act X of 1877.

It, however, remains to consider whether, although no appeal lies against the order of the Lower Appellate Court under the [685] new Code, the right of appeal, which undoubtedly existed before the new Code came into operation, has been thereby taken away.

The appeal was given by Act XXIII of 1861, s. 11, and there are only two modes by which the appeal so given can have been taken away,—(1) by the repeal of that Act; (2) by the prohibitory words of the first and last clauses of s. 588.

Act XXIII of 1861 is repealed by the new Code, s. 3, with the proviso that "nothing herein contained shall affect the procedure prior to decree in any suit instituted or appeal presented before this Code comes into force."

Act I of 1868, s. 6, also provides, "the repeal of any Statute, Act or Regulation shall not affect anything done or any offence committed, or any fine or penalty incurred, or any proceedings commenced before the Repealing Act shall have come into operation."

The repeal, therefore, of Act XXIII of 1861 is subject to these two provisos.

The proceeding before the Lower Appellate Court,—that is, the appeal of the decree-holder from the decision of the Munsif, was commenced by the petition of appeal, dated the 6th April 1877. It was, therefore, commenced before the Repealing Act came into operation. It appears to us, therefore, that, in consequence of the second of the above provisos, the repeal of Act XXIII of 1861 does not "affect" that proceeding.

This being so, there was, at any rate, so far no difficulty in the way of the Lower Appellate Court making its order on October 5th under the old Code, for though that Code was then repealed, yet, for the purposes of the appeal then pending for decision before the Lower Appellate Court, the old Code still remained in force.

The question, however, still remains whether the order of the Lower Appellate Court ought to be considered as, in fact, made under Act XXIII of 1861, or under the new Code. This must be determined in order to see whether or no the case falls within the prohibitions contained in the first and last clauses of s. 588.

On the whole there is, we think, nothing in Act X of 1877 which compels us to say that the order of the Lower Appellate [686] Court was made under the new Code; and as, for the purposes of the appeal in the Lower Appellate Court, Act XXIII of 1861 was in force, we think that the order of the Lower Appellate Court ought to be considered as, in fact, made under that Act, and not under the new Code.

The prohibitory words, therefore, of s. 588 do not apply to this case.

If these prohibitory words do not apply, then, as already shown in Miscellaneous Special Appeal No. 360 of 1877, this Court is empowered to hear this appeal under cl. 16 of the Letters Patent of 1865; and we think, therefore, that this appeal ought to be heard.

The remaining four cases all stand upon the same grounds, as will appear from the following statement of facts.

No. 27 OF 1878

In this case certain persons presented a petition to a Munsif under s. 119 of Act VIII of 1859, alleging that there had been an *ex parte* decree against them, and praying that this decree should be set aside and the suit heard. The Munsif, on the 19th June 1877, rejected the application.

The petitioners appealed, and the Officiating District Judge, on the 27th September 1877, rejected the appeal.

The petitioners then, on the 31st January 1878, presented a second appeal to this Court.

An appeal against the order of the Lower Appellate Court lay to this Court under ss. 119 and 372 of the former Code of Procedure.

No. 30 OF 1878.

In this case a decree-holder applied for execution of a decree obtained *ex parte*. The judgment-debtor then put in an application under s. 119, praying that the judgment should be set aside and the case heard. On this he was summoned by the Subordinate Judge to appear personally. He did not attend, and having given no evidence in support of his application, it was dismissed on the 15th March 1876. The judgment-debtor, on the 26th April 1876, appealed, and on the 3rd October 1877, the Officiating District Judge dismissed the appeal.

[687] On the 31st January 1878 the judgment-debtor presented a second appeal to this Court.

This appeal would lie under the provisions of ss. 119 and 372 of Act VIII of 1859.

No. 33 OF 1878.

The decree-holder in this case had obtained a decree for possession, mesne profits, and costs. He applied for execution, and the Subordinate Judge on the 5th August 1876, ordered that he should recover mesne profits from Srabun 1269 to the end of 1280; and certain costs, which were specified.

The judgment-debtor, on the 10th August 1877, appealed to the District Judge, complaining against the order of the Subordinate Judge, both as to mesne profits and costs. The District Judge, on the 30th November 1877, dismissed the appeal.

On the 31st January 1878 the judgment-debtor appealed to this Court.

This appeal would lie under the provisions of s. 11 of Act XXIII of 1861.

No. 48 OF 1878.

In this case the decree-holder had obtained a rent-decree for money on the 16th September 1871. On the 18th July 1876 he applied for execution. The Subordinate Judge, on the 14th December 1876 held that execution was barred by s. 58 of Act VIII of 1859. On the 13th January 1877, the execution-creditor appealed to the District Judge, who, on the 15th December 1877, reversed the order of the Subordinate Judge and ordered execution to issue.

The judgment-debtor, on the 25th February 1878, presented a petition of appeal to this Court.

This appeal would lie under s. 11 of Act XXIII of 1861.

The question in all these last four cases is precisely the same,—namely, whether the provisions under which these appeals were formerly given being repealed, the appeals will lie now, the repeal of those provisions notwithstanding.

For the reasons stated in Miscellaneous Special Appeal No. 360 of 1877, and Miscellaneous Special Appeal No. 26 of 1878, we [688] think this Court is still empowered to hear these appeals, and that, therefore, these appeals ought to be heard.

In dealing with these appeals we have not given to s. 6 of Act I of 1868 so wide an application as the Chief Justice and one other of the learned Judges are disposed to do. It seems to us that difficulties may arise if we give that section too wide an operation. We prefer, therefore, to admit these appeals on another ground upon which they seem to us admissible, reserving, for the present, the consideration of the exact limits of application of s. 6 of Act I of 1868 to the new Code of Procedure.

Ainslie, J.—I concur with my learned brothers, MARKBY and MITTER, JJ., in thinking that, in all cases in which an appeal lay under Act VIII of 1859, the right of appeal is saved by the 16th clause of the Letters Patent.

This disposes of all the appeals before us excepting No. 323. The order in this case was made under s. 208, Act VIII of 1859, and was not open to appeal. The matter dealt with by the order is now governed by s. 232 of the present Code. Reading s. 588, cl. (j), with cl. (p), an order made under s. 233, if in favour of the assignee of a decree, is appealable as an order; but s. 588 only applies to orders made under the Code, and s. 591 bars any appeal from an order not provided for by s. 588.

I, therefore, concur in rejecting Appeal No. 323, and in admitting all the others before us.

NOTES.

[INTERPRETATION OF STATUTES—RIGHT OF APPEAL UNDER REPEALED ACTS.]

I. THE HEADNOTE—

As the headnote is not clear, we state below the propositions dealt with by these cases :—

The Code of Civil Procedure, 1877, does not, by express terms or necessary implication, give its provisions as to appeal any retrospective operation.

(So held by all the Judges.)

The right of appeal in respect of suits and proceedings under the Civil Procedure Code, Act VIII of 1859, will continue to be governed by the provisions of that Code, even after the coming into force of the C. P. C. of 1877 which repealed it.

(This is the result of the opinions of all the Judges, although the reasons were different, at any rate where the old Code gave a right of appeal.)

This is the case whether at such date, the suit or proceeding in the lower Court (all the cases here were execution proceedings) was pending (as in 26 of 1878 ; 30 of 1878 ; 33 of 1878 ; 48 of 1878) or had been disposed of (360 of 1877 ; 2 of 1878 ; 27 of 1878).

Where there was a right of appeal under the repealed Code, that right was held not taken away,

- (a) by GARTH, C.J., and JACKSON, J. (MARKBY and MITTER, JJ. *doubting*) because: the General Clauses Act, 1868, s. 6, saved '*pending proceedings*,' which term included all proceedings from the date of institution to final disposal *inclusive of appeal*.
- (b) by MARKBY, MITTER and AINSLIE, JJ. (JACKSON, J., *dissenting*) because :
 - (i) although the old Code was repealed, the right to *hear* appeals, under that Code, remained by virtue of the Letters Patent, 1865, cl. 16, and this carried with it the right to *present* appeals ; and
 - (ii) orders on proceedings that were actually pending disposal were deemed to have been passed under the old Code and not under the new.

Where under the old Code there was no right of appeal (as in the case 323 of 1877) none was permitted

- (1) by GARTH, C.J., AINSLIE, J. and (apparently also, JACKSON, J.), because, there was no appeal in respect of that matter under either Code.
- (2) by MARKBY and MITTER, JJ., because no appeal was given by the old Code and the new Code was inapplicable by its terms to proceedings under the old Code.

'Proceedings' in 1 of 1868, Sec. 6 and 'Procedure' in X of 1887, Sec. 3, defined by GARTH, C.J. and JACKSON, J.

Distinction between '*order*' and '*decree*' in the definition clause pointed out by all the Judges except GARTH, C.J., and the words '*other judicial proceedings*' in the definition of '*decree*' explained by them not to refer to proceedings in execution of a decree given in a suit.

The following **TABULAR ANALYSIS** of the facts and the decisions in the several cases disposed of by the Full Bench may be found useful:—

Appeal No.	860 of 1877	2 of 1878	26 of 1878.	27 of 1878	30 of 1878	33 of 1878	48 of 1871	323 of 1877
Nature of the order.	Ordering execution as not time-barred.	Ordering execution of lease.	Ordering execution against moveables before tenure	Ordering rejection of application to set aside <i>ex parte</i> decree.	Ordering rejection of application to set aside <i>ex parte</i> decree.	Order in respect of moneys profits and costs.	Ordering execution as not time-barred.	Order refusing execution to assignee of decree.
Date of the order of lower Court.	23-8-77	15-9-77	5-10-77 on appeal filed 6-4-77	27-9-77	3-10-77 on appeal filed 26-4-76	30-11-77 on appeal filed 10-8-77	15-12-77 on appeal filed 13-1-77	17-8-77
Date of coming into force of C. P. C., 1877, repealing C. P. C., 1859, etc.	1-10-77	1-10-77	1-10-77	1-10-77	1-10-77	1-10-77	1-10-77	1-10-77
Date of Appeal.	19-11-77	2-1-78	4-1-78	31-1-78	31-1-78	31-1-78	25-2-78	12-11-78
Whether appealable under the old C. P. C.	Yes, (1861) 11	Yes, (1859) 119 & 372	Yes, (1859) 119 & 372	Yes, (1859) 119 & 372	Yes, (1859) 119 & 372	Yes, (1861) 11	Yes, (1861) 11	No.
WHETHER APPEAL IS SAVED BY (OR LIES UNDER)	C. P. C., 1877.		Garth, C.J.					
	Jackson, J.	No.	No.	No.	No.	No.	No.	No.
	Markby, Mitter, Ainslie, JJ.							
Letters Patent, 1868, cl. 16	Garth, C. J.	not considered	not considered	not considered	not considered	not considered	not considered	not considered
	Jackson, J.	No	No	No	No	No	No	No
	Markby, Mitter, Ainslie, JJ.	Yes	Yes	Yes	Yes	Yes	Yes	No
General Clauses Act I of 1893, s. 6.	Garth, C. J.	Yes	Yes	Yes	Yes	Yes	Yes	No
	Jackson, J.	Yes	Yes	Yes	Yes	Yes	Yes	..
	Markby, Mitter, Ainslie, JJ.	doubting	doubting	doubting	doubting	doubting	doubting	doubting

II. THE GENERAL PRINCIPLES :—

(a) Statutes are *prima facie* prospective only, and one class of exceptions to this rule is those that affect procedure ; and they are given retrospective operation ?

(b) But the right of appeal has been held to be something more than mere procedure :—
In *Colonial Sugar Refining Company v. Irving* (1905) A. C., 369, the Privy Council observed :—

“ As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act (*which took away the right of Appeal to Privy Council*) is not retrospective by express enactment or necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure ? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.”

In that case, the proceedings had been commenced when the Judiciary Act 1903 came into force, and the decision was not given until after that date.

(c) On the same principle that an existing right of appeal is not *prima facie* taken away, rests the rule that a new right of appeal is not *prima facie* conferred :—(1910) 7 A.L.J., 1070 (This case is like No. 323 of 1877). See also (1878) 3 Cal., 727.

See also (1886) 13 Cal., 86 (1878) 3 C.L.R., 203.

(d) There have been many conflicting decisions, however, on this subject. See (1889) 16 Cal., 267 F. B. (which deals exhaustively with this subject) and our Notes to that case in our 'LAW REPORTS' REPRINTS of the I. L. R.

(e) It was laid down in the following that the particular proceeding in execution should have been commenced before the Act :—(1879) 4 C. L. R., 18 ; (1879) 5 Cal., 259.

(f) The case of (1879) 4 Cal., 825 seems to be at variance with this case ; where the question was whether another appeal also will be governed by the old Act.

III. THE GENERAL CLAUSES ACT ON REPEAL : —

The former Act has been repealed and X of 1897 takes its place. See s. 6 thereof.

IV. THE DEFINITION OF 'DECREE' IN THE CIVIL PROCEDURE CODE —LEGISLATION CONSEQUENT ON THIS DECISION :—

(a) C.P.C. 1859 contained no definition.

(b) The C.P.C. 1877 defined 'decree' to mean 'the formal order of the Court in which the result of the decision of the suit or other Judicial proceeding is embodied.'

The word 'proceeding' was explained, by MARKBY, MITTER and JACKSON, JJ, in these cases to mean Judicial proceedings other than those arising out of a suit. This view was directly opposed to the Allahabad case of 1 All., 668 (but see 2 All., 74). Consequent upon this conflict, the Amending Act XII of 1879 defined 'decree' as follows :—

“ Decree means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court when such adjudication, so far as regards the Court expressing it decides the suit or appeal. An order rejecting a plaint or directing accounts to be taken, or

determining any question mentioned or referred to in section 244, but not specified in section 588 is within this definition; an order specified in section 588 is not within this definition.

(c) See also the alterations in the definition in the C. P. C. 1908 sec. 2 (2).

V. THE MEANING OF "PROCEEDING" AND "PROCEDURE."

See the definitions of GARTH, C. J. and JACKSON, J. at 3 Cal., 675 and 677, and 679 respectively.

But these definitions have not been accepted uniformly:—See per WILSON, J. in (1889) 16 Cal., 267 at 272 and 273 and the cases there cited. See also (1894) 22 Cal., 364; 2 Bom., 182; *Kendall v. Hamilton* (1879) L. R., 4 A. C., 504 and the Indian cases following it.]

[3 Cal. 688]

APPELLATE CRIMINAL.

The 16th February, 1878.

PRESENT.

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MARKBY AND
MR. JUSTICE BIRCH.

J Williams.....Petitioner

versus

Williams (Respondent) and Conran Co-respondent.*

*Divorce Act (Act IV of 1869), s. 14—Delay—Connivance—Rebuttal of
Presumption.*

Whilst on the one hand there is no absolute limitation in the case of a petition for dissolution of marriage, yet the first thing which the Court looks to when the charge of adultery is preferred, is, whether there has been such [689] delay as to lead to the conclusion that the petitioner had either connived at the adultery or was wholly indifferent to it: but any presumption arising from apparent delay may always be rebutted by an explanation of the circumstances.

THE facts of this case, so far as they are material, appear from the judgment of the Court.

Garth, C. J.—In this case the petitioner, John Alexander Vincent Williams, sues for a divorce from his wife, Grace Evelina Williams, on the ground of her adultery with the co-respondent, Robert Conran; and he also claims damages against the co-respondent. The District Judge has granted a decree *nisi* for the dissolution of the marriage with Rs. 3,000 damages against the co-respondent, and this decree is now before us for our confirmation.

It appears that the parties were married in the year 1858 at Benares. They had several children, but only one survived. In the year 1863 they were living together at Allahabad in the Police barracks, where the co-respondent, who is a single man, also resided, the petitioner and the co-respondent being both at that time Police officers. The co-respondent was on intimate terms with the petitioner and his wife; but there is no reason to suppose that the petitioner had at that time discovered anything which could give him cause for suspicion.

In the year 1864 or 1865 the petitioner and his wife went to reside at Benares, and in the year 1866 Mrs. Williams became so ill that her life was

* Reference in Divorce Suit No. 1 of 1877 from an order of J. F. Browne, Esq., Offg. Judge of Zilla Patna, dated the 22nd June 1877.

despaired of. She then expressed a wish to see the co-respondent. She said that she thought she was going to die, and that she wished to make over her only child to him. The petitioner, accordingly, sent for the co-respondent, but it does not appear that the child was actually made over. The co-respondent stayed for a few days, and then went to Allahabad. A week afterwards the co-respondent returned to the house, having been sent for again by the respondent's sister at the respondent's request.

About a month afterwards the petitioner was transferred from Benares to Cawnpore. The respondent was then recovering, and the petitioner states that it was then arranged that he [690] should furnish a house at Cawnpore, and remove the respondent thither when she was stronger. The petitioner says, that whilst he was getting the house ready, he got a letter from his wife, saying that he was to consider her as dead, and that she would not join him. This letter is not produced, nor is the date of it given. The only attempt which the petitioner then made to find his wife was by writing letters, but he does not say to whom he wrote, nor does he give any particulars as to the information he received except with reference to a letter which he says he wrote to Mr. Conran fifteen or twenty days after the respondent had expressed her intention not to join him. His account of this correspondence is as follows :

" I wrote to Mr. Conran about fifteen or twenty days after my wife told me by letter that she would not join me. I wrote to ask him whether he had ever seen her in the course of his duties at the different stations on the line. He evaded a direct answer, and sent me an impertinent answer to the effect that my wife's grandmother, Mrs. McKinnon, had told him that I did not approve of his proceedings with my sister-in-law, and under such circumstances I should not ask him for information. I answered the letter, and he then wrote to me to say that he did not wish to hear from me again as I did not entertain a high opinion of his morality." None of these letters are produced. He further says, that he heard from his wife in 1868, when she complained that her own relations had charged her with unchastity. He does not produce this letter, nor does he say where it was posted. But he says that he wrote to her relations stating that these imputations were unfounded. He does not say so explicitly, but he evidently desires it to be understood that this is all that he heard of his wife between 1866, when she left him, and February 1877, when by a mere accident he was informed by a person at Benares that his wife was then at Burdwan with Mr. Conran. He says, that a few days after receiving this information, when on his way through Dinapore, he saw the co-respondent on the railway platform. He says that he did not speak to him, because he had written to him long before and had received what he calls the rude answer above mentioned. He says that he then employed a Mr. Smith [691] residing at Dinapore to make enquiries, and Mr. Smith ascertained that the respondent was living with the co-respondent at Dinapore. Thereupon the petitioner came down himself to Dinapore, and having disguised himself as a native, went to the house and had an interview with his wife. Subsequently, Mr. Smith sent for Mr. Conran to the dak-bungalow, and he then admitted the adultery. Immediately afterwards, these proceedings were instituted.

The petitioner's account of himself since 1868 is not very definite. He says that he left the police in 1872, and was then employed as manager of an estate in Oudh for about thirteen months at a salary of Rs. 200 a month. He then got the command of the troops of the Rajah of Benares at the same salary. This post he held about nine months, and since that time he has been acting as agent for a Mrs. Kawty at Assensole and elsewhere, and also carrying on a

general business, apparently on his own account, at Dinapore. He does not say where he has resided. He says that he does not know where his child is, but he has heard that he is at a school in Darjeeling.

We have no exact information where the respondent has resided since she left her husband, but it is proved that in May 1875 a child was baptized at Dinapore as being the daughter of Richard Harper and Grace Evelina Conran, therein described living at Khagoul. Khagoul is a suburb of Dinapore, and is in fact the railway station which usually passes under the name of Dinapore. The co-respondent has apparently been all along, and still is, in the police. The petitioner swears that he had no suspicion even against his wife until he received the information in February that she was at Burdwan with the co-respondent.

Neither respondent nor co-respondent has appeared in this suit.

The Judge considers the petitioner's story, though a remarkable one, as implicitly true in every respect, and sufficient to show there was no connivance, collusion, or unusual delay.

We cannot accept this view of the matter.

It has been a long established principle, that whilst on the one hand there is no absolute limitation in the case for a [692] petition of dissolution, yet that the first thing which the Court looks to when the charge of adultery is preferred, is, whether there has been such delay as to lead to the conclusion that the petitioner had either connived at the adultery or was wholly indifferent to it; but any presumption arising from apparent delay may always be removed by an explanation of the circumstances. That principle is recognized in s. 14 of the Act.*

Now the way in which the petitioner meets the question of delay in this case is as follows. He wishes it to be believed that he never suspected the chastity of his wife at all from the time she left him in 1866 until the accidental discovery in February of last year. He also would have it inferred, that he was wholly ignorant of where his wife was residing during those eleven years, and that he commenced these proceedings as soon as he discovered the truth. Upon the evidence given in this case, this appears to us to be wholly incredible. After his wife's strange conduct in sending twice for Mr. Conran when she supposed herself to be dying, and expressing a desire to hand over her child to him, it seems incredible that when a month afterwards she declared her intention to leave her husband, he should not have even suspected Mr. Conran; and this is all the more strange when we consider the

* [Sec. 14 :—In case the Court is satisfied on the evidence that the case of the petitioner

Power to Court to
pronounce decree for dis-
solving marriage.

has been proved, and does not find that the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted, in collusion with either of the respondents, the Court shall pronounce a decree declaring such marriage to be dissolved in the manner and subject to all the provisions and limitations in sections sixteen and seventeen made and declared :

Provided that the Court shall not be bound to pronounce such decree if it finds that the petitioner has, during the marriage, been guilty of adultery, or if the petitioner has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage,

or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct of or towards the other party as has conduced to the adultery. * * *

petitioner's account of the correspondence which took place between himself and Mr. Conran, which alone was quite sufficient to have aroused the suspicion of any ordinary man. At least, it was to be expected that, on receiving his wife's letter, the petitioner would have at once come down from Cawnpore to Benares, and have had an interview with his wife, if, as he says, he was really then desirous that she should return to him, and considering her condition, and the facilities which he as a Police officer would have for making enquiries, there cannot be the least doubt that he could then have easily found her, if he had been so minded; still less is it credible that during all these years the petitioner has never been able to find any clue to where his wife was residing, or that he has never had any suspicion that she was residing with Mr. Conran. She had never gone to any great distance, and has apparently been residing for a considerable time with Mr. Conran near to the railway station at Dinapore, where [693] these parties have been living openly as man and wife. The petitioner does not deny that he has been frequently at Dinapore, and as he carries on a business there, the reasonable inference is, that he has been so. It is impossible that it can have escaped his knowledge that Mr. Conran was residing at Dinapore as a married man, and even if it did not come directly to his ears, that the person living at Dinapore as Mrs. Conran was the respondent, which is in itself very improbable; it is at any rate impossible to believe that he did not know where Mr. Conran was to be found, and yet knowing this, he did not make any attempt to obtain information from him as to the whereabouts either of his wife or his child.

Upon the whole, it seems to us impossible to escape the conclusion that the petitioner from the first knew perfectly well that his wife was living with Mr. Conran, and that knowing this, he forebore taking any steps to procure a divorce. This of itself would not disentitle the petitioner to a divorce if he were capable of explaining the delay; but when this delay not only remains unexplained, but the petitioner has attempted to get rid of the difficulty by deceiving the Court, it is impossible to avoid the conclusion that there are in this case, if the truth were known, some circumstances of connivance or insincerity which would disentitle the petitioner to the relief which he asks.

Had the petitioner stated the true facts of the case, it is quite possible that we should not have considered the delay to be a bar to the granting of the decree: but the true facts having been concealed from us, we are not in a position to give the petitioner the relief which he asks. We, therefore, refuse to confirm the decree for the dissolution made by the District Judge, and we direct that the petition be dismissed.

Petition dismissed.

NOTES.

[This case was followed in (1892) 17 Bom., 624 F. B.; see also 7 M. H. C., 284; 12 C. W. N., 1009.]

[694] APPELLATE CIVIL.

The 21st March, 1878.

PRESENT:

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Suddurtonnessa and another.....Plaintiffs

versus

Majada Khatoon and another.....Defendants.*

*Mahomedan family adopting Hindu customs—Law applicable
to—Discretion of Judge.*

A Mahomedan family may adopt the customs of Hindus subject to any modification of those customs which the members may consider desirable. A Judge is not bound, as a matter of law, to apply to a Mahomedan family living jointly all the rules and presumptions which have been held by the High Court to apply to a joint Hindu family. It rests with him to decide in any particular case how far he should apply those rules and presumptions.

THIS was a suit to recover possession of an eight gunda one kara and one krant share of a five-anna share of a certain talook. The plaintiff stated, that while her husband and his co-sharers lived jointly, five-anna share of the talook in dispute was purchased from joint funds; that the kobala was executed in the name of Golam Ali and Nazarut Ali; that all the co-sharers remained in possession by enjoying the profits thereof up to the year 1274; that, on their separation, the widows of Golam Ali and Nazarut Ali granted an ijara in respect of the entire five-anna share to the defendant No. 10, and thereby dispossessed the plaintiff. The defendants pleaded, amongst other matters, that the disputed property was not purchased from joint funds, that Golam Ali and Nazarut Ali obtained it under a gift, and that they themselves and their heirs held possession thereof, and that the co-sharers separated in the year 1250. The Lower Appellate Court did not apply the strict rules of Hindu law to the case, and dismissed the suit. From this decision the plaintiffs appealed.

Baboo Doorga Mohun Das for the appellants.

Baboo Taruck Nath Palit and Moulvie Serajul Islam for the respondents.

[695] Markby, J.—It is impossible to say that the judgment of the Lower Appellate Court in this case was erroneous in law, unless we go to the length of saying that a Judge is bound, as a matter of law, to apply to a Mahomedan family living jointly all the rules and presumptions which have been held by this Court to apply to a joint Hindu family. Now we are not prepared to go to that length. When a Mahomedan family adopts the customs of Hindus, it may do so subject to any modification of those customs which the members may consider desirable; and it must rest with the Judge who has to decide each particular case how far he should apply the rules of a Hindu joint family to the case of any Mahomedan joint family that comes before him.

With regard to the case quoted—*Vellai Mira Ravuttan v. Mira Moidin Ravuttan* (2 Mad. H. C. Rep., 414)—we have no reason to doubt that it was a perfectly proper decision with reference to the facts then before the Court. The

* Special Appeal, No. 1073 of 1877, against the decree of Baboo Nobin Chunder Paul, Second Subordinate Judge of Zilla Dacca, dated the 17th February 1877, reversing the decree of Baboo Sree Nath Paul, Munsif of Manickgunge, dated the 4th April 1876.

Court does not there say anything contrary to what I have just now laid down as the law in this part of the country. Although in that particular case the Court, sitting as a Court of regular appeal, did apply to the acquisition of a manager on the part of a mahomedan joint family the same presumption as applies to the Manager of a Hindu joint family, they nowhere say that that must be done in all cases. We cannot say that because the Subordinate Judge does not apply that presumption to this case his judgment is erroneous in law. We cannot, therefore, interfere with his judgment in special appeal.

The appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[See as to the application of Hindu Law, (1882) 8 Cal., 826 : 10 C. L. R. 603 doubting 3 C. L. R., 97 ; (1884) 10 Cal., 562 ; (1900) 23 All., 20.]

[696] *The 16th May, 1877, and 18th January, 1878.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BIRCH.

Prosunno Coomaree Debea and another.....Plaintiffs

versus

Sheikh Rutton Bepary and others.....Defendants.*

Landlord and Tenant—Erection of buildings by Tenant-at-will or from year to year—Occupancy—Right of Landlord to determine Tenancy—Compensation—Act X of 1859, s. 6—Duty of Judges of Lower Courts.

There is no law in this country which converts a holding at will, from year to year, or for a term of years, into a permanent tenure, merely because the tenant, without any arrangement with his landlord, builds a dwelling-house upon the land demised.

The nature of a holding, as between landlord and tenant, must always be a matter of contract, either expressed or implied. If there is no express agreement, a tenant becomes a tenant-at-will or from year to year, and is liable to be ejected upon a reasonable notice to quit unless some local custom to the contrary is proved.

Adonto Churn Dey v. Peter Dass (13 B. L. R., 417 ; S. C., 17 W. R., 383) followed.

THE plaintiffs in this suit sought to eject certain tenants from homestead lands on which was situate a house and some fruit-trees. They brought their suit upon a notice served on the defendants, in which they stated that they wanted the lands for the erection of a cutcherry, and claimed the right to re-enter on an agreement said to have been executed by the defendants' father. The defendants denied the agreement, and contended that they and their ancestors had held the lands in suit from a time previous to the Permanent Settlement, and therefore no suit in ejectment could lie. The written statement further stated that the defendants' father had raised earth upon the land and built the house now standing upon it. The Court of First Instance rejected

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Prinsep, dated 16th of May 1877, in Special Appeal No. 2467 of 1876, upholding the judgment of Baboo Bhoobun Chunder Mookerjee, Officiating Subordinate Judge of Dacca.

the agreement relied on by the plaintiffs as not genuine; it further held that the defendants had failed to prove occupation from before the Permanent [697] Settlement, but found that the defendants had through their ancestors and themselves been in occupation for fifty or sixty years. The evidence in respect of the raising the earth and the erection of the house by the defendants' father was held not worthy of credit. The Court, however, further held that the lands not being in use for any agricultural or horticultural purpose, no right of occupancy could accrue, and the notice to quit having been duly proved, the plaintiffs, in the absence of any special contract whatever between the parties, were entitled in their general right as landlords to a decree. The Lower Appellate Court reversed their decision on the ground that "by the law of this country the right of a homestead tenant to occupy his holding permanently becomes absolute so soon as he is allowed to erect his dwelling-house by his landlord, whether he holds under a verbal agreement or written lease."

The plaintiffs thereupon appealed to the High Court, the appeal coming on for hearing before a single Judge (PRINSEP, J.). The learned Judge was of opinion that the position of the plaintiffs in the suit could not be placed higher than that of a purchaser at a sale for arrears of Government revenue as prescribed by s. 37 of Act XI of 1859,* and therefore, in the absence of any special right, the plaintiffs were not entitled to re-entry; further, that it being proved that the defendants or their ancestors had erected a dwelling-house and lived on the lands for fifty or sixty years, they had thereby acquired a tenancy which was *prima facie* of a permanent character, and in support of this view referred to *Shib Das Bandopadhyaya v. Bama Dass Mookhopadhyaya* (8 B. L. R., 378). The learned Judge also held that *Adooto Churn Dey v. Peter Dass* (13 B. L. R., 417; S.C., 17 W. R., 383), was distinguishable from the facts in the present case, and for these reasons dismissed the appeal on the 16th May 1877.

* [Sec. 37 :—The purchaser of an entire estate in the permanently-settled districts of Bengal, Behar, and Orissa, sold under this Act for the recovery of arrears due on account of the same shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants, with the following exceptions :—

First.—Istemraee or mokurree tenures which have been held at a fixed rent from the time of the permanent settlement.

Secondly.—Tenures existing at the time of settlement, which have not been held at a fixed rent. Provided always that the rents of such tenures shall be liable to enhancement under any law for the time being in force for the enhancement of the rent of such tenures.

Thirdly.—Talookdaree and other similar tenures created since the time of settlement and held immediately of the proprietors of estates; and farms for terms of years so held, when such tenures and farms have been duly registered under the provisions of this Act.

Fourthly.—Leases of lands whereon dwelling houses, manufactories, or other permanent buildings have been erected, or whereon gardens, plantations, tanks, wells, canals, places of worship, or burning or burying grounds have been made, or wherein mines have been sunk. And such a purchaser as is aforesaid shall be entitled to proceed in the manner prescribed by any law for the time being in force for the enhancement of the rent of any land coming within the fourth class of exceptions above made, if he can prove the same to have been held at what was originally an unfair rent, and if the same shall not have been held at a fixed rent equal to the rent of good arable land, for a term exceeding twelve years; but not otherwise.

Provided always, that nothing in this section contained shall be construed to entitle any

Proviso. such purchaser as aforesaid to eject any ryot, having a right of occupancy at fixed rent, or at a rent assessable according to fixed rules under the laws in force, or to enhance the rent of any such ryot otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do.]

A further appeal under s. 15 of the Letters Patent was accordingly preferred.

Baboo Bussunt Coomar Bose for the Appellants.

The Respondents were not represented.

[698] The judgment of the Court was delivered by

Garth, C.J.—In this case we are of opinion that the appeal should be decreed. (The learned Judge stated the facts of the case and continued.) So that we must take the established facts to be that the defendants, their father and grandfather, have been occupying this land for fifty or sixty years; that it has been used as a homestead, consisting of a house and fruit-trees; that there is no evidence as to the origin of the tenancy, nor (except as to the amount of rent) as to the terms of it; and that it does not appear who built the house or planted the fruit-trees. The notice to quit has been proved, and no objection has been taken that any longer notice to quit was required by law.

Upon these facts, the Munsif has decreed in favour of the plaintiffs.

The Subordinate Judge has reversed that decision and has delivered a judgment which, in our opinion, is not only contrary to law, but which we cannot refrain from characterizing as being wilfully perverse and disrespectful to this Court.

He begins by saying, that he is aware of numerous decisions of the High Court, in which it has been held that, as homestead tenants have no right of occupancy under s. 6 of the Rent Act, they are to be adjudged tenants-at-will and liable to ejectment at the landlord's pleasure.

He then, professing the utmost deference and veneration for this Court, proceeds to lay down the law and pronounce a judgment directly in opposition to the decisions to which he refers; and—without even condescending to examine those decisions, or attempting to distinguish them from the case with which he is dealing—takes upon himself to lay down the proposition broadly, that, “by the law of this country the right of a homestead tenant to occupy his holding permanently becomes absolute so soon as he is allowed to erect his dwelling-house by his landlord, whether he holds under a verbal agreement or a written lease,” and professing to act upon this rule he reverses the Munsif's judgment and dismisses the plaintiffs' case.

Now it must be noted in the first place, that here it is not found as a fact, that either the defendants or their ancestors [699] built the house which stands on the land in question. The Munsif negatived the defendants' statement in that respect, and the Subordinate Judge does not find it to be proved.

But apart from this consideration, there is no law, of which we are aware, in this country, which converts a holding at will, or from year to year, or for a term of years, into a permanent tenure, merely because the tenant, without any arrangement with his landlord, chooses to build a dwelling-house upon land demised.

Such a law, if it existed, would, in a large number of cases, lead to great injustice and inconvenience, and would often leave landowners entirely at the mercy of their ryots. Small kutcha dwellings in this country may be erected in a short time and at a very trifling expense; and if a landlord, as soon as he or his agent discovers such a dwelling to have been erected, were obliged on the one hand to turn the tenant out, or make him pull down his house; or, on the other hand, as the only alternative, to allow the tenants permissive holding

, to become a permanent tenure, the consequences would often be disastrous to tenants, or very unjust to landlords.

The truth is, that the terms of a holding, as between landlord and tenant, must always be matter of contract, either expressed or implied. If they enter into an express agreement of tenancy, either written or verbal, such agreement generally defines the terms of the holding. If, on the other hand, a tenant is let into possession without any express agreement, and pays rent, he becomes a tenant-at-will, or from year to year ; or, in other words, holds by the landlord's permission upon what may be the usual terms of such a holding by the general law, or by the local custom ; and in such a case, he is, of course, liable to be ejected by a reasonable notice to quit.

Occasionally there are local customs by which special terms and incidents are engrafted upon the contract of tenancy ; but the existence of the custom in such cases must be a matter of proof, and no Judge has a right to act upon such customs unless their existence is duly established.

In this case no such custom is even suggested, and as there was no express agreement of tenancy and no evidence of its origin, the defendants must be considered as holding from year to year, and liable to be ejected by a proper notice to quit.

[700] The Subordinate Judge has cited several texts from Menu and Vrihaspati, which appear to us to have nothing to do with the question. They apply to cases of *forcible* and *criminal* trespass and dispossession, and do not profess to regulate the ordinary relations between landlord and tenant, or to deal with cases of dispossession by legal process.

What the Subordinate Judge says with regard to the Statutory law of this country is also beside the question. The Legislature has, undoubtedly, in several instances, protected from sale or confiscation lands held under *bond fide* leases at fair rents for building purposes, continuing to be used for those purposes. But these enactments have nothing to do with the present case, in which, as far as we can see, no building agreement of any kind was ever made between the parties.

The truth is, that if a tenant wishes to build dwelling-houses upon his land, he should take care to make a proper arrangement accordingly with his landlord. He has no right to hire his land for one purpose, upon an ordinary permissive holding from year to year, or at will, and then, by using it for another purpose, to convert it, at his own option and without consulting his landlord's wishes, into a permanent tenure. Such a law, if it were in force, would be manifestly unjust to the landlord, and would lead to much litigation and inconvenience.

The case of *Adaito Churn Dey v. Peter Dass* (13 B.L.R., 417 ; s.c., 17 W.R., 383), decided by L. S. JACKSON and GLOVER, JJ., is in its circumstances very similar to the present, except that in that case it was proved (which it has not been here) that the defendant had built a kutchra-pucka wall upon the land of the value of Rs. 500, and that the defendant's father and grandfather had occupied the disputed land by raising houses upon it for upwards of two generations, embracing a period of thirty or thirty-two years. Nothing is said in that case as to the defendant or his predecessors having paid any rent ; but we must assume that they did so, otherwise they would have acquired an independent title by adverse possession.

In other respects the tenancy was an ordinary one, as it is here, for no fixed period, and in the absence of proof to the [701] contrary, it was held to be permissive, that is, as we understand it, at will, or from year to year.

Under these circumstances, it was held by the learned Judges, that the defendants were liable to be ejected in the ordinary way, and that the fact of their having built the wall, and of their ancestors having erected the houses, placed them in no better position than they would have been under their original holding. See also to the same effect the cases of *Rylash Chunder Sircar v. Woomanund Roy* (24 W.R., 412) and *Ramdhun Khan v. Haradhun Daramanik* (9 B. L. R., 107).

In some instances, no doubt, either from expressions used in the contract of tenancy, or from the fact of land having been let by a landlord expressly for the purpose of the tenant building pukka houses upon it, such circumstances, coupled with a long and uninterrupted possession by the original grantee and his descendants, have been held to raise a presumption that the tenure was intended to be permanent, but such cases often create doubt and difficulty, and it is always far safer for a tenant, if he means to build, to have the terms of his tenure clearly defined by a written instrument.

Had the Subordinate Judge properly considered the facts of this case, and treated with due deference the decision of this Court, to which he has himself referred, he would not have fallen into error. Unless the subordinate judiciary in this country will loyally defer to the opinion of the High Court, and submit their own views and prejudices to the High Court's judgment, it is quite impossible that uniformity in the law, which is one of the highest objects to be attained in the administration of justice, can ever be arrived at.

As regards the decision of the learned Judge of this Court, which is now under appeal, we are quite unable to appreciate the grounds upon which he has attempted to distinguish the facts of this case from those of the authorities to which he has referred. In those cases, as in this, there was no evidence, that the tenant held for any particular time. He held at a rent in the ordinary way, and did not give any evidence to show that his holding was of a permanent character, or for any defined period.

[702] Under these circumstances, his tenancy was considered to be at will or from year to year; or, in other words, permissive at his landlord's pleasure. We consider that the case of *Adito Churn Dey v. Peter Dass* (13 B. L. R., 417; s. c., 17 W. R., 383) is wholly undistinguishable from the present.

The judgments of both Appellate Courts are reversed, and the judgment of the Munsif restored with costs in each Court.

NOTES.

* [PERMANENT TENANCY IN THE ABSENCE OF GRANT—

I. GENERAL RULE—

The duration of tenancy like other terms is to be gathered from the contract of parties, express or implied, or from law and usage when conditions are annexed to it thereby :—(1878) 3 Cal. 696.

II. WHERE THE ORIGIN IS KNOWN—

Where the origin is known or there was a lease under which possession is taken, the holding is referable to it and those terms will be applied—3 Cal. 696; 16 Cal. 223.

III. PRESUMPTION WHEN UNKNOWN—

In the absence of the above and subject to I. *supra* the presumption *prima facie*, is one of yearly tenancy (or tenancy at will) and no presumption of permanency *prima facie* arises :—(1878) 3 Cal. 696.

Onus is on defendant :—(1904) 32 Cal. 51 P. C.

IV. WHEN PRESUMPTION OF PERMANENCY MAY ARISE—

But a presumption of permanency may be inferred generally from the following circumstances though none of them is of a conclusive character :—

- (a) i. *Long possession* :—7 B. L. R. 159^q (1889) 17 Cal. 144; (1901) 5 C. W. N. 801; (1904) 32 Cal. 51.

- ii. But mere long possession was held insufficient in the following :—(1878) 3 Cal. 696; (1881) 8 C. L. R. 50; (1881) 10 C. L. R. 25; (1884) 10 Cal. 502 (origin known); (1888) 16 Cal. 223 (origin known); (1891) 15 Bom. 847; (1898) 25 Cal. 896 at 908

- (b) i. *Uniform rent for a long time* :—8 C. W. N. 155; 8 C. W. N. 297; 1 C. L. J. 577 (progressive rent).

- ii. but see (1888) 16 Cal. 223 (origin known).

See also our Notes to 11 M. I. A. 493 and 12 M. I. A. 263 in the *Indian Reports* (1910) Vol. III.

- (c) *Succession and transfer* :—(1905) 5 C. W. N. 801; 8 C. W. N. 981; (1904) 32 Cal. 41 (1904) 32 Cal. 51; 10 C. W. N. Notes 96, 128.

- (d) *Purpose of the lease* :—

as for building purposes :—(1881) 8 C.L.R. 50; (1881) 10 C.L.R. 25 (obs.) at 30; 11 C.L.R. 281; 2 C.W.N. 273; 9 C.W.N. 463; 7 Bom. L.R. 401.

for canal and reclamation :—(1901) 28 I. A. 211- 28 Cal. 693.

- (e) i. *Erection of pucca buildings* :—3 C. W. N. 255; 4 C. W. N. 221; 5 C. W. N. 858; 11 C. W. N. 242.

- ii. this alone held insufficient :—(1877) 3 Cal. 696; (1881) 8 C. L. R. 50; (1881) 9 C. L. R. 221 at 223; 21 All. 496 P. C.

- iii. where the presumption is allowed to arise, it must be shown that the erection was by the tenant or his predecessor :—(1881) 10 C. L. R. 25.

V. SUFFICIENCY OF PERMANENT STRUCTURES --

- i. But a tenant merely by erecting permanent structures cannot enlarge the duration of his tenancy :—(1878) 3 Cal. 696; (1881) 10 C. L. R. 25.

- ii. Exception to this rule founded on equity :—

1. Where tenant by the act of the landlord is encouraged to lay out money :—*Ramsden v. Dyson*, L. R. 1 E. & I. Ap. 129.

2. Followed in (1901) 28 I. A. 211 P. C. 28 Cal. 693, where the Government were held bound by the grantee having been encouraged to dig canal and reclaim jungles.

3. Also see *Plimmer v. The Mayor, etc., of Wellington* (1884) L. R. 9 A. C. 699 where Government was held bound by the encouragement to erect permanent jetties, etc., under a license:

“The license given which was indefinite in point of duration but was revocable at will, became irrevocable by the transactions of 1856, because those transactions were sufficient to create in his mind a reasonable expectation that his occupation would not be disturbed; and because they and the subsequent dealings of the parties cannot be reasonably explained on any other supposition. Nothing was done to limit the use of the jetty in point of duration. The consequence is that Plimmer acquired an indefinite, that is, practically, a perpetual right to the jetty for the purposes of the original license, and if the ground was afterwards wanted for public purposes, it could only be taken from him by the Legislature, etc.”

4. But where the grant was not essential to the enjoyment of those objects on which the tenant was encouraged to spend, this presumption is not applied :—*Bankart v. Tennant* (1870) L. R. 10 Eq. 141.
5. Nor where the landlord did not actively encourage the tenant to do so but was simply silent :—(1899) 26 I.A., 58—21 All. 496 P. C. *

VI. EFFECT OF ERECTION OF BUILDINGS—

- i. The tenant erecting buildings can remove them :—(1902) 27 Mad. 211.
- ii. He may also be restrained from erecting :—(1881) 9 C. L. R. 221.
- iii. For the evidentiary value as to the duration of tenancy, see *supra* IV. and V.]

[3 Cal. 702]

The 5th February, 1878.

PRESENT :

MR. JUSTICE KEMP AND MR. JUSTICE MORRIS. *

Mahomed Arshad Chowdhry.....Defendant

versus

Sajidabanoo.....Plaintiff.*

[-2 C. L. R. 46]

Mahomedan Law--Widow's Rights--Return.

By the Mahomedan law of inheritance, in default of other sharers and in the absence of distant kindred, the widow is entitled to the 'return,' to the exclusion of the fisc.

THIS was a suit brought by the widow of one Nawab Ali Chowdhry for recovery of possession of certain lands, part of the estate of her husband, who died on the 21st of July 1867. The plaintiff claimed as sole surviving heir of the deceased. In the written statement, the defendant represented himself as a "cousin in the collateral line" to the said Nawab Ali Chowdhry, and among other defences denied the right of the plaintiff to more than a fourth share of her husband's estate. The parties to this suit were of the Suni sect of Mahomedans. The Court of First Instance found on the facts that the defendant was not of the same family with Nawab Ali Chowdhry, and that, in the absence of any other heir, the plaintiff was entitled to all the properties left by her husband, the said Nawab Ali Chowdhry. The defendant appealed to the High Court.

Mr. H. Bell (with him Moulvi Serajul Islam and Moulvi Mohamed Yousuff) for the Appellant.

[703] Mr. C. Gregory and Baboo Joy Gobind Shome for the Respondent.

Mr. H. Bell.—The plaintiff's claim is inadmissible under Mahomedan law. At most she is entitled to no more than a fourth share of her husband's estate. She cannot share in what is technically called the 'return'—*Muzzamat Hurmut-ool-Nissa v. Allahdia Khan* (17 W. R., 108). Where the shares do not exhaust the property, the surplus goes to the residuaries connected by 'nasab' or consanguinity with the deceased. Between wife and husband there

* Regular Appeal, No. 249 of 1876, against the decree of Ram Coomar Pal Chowdhry Roy Bahadoor, Subordinate Judge of Zilla Sylhet, dated the 26th of May 1876.

is no *nasab*; see Baillie's Mahomedan Law of Inheritance, pp. 10, 13, 44, 77, and 79; see also Rumsey's Chart of Mahomedan Inheritance, p. 27. Later commentators assent to the doctrine that the widow may obtain a share in the return, see Shama Churn's Tagore Law Lectures (1873), pp. 91, 95, 232, and 233; but only on the ground of irregularity or insecurity in the public treasury; it was thought that the property should go by preference to the Mahomedan wife rather than to an alien Government. But the widow, unless the heir, could not resist the right of the Crown. The Crown takes not under Mahomedan law, but by virtue of its prerogative—*Collector of Masulipatam v. Cavalry Vencata Narainapah* (8 Moore's L. A., 500, 520), *Advocate-General v. Ranees Surnonoje Dossee* (9 Moore's L. A., 387, 405). The defendant is in possession. Except on proof of title by the widow, she has no right except as to a four-anna share; the remaining twelve-anna share has escheated to the Crown. The possession by the defendant holds against all claimants except the Crown.

Mr. C. Gregory for the Respondent. — In this case there are no residuaries, and except the widow no sharers. The authorities already quoted show that the widow is entitled to the return; the point was so decided in *Mussamut Soobhanee v. Bhetun* (1 Sel. Rep., S. D. A., 346).

Mr. Bell in reply.

Cur. ad. vult.

Kemp, J. (MORRIS, J., *concurring*) (after disposing of questions not material to this report, proceeded as follows): — It is [704] admitted by the defendant that the plaintiff, as widow of the late Nawab Ali Chowdhry, is entitled to a four-anna share; but it was at first alleged by him in his written statement that she was in possession of that four-anna share. That contention was subsequently abandoned in the course of the argument by the learned Counsel who appears for the appellant, and it is clear that the plaintiff has been dispossessed even of the share to which she is by the admission of the defendant entitled under the Mahomedan law. That brings us to the question raised in this case as to whether the plaintiff is entitled to succeed to anything beyond a four-anna share in the estate of her late husband Nawab Ali Chowdhry. The learned Counsel for the appellant quoted a Privy Council decision in the case of *Mussamut Hurmutool-Nissa Begam v. Allahdia Khan* (17 W. R., 108); Hajee Hedayut; Baillie's Mahomedan Law, 2nd edition, pp. 10, 11, 44, 77, 79; Macnaghten's Mahomedan Law, p. 93; and also a passage at p. 651 of the *Futwa Alumghiri*. In the Privy Council decision quoted by the learned Counsel, their Lordships observe that "the proposition which assumes that if there are no residuaries the three-fourths of the property would necessarily go to the Crown, may be contestable. As a general rule, a widow takes no share in the return; but some authorities seem to hold that if there are no heirs by blood alive, the widow would take the whole estate to the exclusion of the fisc." Now these observations, although they had no bearing upon the ultimate decision of the case, seem to us rather in favour of the plaintiff than of the defendant. Then with reference to the quotations from Baillie's and Macnaghten's Mahomedan Law and from the *Futwa Alumghiri*, there can be no doubt that the more ancient authorities did hold that the widow and the husband were not entitled to the "rudd", or return, under the Mahomedan law; but more modern authorities have held the other way, and have ruled that in the absence of the "bait-ul-mal," the widow and husband are entitled to the return. The other side have quoted a decision of the Sudder Dewany Adawlut in the case of *Mussamut Soobhanee v. Bhetun* alias *Shah Azim Ali* (1 Sel. Rep., S. D. A., 346) before HARRINGTON [705] and

STUART, Judges of the Sudder Dewany Adawlut. In that case, which is precisely on all fours with this case, the futwa of the moulvis was taken, and it was to this effect that the widow was entitled to the return under the Mahomedan law. The authorities cited by the moulvis in support of their futwa are mentioned in a note appended to that case by Sir William Macnaghten. These authorities are the Hemadya, which is a work of considerable authority (see page 341 of Morley's Digest), and the Zukheerali. The modern authorities as to the widow being entitled to the return under the Mahomedan law are set out at p. 233 of Shama Churn's Lectures on Mahomedan law.

We, therefore, think that the weight of authority is in favour of the plaintiff's contention. She, as widow of Nawab Ali Chowdhry, is entitled to the return to the exclusion of the defendant, who has failed to establish his title as kinsman under the Mahomedan law. We, therefore, hold with the Subordinate Judge that the widow is entitled to the return.

Appeal allowed. [dismissed?]

NOTES.

[MAHOMEDAN LAW—SUCCESSION—HUSBAND AND WIFE—RETURN—

THIS CASE WAS FOLLOWED IN (1903) 30 Cal. 683. In (1884) 11 Cal. 14, it was pointed out that the wife is not entitled to the return until the distant kindred too are exhausted (unlike other takers by the return).]

[3 Cal. 705]

The 19th February, 1878.

PRESENT:

MR. JUSTICE KEMP AND MR. JUSTICE MORRIS.

Bemolasoondury Chowdhraïn and others.....Plaintiffs

versus

Punchanun Chowdhry and others.....Defendants.

Rights under partition (Butwara) Proceedings—Res Judicata—Explanation II, s. 13 of Civil Procedure Code—Reg. XIX of 1806.

A sued B to establish his rights of possession to certain lands allotted him under a butwara made in accordance with the provisions of Reg. XIX of 1806. In a previous suit by B instituted after the butwara against a tenant for arrears of rent due for a portion of the lands now in dispute, A intervened and was made a defendant on the sole ground that he was the person entitled to the rent, but failed to establish his claim. *Held*, following the Full Bench case of *Govind Chunder Koondoo v. Taruck Chunder Bose* (I.L.R. 3 Cal. 145; S.C., 1 Cal. Rep., 35), that A's present suit was barred by the judgment in the former suit.

[706] THIS was a suit for possession on the basis of zemindari title to a half share in certain villages in Parganna Sonabaju. On the 21st of November 1852, the plaintiff, together with other shareholders, purchased certain property, including the lands now in dispute, at a sale for arrears of Government revenue. In the butwara carried out under the provisions of Reg. XIX of 1806, these

* Regular Appeal, No. 288 of 1876, against the decree of Baboo Nundoo Coomar Bose, Second Subordinate Judge of Zilla Rajshahye, dated the 27th May 1876.

lands fell within the share allotted to the plaintiffs, and on the 15th of September 1872 formal possession was given to them by proclamation of the amin. In attempting to take actual possession of the lands, the plaintiffs were opposed by the defendants; and on the 5th of October 1872 the Magistrate of the district, in a proceeding held under s. 318 of the Code of Criminal Procedure, directed the defendants to be retained in possession till ousted by due course of law. Some time in the year 1874 the defendants instituted a suit against one Komal Ghose, a tenant of a portion of the lands in dispute, for arrears of rent; whereupon the husband of the present plaintiff obtained permission, and was made a party to this suit, on the allegation that he was the rightful landlord; but he put forward no claim to the property based on the butwara proceedings. The Munsif gave the then plaintiff a decree, which was upheld on appeal by the Lower Appellate Court on the 29th January 1875, on the ground that the present defendant had established a right to, and was in possession of, the lands in dispute. The plaintiffs filed the present suit on the 16th September 1875 in the Court of the Subordinate Judge of Rajshahye, who, on the 27th May 1876, dismissed it, holding on the facts that the defendant was the owner and entitled to possession.

Saroda Gobind Chowdhry, the husband of the plaintiff, died pending the suit, and Bemolasoondry Chowdhraim was put on the record as his representative. She now preferred this appeal to the High Court.

Baboo Srinath Das and Baboo Gooroo Das Banerjee for the Appellants.

Baboo Mohini Mohun Roy and Baboo Ishur Chunder Chuckerbutty for the Respondents.

[707] The judgment of the Court was delivered by

Kemp, J. (who, after stating the facts of the case, continued):—In appeal before us the first ground taken that there is no such putnee talook as alleged by defendants has been virtually abandoned. Indeed, in the face of the evidence, it is clear that this talook was in existence prior to 1806, in which year Upendro Narayan Chowdhry, zemindar, assigned it by way of maintenance to his grandsons Permanand Chowdhry and Lukhi Chunder Chowdhry ancestors of the present defendant No. 1. Its existence was also established by the decree in the suit of *Saroda Gobind Chowdhry and others v. Komul Ghose*. The second alleged ground of action is equally untenable, because any possession which may be given, or be said to be given, under the Butwara Law can have no force against third persons who were no parties to it.

By a butwara the rights of under tenure-holders are in no way affected, and though, as between shareholders, the assignment of specific lands to each shareholder has binding effect, yet such assignment does not of itself entitle the shareholder to obtain khas possession to the deprivation of the rights of the tenants on the land.

Another bar to the entertainment of this suit is the prior adjudication recognizing the title of the defendants in the suit of *Saroda Gobind Chowdhry and others v. Komul Ghose*. In that suit the plaintiffs chose to intervene, and the question of title as between them and the defendants was distinctly raised and determined. In the words of the judgment—"The plaintiffs have sufficiently proved by documentary and oral evidence that they have a right to, and are in possession of, an eight-anna share of turuf Ekdanta in virtue of a putnee talook." As, moreover, that suit was instituted two years after the conclusion of the butwara, any right to khas possession which the present plaintiffs

considered themselves entitled to under the butwara should have been expressly set forth in that suit. They are, therefore, estopped under the ruling of the Full Bench in *Gobind Chunder Koondoo v. Taruck Caunder Bose* (I. L. R., 3 Cal., 145 ; s.c., 1 Cal. Rep., 35), from setting up this title [708] now. This principle is also recognized in the new Code of Civil Procedure, s. 13, expl. II. On the merits, we think that the possession of the defendants cannot be disturbed. (The learned Judge then proceeded to examine the evidence and continued.) When, therefore, it is apparent that this talook has been known and recognized by the ancestors of the parties in the present suit, and that the defendants or their ancestors have been in continuous possession of the lands appertaining to their share for upwards of seventy years, we think that it does not lie in the power of the plaintiffs to disturb this existing possession.* If the plaintiffs could truthfully assert that they knew nothing of the existence of this talook in the possession of the defendants, and accepted the lands assigned to them under the butwara, because they were under the impression that the assets were calculated upon the rental payable by the ryots, which rental they were to receive, this would be good ground for applying to the Board of Revenue to set aside the butwara. But there is no jurisdiction in the Civil Court to disturb a butwara which has been effected by the properly-constituted authorities acting in accordance with the law.

The suit was, therefore, rightly dismissed by the Subordinate Judge.

Accordingly we affirm the judgment of the Subordinate Judge and dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[See the Notes to I. L. R., 3 Cal., 145 *supra*.]

[3 Cal. 708]

The 14th March, 1878.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Pogose..... Judgment-debtor

versus

Catchick and another..... Decree-holders.

[2 C. L. R. 378]

Charter Act (24 and 25 Vict., c. 104), s. 15—Erroneous order—No right of appeal—Putting a party on the record who is not legal representative of a deceased person.

Where a decree had been obtained against a British subject domiciled in India, who subsequently died intestate, and an order was made reviving the decree against one of his children, and ordering execution to proceed before [708] letters of administration to his estate had been taken out, and without inquiry being made as to who were his legal personal representatives,—*held*, that although no appeal lay against the order, yet that as it was clearly erroneous, and as, under the circumstances of the case, it must lead to the greatest confusion and injury to the interests of the parties, if the execution was proceeded with, the Court was justified in interfering under s. 15 of the Charter Act.

* Miscellaneous Regular Appeal, No. 342 of 1877, against the order of Babu Nuffur Chunder Bhutto, the Officiating Second Subordinate Judge of Zilla Backergunge, dated 29th August 1877.

IN this case a decree had been obtained against one Peter Nicholas Pogose, a British subject domiciled in India. He subsequently died intestate. The lower Court, before letters of administration were granted to his estate, and without inquiry as to who were his legal personal representatives, revived the decree against the appellant, one of his children, and ordered execution to proceed.

Mr. McNair for the Appellant.

Baboo Bhoobun Mohun Dass for the Respondents.

The judgment of the Court was delivered by

Markby, J.—In this case we think that the order of the Subordinate Judge, so far as it makes the present applicant, Mr. P. N. Pogose, a party to these execution proceedings, must be set aside.

The original judgment-debtor was dead. He was an Armenian, and, therefore, succession to his estate is governed by the Succession Act, and the only person who could be his representative is the person indicated by that Act. The only difficulty at all about the matter is whether there is an appeal against this order of the Subordinate Judge or not. Whatever our own opinion may be, however, it is better that in this particular case we should follow the decision of Mr. Justice AINSLIE and Mr. Justice McDONELL given in a somewhat similar case on the 28th August 1877, in which it was held that no appeal lies, [710] and for the purposes of this case adopting that decision, we hold that no appeal lies in this case also. But nevertheless, although no appeal lies, we think it clearly a case in which we ought not to allow this erroneous order of the Subordinate Judge to stand. It is quite clear that it must lead to the greatest possible confusion and injury to the interest of the parties in this case, if this execution is proceeded with in the shape in which the proceedings now stand. Warning has already been addressed to the Subordinate Judge in the very judgment to which I have referred. Possibly, that judgment was not before him when he made the order now complained of. But it appears that there was before him another order of this Court in which it was distinctly pointed out that he had done entirely wrong in putting Mr. P. N. Pogose upon the record in defiance of the Succession Act. We are wholly at a loss to understand why the Subordinate Judge in spite of warnings of this Court insists on persevering in this course, and we think that on this occasion we are justified in interfering under s. 15 of the Charter Act. We do not intend to differ from what the Chief Justice said in the case, which was heard before himself and Mr. Justice MITTER. The Subordinate [711] Judge had no doubt jurisdiction

*See *Raygo v. Pogose*, Misc. Sp. Appeal, No. 104 of 1877 (AINSIE and McDONELL, JJ.) in which the learned Judges held that s. 364 of Act VIII of 1859 prohibited an appeal from an order made on proceedings taken under s. 210 of the same Act. The rule applicable on such cases being analogous to that laid down in respect of s. 208 by the Privy Council in *Abidun-massa Khatoon v. Amirunmassa Khatoon*, 1. L. R., 2 Cal., 327

†The 10th September, 1877.

PRESENT :

c SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

In the matter of P. N. Pogose.....Petitioner

versus

Khajah Ashanoollah.....Opposite party.

(Rule No. 952 of 1877, in the case of *P. N. Pogose v. Khajah Ashanoollah*.)

Mr. G. Gregory and Baboo Chunder Madhub Ghose for the Petitioner.
Messrs. Evans and Jackson for the Opposite party.

to decide who was the legal representative of the deceased and, if he had decided that, we should not have thought it right, having regard to what has been said by the Chief Justice in his judgment, to interfere under s. 15. But he has not decided that question in this case. * He could not venture to decide that Mr. P. N. Pogose was his father's representative in the face of the Chief Justice's judgment and the Succession Act. What he really does is this: He [712] chooses to take upon himself to say that the proceedings pointed out by the law would be very inconvenient to the parties, and thinks that he would do some good to them by taking the course which he has taken. As I have already said, the result of taking that course must be disastrous to the parties, and we think we are fully justified in interfering in this case. The order of the Subordinate Judge putting Mr. P. N. Pogose upon the record as the legal representative of the deceased without enquiring whether he is so or not, is an order which cannot be allowed to stand. Properly there ought

Garth, C. J. (MITTER, J., concurring).—We think that this rule should be discharged. It is an application under s. 15 of the High Courts Act to set aside the order made by the Subordinate Judge of Dacca admitting the applicant, a defendant on the record, as representing the deceased judgment-debtor, and ordering the sale of the property to proceed accordingly; and the ground upon which the rule was moved was that the Subordinate Judge had no jurisdiction to make that order.

The Subordinate Judge was, undoubtedly, wrong in making the order complained of and the question which we have to decide is whether the order was merely an erroneous decision, in a matter which it was for the Judge to determine, or whether it was a nullity as made by him without jurisdiction.

The Judge was clearly not justified in placing the applicant on the record, and he ought to have known his duty better than to have made an order of this kind directly in the teeth of the provisions of the Succession Act, and without making any proper enquiry as to whether Mr. Pogose, who was put upon the record, was the legal representative of the deceased.

He was also very wrong in making an order of this kind on the very day that the sale was to take place. Such conduct was obviously calculated to induce the sale of the property at an inadequate price, and if we were satisfied that the order of the Subordinate Judge was made without jurisdiction, we should certainly have set aside the order and the sale which took place under it.

But it appears to us, having regard to the provisions of the Procedure Code, that the Subordinate Judge was the proper person to decide in point of fact as well as law, who was the proper representative of the deceased.

The person who was put upon the record was the deceased judgment-debtor's elder son. He was summoned in the regular way, under s. 216, to show cause why he should not be made a party to the suit and why the decree should not be executed against him.

It appears that he came before the Court in obedience to that summons, and his objection there was not that he had not been duly made the legal representative of the deceased under the Succession Act, but that he had no longer anything to do with his father's property, which had been conveyed away to the Official Trustee for the benefit of the judgment-debtor's creditors.

Whether he took the proper point or not, the Subordinate Judge was very wrong in dealing with the matter as he did, but he was clearly, as it seems to us, the only proper person to decide the question before him. Suppose two persons, both claiming to have been made representatives of a deceased person under the Succession Act, had appeared before the Court, and that the only question was which of them was the legally-constituted representative. That question must have been determined by the Subordinate Judge. We are, therefore, of opinion that he has not acted without jurisdiction in deciding that the applicant was the proper person to be put upon the record, but he has been guilty of an error of law, which the present applicant might have rectified, if he had appealed within the time allowed him by law.

He has not chosen to take that course. He has allowed the time to go by, and now he asks this Court to put its extraordinary powers in force to assist him out of the difficulty.

This Court, under the circumstance, has no power to help him, and the rule must be discharged with costs.

to have been a formal application under s. 15; but as there has been some difference of opinion between the Judges of this Court upon this matter, we think that we are justified in treating this case substantially as an application under s. 15, without putting the parties to further expense.

Dealing with this case under s. 15, we direct that the order of the Subordinate Judge putting Mr. P. N. Pogosé upon the record as the representative of the deceased be set aside. We make no order as to costs.

NOTES.

[See (1885) 9 Bom. 432 where it was held that the fact of a case being decided on a wrong view of *res judicata* did not call for the exercise of revisional powers.]

[3 Cal. 712]

The 8th May, 1877 and 6th February, 1878.

PRESENT :

MR. JUSTICE AINSLIE AND MR. JUSTICE MORRIS.

Hurrish Chunder Roy.....Judgment-debtor
versus

The Collector of Jessore.....Decree-holder.

*Under-tenure—Arrears—Sale in Execution—Execution against other Property—
(Bengal.) Act VIII of 1869, s. 61.*

A, a judgment-creditor, having obtained two decrees—one for money, the other for the rent of certain tenures—sold his debtor's right and interest in the tenures in execution of his money-decree, and afterwards in execution of his decree for rent again put up for sale the same tenures. At the second sale, B became the purchaser of whatever could pass under such sale. A subsequently sued and obtained a decree against B for arrears of rent that [713] had become due in respect of the said tenure since the last supposed sale to him, and in execution of such last-mentioned decree again attached the tenures. On the intervention of third parties, the tenures were released from attachment. A having applied to levy execution on other immoveable properties of B, held that the tenures having been released from attachment, A was not entitled, under s. 61 of Act VIII of 1869 (B. C.), to proceed against the other immoveable property of B, it being open to him to show by a regular suit that the tenures were liable to be sold in execution of his decree, and further, that upon the facts of the case he had disentitled himself to any equitable relief.

IN this case the plaintiff, the present decree-holder, obtained two decrees against one Behari Lall: the first an ordinary money-decree, the other a decree for the rent of certain tenures. In execution of the money-decree the plaintiff, on the 15th April 1869, sold his debtor's right and interest in the tenures, which ultimately passed into the hands of two persons, Keshub Nath and Omnath. On the 24th of the same month the plaintiff, after having extinguished the whole of Behari Lall's interest in the said tenures by the previous sale, proceeded again to sell the same tenures in execution of his decree for rent, and whatever may be supposed to have passed by such sale was purchased by the defendant, the present judgment-debtor. Subsequent to this sale the plaintiff brought his present suit against the defendant for arrears of rent since due on

* Miscellaneous Special Appeal, No. 42 of 1877, against the order of H. B. Lawford, Esq., Judge of Zillah Jessore, dated the 31st of January 1877, affirming the order of Baboo Kedaresur Roy, Subordinate Judge of that district, dated the 6th of November 1876.

the same tenures, and in execution of the decree so obtained attached the tenures. Third parties intervening under s. 246 of Act VIII of 1859, the tenures were, on the 11th May 1873, released from attachment. The judgment-creditor then sought to levy execution on other immoveable properties of the judgment-debtor.

The Lower Appellate Court affirming the order of the Court of First Instance considered that, as he (the judgment-creditor) had done his best to get the tenures sold, but that the Subordinate Judge, by an apparently illegal order refusing their sale, had released them from attachment, he was entitled to proceed against other immoveable property of the judgment-debtor.

The present appeal was accordingly preferred to the High Court. The case came on for argument on 8th May 1877.

Baboo *Nulit Chunder Sen* for the Appellant.

[714] Baboo *Annoda Persaud Banerjee* for the Respondent.

AINSLIE and MORRIS, J.J., reversed the order of the Courts below on the ground that the question had already been decided in a previous application to execute the decree which had been refused by the Judge of the 24-Pergunnahs on 11th March 1873, and that as no appeal had been preferred the question must be taken to have been finally determined.

Subsequently, but before judgment was signed, Baboo *Annoda Persaud Banerjee*, for the respondent, pointed out to the Court that the purport of the decree passed by the Judge of the 24-Pergunnahs on 11th March 1873 had been misunderstood.

The following judgments were accordingly delivered by

Ainslie, J.—A judgment in this case was delivered by us on the 8th of May last, but before it was signed it was objected by Baboo *Annoda Persaud Banerjee* for the respondent, that the Court had fallen into a mistake as to the purport of the decree made by the Judge of 24-Pergunnahs on the 11th of March 1873. On examining that decree it appears to us that it was so. The case, therefore, must be disposed of on other grounds.

[Sec. 246 :—In the

How claims and objections to the sale of attached property are to be investigated.

ment of any claim being referred to, or objection offered against the sale of lands or any other immoveable or moveable property which may have been attached in execution of a decree or under any order for attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in section 220. And if it shall appear to the satisfaction of the Court that the land or other immoveable or moveable property was not in the possession of the party against whom execution is sought, or of some other person in trust for him, or in the occupancy of ryots, or cultivators or other person paying rent to him at the time when the property was attached, or that, being in the possession of the party himself at such time, it was so in his possession not on his own account or as his own property, but on account of or in trust for some other person, the Court shall pass an order for releasing the said property from attachment. But if it shall appear to the satisfaction of the Court that the land or other immoveable or moveable property was in possession of the party against whom execution is sought, as his own property, and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him at the time when the property was attached, the Court shall disallow the claim. The order which may be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order.]

The object of the special appellant here is to set aside the judgment of both the Courts below on the ground that it is inconsistent with the terms of s. 61 of Act VIII of 1869 (B.C.) which says that "if after sale of any such under-tenure in execution of decree any portion of the amount decreed remains due, process may be applied for and issued against any other property, moveable or immoveable, belonging to the debtor." In this case the under-tenure, of which the arrear was decreed to be due, has not been sold. Therefore, in the words of the section, execution cannot proceed against any other immoveable property of the debtor. But it is contended that inasmuch as the tenure had been attached and subsequently released from attachment by an order of Court, and as execution therefore could not proceed against it, the judgment-creditor is clearly entitled to proceed against other immoveable property of the debtor.

[715] In the first place it does not appear that the creditor has exhausted all the remedies open to him. On the order of the Subordinate Judge releasing the property from attachment it was open to him by a regular suit to show that the property was really liable to be sold in execution of his decree. Besides, it appears to us that if we are to go into the question of the equity of the judgment-creditor, we must look at the whole of the facts. On the statement of facts put before us it seems to me, speaking for myself, perfectly clear that the judgment-creditor is not entitled to the equitable relief he seeks. (The learned Judge proceeded to go into the facts of the case, and continued.) Whatever may be the rights of a zemindar holding a decree for rent against one of his tenants in respect of the sale of the tenure on which the arrears have accrued, when such rights are put forward in opposition to the rights of third parties, it seems to me that it is impossible for any zemindar to put forward a claim under the Rent Law which shall take effect against his own acts done as in this case under the Code of Civil Procedure. It is sufficient to state the circumstances of the original sale to show that when nominal arrears are said to have accrued due from Hurrish Chunder, the appellant, on the tenure nominally sold to him, but previously sold to others; and when it is sought to seize and sell other property of Hurrish Chunder for such arrears, the whole proceedings are certainly tainted by want of equity. Therefore, when the zemindar comes here and asks us to give him an equitable relief against the distinct words of the Statute, it seems to me that his mouth is completely closed by reference to his own proceedings in 1869.

I would, therefore, reverse the judgments of both the Courts below with costs.

Morris, J. - I concur in thinking that no further execution as asked for, can be taken out.

* *Appeal dismissed.*

NOTES.

[Where the tenure was transferable by custom or law other immoveables might be proceeded against:—(1881) 7 Cal., 748. But this was doubted in (1886) 14 Cal., 14, and as the Act itself was repealed no reference was made to the Full Bench.]

[716]. The 7th March, 1878.

PRESENT:

MR. JUSTICE KEMP AND MR. JUSTICE MORRIS.

Ramsounder Sandyal.....Judgment-debtor

versus

Gopessur Mostofee and others.....Decree-holders.

[2 C.L.R. 220]

*Execution—Claim—Suit—Limitation—Act VIII of 1859, ss. 212, 246—
Act IX of 1871, Sch. II, Art. 167.*

Within three years of his first application in execution of a rent-decree, A, the judgment-creditor, made a second application to sell certain lands, the alleged property of B, the judgment-debtor. Third parties intervened, who established their claim to the land. A thereupon brought a regular suit, and succeeded in obtaining a decree, declaring the lands in suit to be the property of B. Within a year of the date of this decree, but more than three years after his first application for execution, A, filed a third application for attachment of other lands belonging to B. *Held*, the application was barred by limitation.

Baboo Pyaroo Tuhobildarnee v. Syud Nazir Hossein (23 W.R., 183) distinguished.

ON the 1st August 1864 the plaintiff obtained a decree in a suit for rent against the defendant (afterwards confirmed by the High Court), and on the 2nd of January 1869 applied for execution of his decree under s. 212 of Act VIII of 1859. On the 22nd November 1870 the decree-holder made a second application to sell the right, title and interest of the judgment-debtor in a certain decree and certain lands were specified in such application. Third parties intervened under s. 246 of Act VIII of 1859, and on this claim the properties were released from attachment. On the 6th December 1871 the decree-holder instituted a regular suit to establish the right of his judgment-debtor to the lands previously attached and obtained a decree on the 22nd April 1872. This decree was upheld by the High Court on the 16th July 1874. Before the final order, the decree-holder made a third application on the 6th September 1873, asking that a certificate might be sent to the Munsif of Nattore in order that proceedings in execution [717] might be taken against property belonging to the judgment-debtor in that district other than the property, the subject of the regular suit. The application contained no reference to the properties which were the subject of the regular suit. The only paper filed with the application was the original decree of the first of August 1864 for rent, and the subsequent orders of the Judge and of the High Court confirming that decree. The Court of First Instance rejected the application as barred by limitation, on the ground that the judgment-creditor had not shown due diligence in filing his regular suit after the successful issue of the claim made by the intervenors under s. 246 of Act VIII of 1859. The Lower Appellate Court, on the authority of *Baboo Pyaroo Tuhobildarnee v. Syud Nazir Hossein* (23 W.R., 183), reversed the decision of the Court below. The judgment-debtor appealed to the High Court.

Baboo Mohini Mohun Roy for the Appellant.

Baboo Rash Behari Ghose for the Respondents.

* Miscellaneous Special Appeal, No. 252 of 1877, against the decree of H. Beveridge, Esq., Officiating Judge of Zilla Rungpore, dated 12th May 1877, reversing the order of Baboo Shamchand Dhur, Munsif of Bograh, dated 19th January 1876.

Baboo Mohini Mohun Roy.—*Baboo Pyaroo Tuhobildarinee v. Syud Nazir Hossein* (23 W. R., 183), the case quoted by the Court below, does not apply to the present case. Here there was a fresh application for attachment of different lands; the application was silent upon, and therefore must be taken to have purposely ignored, all the proceedings under the regular suit. It must, therefore, stand or fall on its own merits; and being admittedly made beyond time, is barred by limitation. Nor can the application be brought within art. 167, Sch. II of Act IX of 1871, as it was not made to keep in force a previous execution proceeding.

Baboo Rash Behari Ghose.—The last application made by the judgment-creditor may be said to have been one to "keep in force" a previous decree or order of the Court—see *Chunder Coomar Roy v. Bhuggobutty Prosonno Roy* (I.L.R., 3 Cal., 235; s.c., 1 C. L. R., 23); and having [718] been made within three years of the previous application of the 22nd November 1870, is within time. Again, the decree-holder was obstructed in obtaining execution of his decree; the time occupied in removing these obstructions cannot be included in the period of limitation applicable to this case. The case quoted by the lower Court strictly applies to the facts of this case. The form and method of application lastly made by the judgment-creditor may be open to comment, but the Court will look rather to the facts which preceded that application, and not to the way in which the application was made.

Baboo Mohini Mohun Roy in reply.

The judgment of the Court was delivered by

Kemp, J. (who, after shortly stating the facts, continued):—It is contended by the pleader for the special appellant that if the starting point is to be the application under s. 212, which was made on the 2nd of January 1869, then the present application having been made more than three years from that date is barred. On the other hand, it is contended by the pleader who appears for the respondent, that the application of the 6th of September 1873 is within time, as the last previous application was made on the 22nd of November 1870. That was an application to sell the interest of the judgment-debtor in a certain decree and certain specified properties.

The pleader admits that this application of the 22nd November 1870 was not made under s. 212 of the Civil Procedure Code, but he says that it was an application "to keep in force" the decree within the meaning of art. 167 of Sch. II of the Limitation Act as interpreted by the Full Bench in *In re Chunder Coomar Roy v. Bhuggobutty Prosonno Roy* (I.L.R., 3 Cal., 235; s.c., 1 C. L. R., 23). But we think that this reasoning is wrong. The application being for sale of certain properties already under attachment under an order issued on the application of the 2nd of January 1869, it was clearly an application to enforce the decree, and not one merely to keep the decree alive in the sense intended by the Full Bench. But the [719] pleader further contends, on the strength of the decision of Justices MARKBY and ROMESH CHUNDER MITTER, in the case of *Baboo Pyaroo Tuhobildarinee v. Syud Nazir Hossein* (23 W. R., 183), that the application of the 6th September 1873 must be treated as an application to revive and continue the proceedings instituted on the previous application of the 2nd of January 1869, those proceedings having been stayed for a time,—i.e., from the 19th December 1870 to July 1873,—by reason of the judgment-creditor being forced to maintain, by a regular suit instituted for the purpose, the right of the judgment-debtor to the properties under attachment against third parties. But we observe that the circumstances

of the case quoted differ materially from those in the present case. Mr. Justice MARKBY, who delivered the judgment of the Court, says: "Whatever may be the form of the last application, dated the 5th December 1873, in substance it was an application to the Court for the continuation of the former proceedings on the ground that the bar that was set up by reason of the adverse order under s. 246, had been removed by the decision in the subsequent regular suit; " and, therefore, for these reasons the learned Judges held that it was not an application to execute the decree within the meaning of schedule II, article 167 of Act IX of 1871. Now, in the present case, we find that these remarks do not in any way apply. The present application made by the decree-holder on the 6th of September 1873 was as follows:—In the 9th column of the application in which he sets out the relief which he asks for from the Court,—namely, that the judgment-debtor's property being situated within the chowkee of the Munsif of Nattore, it is necessary for him, the decree-holder, to take out a certificate before he can attach property within that jurisdiction, and he therefore prays the Court to forward a certificate of non-satisfaction to the Court of the Munsif of Nattore to enable the decree-holder to proceed to attach and sell the property situated within that jurisdiction; further, with that application he presented the original decree of 1864 for rent, and the subsequent orders of the Judge and of the High Court [720] confirming that decree. It thus appears that the application contained no reference to the properties which were the subject of the regular suit, and was not therefore either in substance or in form such an application as was contemplated by Mr. Justice MARKBY in his judgment in the case above quoted.

It is not as though the judgment-creditor had represented that the obstacle which existed to obtaining satisfaction by selling the decree No. 11 of the Subordinate Judge of Rajshahye, in which the judgment-debtor had a title, had been removed by the reversal of the proceedings under s. 246. On the contrary, he asked for a certificate to be sent to the Munsif of Nattore in order that he might proceed against property which, so far as we understand, was quite independent of the property the subject of the regular suit, which suit had its origin in proceedings adverse to the judgment-creditor under s. 246. We are, therefore, of opinion that the case relied upon by the pleader for the respondent is not applicable to the circumstances and facts of the present case, and as it is clear that the application of the 22nd of November 1870 is not an application to keep the decree in force within the meaning of the Full Bench ruling referred to, the judgment of the Judge must be reversed, that of the Munsif restored, and the appeal decreed with costs.

Appeal decreed.

NOTES.

[LIMITATION—STEP IN AID OF EXECUTION—OBSTACLES—

- i. Time runs notwithstanding the obstacle, when the obstacle did not relate to the particular property sought to be proceeded against :—(1878) 3 Cal., 716; (1881) 7 Cal., 556—9 C. L. R. 334;
- ii. or only related to a particular share of the same property and execution as against the remaining part might have been had :—(1889) 17 Cal. 268.
- iii. As to cases of omission, see (1890) 17 Cal. 631 and (1886) 14 Cal., 124.

- iv. The same principles will apply where a different process is taken :—
 (1895) 18 All. 9 (attachment of property following arrest).
 (1884) 7 Mad. 595.
 (1883) 7 Bom. 293.
- v. (1886) 10 Mad. 22 is no longer an authority as to what would be an obstacle; being overruled by (1904) 28 Mad. 50.
- vi. The application must be made when the obstacle was first removed :—31 Mad. 71.]

[3 Cal. 720]

The 14th February, 1878.

PRESENT :

MR. JUSTICE AINSLIE AND MR. JUSTICE McDONELL.

Lati Koorer.....Decree-holder

versus

Sobadra Koorer.....Judgment-debtor.*

[2 C. L. R. 78]

Practice—Execution of decree—Mesne profits—Act XXIII of 1861, s. 11.

A sued B and obtained possession of certain property under a decree. On appeal this decree was reversed. The judgment and decree of the Appellate Court made no order about mesne profits which had accrued during the time the [721] land was in possession of A. B. thereupon, seeking execution of the Appellate Court's decree, applied to be reinstated in possession, and also for an order awarding her mesne profits for the time during which she was out of possession of the said lands. *Held*, that upon such application, it was competent for the Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced had been deprived of by such enforcement. [See ss. 44, 111 and 112 of the Civil Procedure Code (Act X of 1877).]

IN this case Mussamat Sobadra Koorer, the judgment-debtor and present respondent, had obtained possession of certain land under a decree dated the 7th May 1870 against the present decree-holder. This decree after a remand by the High Court was reversed by the Lower Appellate Court on the 14th May 1874. The present decree-holder, the defendant in the original suit, applied to the Munsif's Court for possession of the property taken in execution under the first decree, and also asked for mesne profits in respect of the time during which she was out of possession, and further asked that such mesne profits should be calculated and awarded to her in execution of the decree of the Lower Appellate Court which set aside the decree for possession obtained by the present judgment-debtor in the Court below. The Court of First Instance refused the application on the ground that the decree-holder could not produce any distinct decree under which mesne profits had been specifically awarded. The Lower Appellate Court upheld the decision on the ground that where a decree is silent touching interest or mesne profits, the Court executing the decree cannot assess or give execution for such interest or mesne profits, and quoted the case of *Sadasiva Pillai v. Ramalinga Pillai* [9 Moo. I. A., 506 (*This is an error for* 2 I. A., 219); 15 B. L. R., 383; 24 W. R., 193] in support of this view. It was further of opinion that the judgment-debtor's possession between Bhado

* Miscellaneous Special Appeal No. 200 of 1877, against the order of A. V. Palmer, Esq., Judge of Zilla Shahabad, dated the 9th of May 1877, affirming the order of Moulvie Imam Ali, Munsif of Buxar, dated the 17th of February 1877.

and Falgoun 1281 (August 1874 and January 1875) had not been established. The decree-holder now preferred this appeal to the High Court.

Baboo Pran Nath Pandit for the Appellant.—This application for mesne profits is maintainable under s. 11 of Act XXIII of 1861. In executing the decree of the Appellate Court, the [722] Court below was bound to make complete restitution to the person affected by the former erroneous decree. See *Nursing Chunder Sen v. Bidyadhur Dossce* (2 W. R., 275), *Chowdhury Shib Narain Pohraj Mandhata v. Chowdhury Kishore Narain Pohraj Mandhata* (10 W. R., 131); *Huroo Chunder Roy Chowdhry v. Shoorodhoney Deba* (B. L. R., F. B., 985; 9 W. R., 403), *Sheikh Wahid Ali v. Musst. Jamaye* (2 B. L. R., F. B., 73; 11 B. L. R., P. C., 149; 11 W. R., F. B., 1); *Raj Kissen Singh v. Baroda Debea* (6 W. R., Misc. Rul., 111); *Bibee Hamida v. Bibee Bhudhur* (20 W. R., 239); *Bama Soondery Debea v. Tarini Kant Lahori* (20 W. R., 415); *Gooroo Doss Roy v. Stephens* (21 W. R., 195); *Raja Lalanand Singh v. Maharajah Lukhimpore* (13 Moo. I. A., 490; 5 B. L. R., 605; 14 W. R., P. C., 23); *Meer Gowhar Ali v. Huralpal Bhugat* (22 W. R., 445), *Ununt Ram Hazrah v. Kuralae Pershad Mistree* (23 W. R., 441).

Baboo Taruck Nath Paul for the Respondent.—Where a decree is silent as to amount of mesne profits, the decree-holder cannot obtain mesne profits in execution of his decree—*Huroo Chunder Chowdhry v. Shoorodhoney Debea* (1 W. R., Misc. Rul., 5); the same rule holds in respect of interest—*Mosoodun Loll v. Bekaree Singh* (B. L. R., F. B., 602; 6 W. R., Misc. Rul., 109). Mesne profits are essentially in the nature of damages which do not exist as an obligation to be discharged, but are only payable when due under an order of Court—*Huro Mohini Chowdhram v. Dhun Monee Chowdhram* (10 W. R., 62). Even in cases where mesne profits are given up to date of institution of suit, the Court executing the decree is strictly confined to the words of the decree and can give no more—*Janokee Nath Mookerjee v. Raj Kristo Singh* (15 W. R., 292), *Syed Shah Ameen Ahmud v. Syed Shah Zameer Ahmud* (18 W. R., 122), *Bhoobhnessuree Chowdhram v. Mansor* (22 W. R., 160).

Cur. ad. vult.

[723] The judgment of the Court was delivered by

Ainslie, J. (who, after stating the facts of the case, continued).—It appears to us that the view taken by the subordinate Courts is not correct. A number of decisions of this Court have been cited, which lay down that where property has passed in execution of a decree, and that decree has been set aside, the Court which gave possession of the property is bound to make complete restitution to the person injured by its cancelled decree. The first of those decisions is *Nursing Churn Sein v. Bidyadhuree Dossce* (2 W. R., 275); that no doubt is not a case exactly in point. The question there was with reference to a specific sum of money taken out from the Collectorate treasury in execution of a decree, but we think that the principle on which the Court then based its judgment is the same as that on which the judgments in cases to be quoted further on are based. There is a case in *Chowdhry Sib Narain Pohraj Mandhata v. Chowdhry Kishore Narain Pohraj Mandhata* (10 W. R., 131), which is distinctly in point; and in that case Mr. Justice BAYLEY in delivering judgment cites the opinion of the late learned Chief Justice Sir BARNES PEACOCK—*Huroo Chunder Roy Chowdhry v. Shoorodhoney Debea* (B. L. R., F. B., 985; 9 W. R., 403, 407). Sir BARNES PEACOCK said that "the decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree in the same manner as an ordinary decree carries with it a right to have it executed, and I should have considered that a decree of reversal necessarily authorized

the lower Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced had been deprived by reason of its having been enforced." Further on he says: "In England, if a judgment is reversed for error, the person against whom the judgment was given is entitled to a writ of restitution. It is not a mere matter of discretion with the Court which reverses a decree whether the party against whom it was given is or is not to be restored to what he has been deprived of under [724] it. There can be no doubt that in point of justice the plaintiff was entitled to have the rents which the defendant had collected from her land whilst he was in possession of it under the erroneous decree refunded. This case is not like *Shaik Wahid Ali v. Mustt. Jamaye* (2 B. L. R., F. B., 73; 11 B. L. R., P. C., 149; 11 W. R., F. B., 1), a Full Bench case, in which it was held that it was discretionary with the Court which passed the decree to award interest or not." The learned Chief Justice goes on then to cite another case—*Rajkissen Singh v. Baroda Dabea* (6 W. R., Misc. Rul., 111).

Then there are two cases, *Bibee Hamed v. Bibee Bhudhun* (20 W. R., 239) and *Bama Soonduree Dabea v. Tarini Kant Lahori* (20 W. R., 415), in which the same view is adopted; and again in *Gooroo Das Roy v. Stephens* (21 W. R., 195), there is a case which came before Mr. Justice L. S. JACKSON and myself, in which we held that, with reference to the judgment of the Privy Council in *Raja Leelanund Singh v. Maharaja Luckimpore Singh* (13 Moo. I. A., 490; 5 B. L. R., 605; 14 W. R., P. C., 23), this Court was bound to carry out the order for the reversal of a previous order to the full extent so as to relieve the person injured by the first order from all its consequences. The same view was followed in *Meer Gowhur Ali v. Hurrpal Bhugut* (22 W. R., 445) and *Ununt Ram Huzrah v. Kurallee Pershad Mistree* (23 W. R., 441).

The cases cited on the other side do not appear to us to be directly in point. They are, *Hurro Chunder Chowdhry v. Sooradhonee Dabea* (1 W. R., Misc. Rul., 5), *Mosoodun Lall v. Bheekarsee Singh* (B. L. R., F. B., 602; 6 W. R., Misc. Rul., 109), *Huro Mohini Chowdhraie v. Dhun Moonee Chowdhraie* (10 W. R., 63), *Janksee Nath Mookeerjee v. Rajkristo Singh* (15 W. R., 292), *Syud Shah Ameer Ahmud v. Syud Shah Zameen Ahmud* (18 W. R., 122), *Bhoobunessuree Chowdhraie v. Mansor* (22 W. R., 160), *Kaleenath Dass v. Rajah Meah* (22 W. R., 406). On reference to these cases, it will be seen that the whole of them refer to the extension of the original decree, and not to the effect of an order for the reversal of a decree.

[725] The case cited by the Judge and a later case—*Forrester v. Secretary of State* (L. R., 4 I. A., 137)—only go so far as to establish what had been the practice of all the Courts in India, namely, that nothing could be added to a decree in course of execution; but in this case it is not a question of adding to the decree at all. What the Court is asked to do is simply to set aside that which has resulted from its own action taken under an erroneous decree.

With reference to the case *Hurro Chunder Roy Chowdhry v. Sooradhonee Dabea* (B. L. R., F. B., 985; 9 W. R., 403), it ought to be mentioned that Mr. Justice LOCH apparently did not altogether assent to the views expressed by the Chief Justice. An examination of that case, however, will show that in fact it belongs to the same class of cases as the other cases cited by the respondent, namely, that it may be treated as a case in which there was an attempt to extend a definite order. This will be seen by referring to page 405 of the same volume. It is there said that "the Sudder Court, on the 18th of May 1858, affirmed the decision so far as it related to the deed, and reversed it as to the award of possession to the then plaintiff, and directed that the property should

remain with the present plaintiff, who, as widow in the absence of an adoption, was entitled to the estate during her life as heir of her deceased husband." So that there was a definite declaration by the Court; and it might be agreed that it made that declaration advisedly, and that it was its intention not to go further than that.

In the present case, from the form of the proceedings stated above, it is evident that there could have been no such express or implied intention of the Court which set aside the decree under which possession had been taken. It was, therefore, open to the Munsif in the present application to do all that was necessary to make the restitution complete.

The Judge has said in his judgment: "I note further that the *de facto* possession of Mussamut Sobadra between Falgoon and Bhadro 1281 is not established." If this were a finding of fact come to on the evidence, no doubt sitting here in special appeal we would be unable to deal with it; but it appears to us [726] that it cannot be treated as such, for although there is evidence on one side which has been uncontradicted by evidence on the other; it does not appear that any particular time was fixed for the parties to appear in Court with all the evidence that they might have to give on questions of fact. The only order which has been brought to our notice is one by which the 23rd of January 1877 was fixed for hearing. That order is to this effect, that it is for the hearing of argument and for making such order as may there be necessary: and it is evident that this was the course adopted by the Munsif. He dealt with the case as one which could probably be disposed of simply on a question of law: and he in fact did dispose of it on a question of law without going into the facts at all. Had his decision been the other way, we think it would follow from the order by which the 23rd of January was fixed for hearing, that he would then have made some order for proceeding upon evidence on the merits of the case. In the absence of such order, the appellant cannot be concluded by the evidence produced by the other side and the absence of evidence on her part.

The case must, therefore, go back to the Court below to ascertain whether, as a matter of fact, Mussamut Sobadra ever was in possession of the property as the result of the execution of her decree; and if so, how much the appellant is entitled to receive from her as mesne profits in respect of the time during which she was in possession.

Costs will follow the result.

Case remanded.

NOTES.

[EXPRESS LEGISLATION—

The C.P.C. 1908, s. 144, has expressly enacted as follows:—

(1) Where and in so far as a decree is varied or reversed the Court of First Instance shall on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits which are properly consequential on such variation or restitution.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

This provision embodies the effect of this case and similar decisions such as (1894) 21 Cal., 989; (1886) 9 Mad. 506; (1895) 22 Cal., 501, (1902) 6 C.W.N. 710. But it should be observed that the Code bars a separate suit.

[727] The 10th April, 1878.

"

PRESENT:

MR. JUSTICE AINSLIE AND MR. JUSTICE McDONELL.

Syud Mahomet Hossein and others.....Appellants

versus

Hadjzi Abdullah and others.....Respondents. "

Registration—Right to Appeal—Act VIII of 1871, s. 76—Repeal of Act VIII of 1871 by Act III of 1877—General Clauses Act I of 1868, s. 6.

An order refusing registration of a deed was passed on 23rd August 1872; and when Act VIII of 1871 was in force, an application for review was presented, and finally rejected on 20th December 1877 after the repeal of Act VIII of 1871 by Act III of 1877. *Held* that, under the provisions of s. 6 of Act I of 1868 (the General Clauses Act), the proceedings must be governed by the Act in force at the time when they were instituted,—namely, by Act VIII of 1871, and therefore no appeal would lie.

In this case an appeal was originally presented to the Judge of Gya under s. 73† of Act VIII of 1871, from an order of refusal to register a deed presented for registration, the ground of refusal being that one of the parties to the deed denied its execution. The Judge, on 23rd August 1872, rejected the appeal, but his successor, on 19th September 1873, issued a rule calling on the other side to show cause why a review should not be admitted; and on 4th January 1873 he admitted a review of his predecessor's order, and the cause was set down for further hearing.

The order admitting the review was set aside by the High Court on appeal, as being in excess of the Judge's powers (See *In the matter of the petition of Hadjee Abdoollah*, 10 B.L.R., 394); but the order of the High Court was in turn set aside by the Privy Council (See *Reasut Hossein v. Hadjee Abdoollah*, I.L.R., 2 Cal., 131), and the application for review was ultimately restored, and heard, but rejected on 20th December 1877. The present appeal was thereupon preferred.

The Registrar submitted the case to the High Court for orders as to whether or not the appeal should be admitted, stating that [728] if the present appeal were viewed as one from an order simply rejecting an application

* Memorandum of appeal against the decision of E. Grey, Esq., District Judge of Gya, dated the 20th December 1877, making the opposite party respondent. No. of Case in lower Court, 1 of 1872.

† [Sec. 73 :—If a Registrar makes, under section 71 or section 72, an order of refusal to register or to direct the registration of any document, or if he has made a like order under section 82 or section 83 of Act No. XX of 1866, or if the Sub-Registrar has refused to register the document on the ground that the person, or one of the persons, by whom the document purports to have been executed has denied the execution,

• Procedure where Registrar refuses to register or direct registration of documents falling under section 17 or section 18, cls., 1, 2, 3, and 4.

or if the Registrar has himself, as Sub-Registrar, made an order of refusal under section 71, any person claiming under such document or his representative, assign, or agent authorised as aforesaid, may within thirty days after the making of the order of refusal, apply by petition to the District Court, in order to establish his right to have the document registered.]

for review, it would not lie, under s. 629 of the new Civil Procedure Code, Act X of 1877, which declared that such an order is final; and if it were viewed as an appeal from an order refusing to register the deed, it would still not lie, since under s. 76 of Act III of 1877,* the order of the District Judge is final, and the old Registration Act (Act VIII of 1871, s. 76 †) was to the same purport.

Moonshee *Mahomed Yusuf*, for the Appellants, contended that he was entitled to an appeal, because Act VIII of 1871 was repealed by Act III of 1877, and the jurisdiction vested in the District Court by ss. 73 and 76 of Act VIII is vested in the Registrar by ss. 72, 73, 75 and 76, of Act III of 1877, and by s. 77 of that Act jurisdiction is given to the ordinary Civil Courts to entertain suits for a decree directing documents to be registered; and as the proceedings in this case terminated after Act III of 1877 had come into force, the order appealed against should be taken to be an order contemplated by s. 77, against which there is an appeal.

No one appeared on behalf of the Respondents.

The judgment of the Court was delivered by

Ainslie, J.—The Registrar of Deeds having refused to register a certain document, an application was made in 1872 to the District Judge under Act VIII of 1871. On 23rd August 1872 the District Judge rejected the petition on the ground that the execution of the deed had not been proved. In September 1872 Reasut Hossein applied for a review of judgment, and on the 19th September 1872 the District Judge issued a rule calling upon the opposite

* [1877, Sec. 76 :—Every Registrar refusing—

- (a) to register a document except on the ground that the property to which it relates is not situate within his district or that the document ought to be registered in the office of Sub-Registrar, or, Refusal by Registrar.
- (b) to direct the registration of a document under section 72 or section 75, shall make an order of refusal and record the reasons for such order in his Book No. 2 and on application made by any person executing or claiming under the document shall, without unnecessary delay, give him a copy of the reasons so recorded.

No appeal lies from any order under this section or section 72.]

† [1871, Sec. 76 :—The Court may summon and enforce the attendance of witnesses and compel them to give evidence and on the day so fixed as aforesaid, Court may order document to be registered. or on any day to which the hearing of the petition may be adjourned, shall inquire—

- (a) whether the document has been executed, and
- (b) whether the requirements of the law for the time being in force have been complied with on the part of the petitioner so as to entitle the document to registration. If it finds that the document has been executed and that the said requirements have been complied with, the Court shall order the document to be registered, and, if the document be duly presented for registration within thirty days after the making of such order, the Registering Officer shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in sections 58, 59, 60. Such registration shall take effect as if the document had been registered when it was first duly presented for registration.

Provided that, when the officer presiding over the District Court, has himself, as registering officer, made any order complained of under this section, the petition shall within sixty days after the making of such order, be presented to the High Court, and the provisions contained in the former part of this section shall, *mutatis mutandis*, apply to such petition and the order (if any) thereon.

• The District Court or the High Court, as the case may be, may direct by whom the whole or any part of the costs of any proceedings before it under this part shall be paid and such costs shall be recoverable as if they had been awarded in a suit under the Code of Civil Procedure. No appeal lies from any order made under this section.]

party to show cause why the review should not be admitted. On the 4th January 1873 the rule was made absolute, the review admitted, and the cause set down for further hearing. This order of the 4th January 1873, therefore, had the effect of cancelling the original order of the Judge and re-opening the proceedings commenced by the petitioner in 1872 under s. 74 of Act VIII of 1871.

[729] The final order of the Judge on that application was made on 20th December 1877, when Act VIII of 1871 had been repealed. It was entitled as a review of judgment in Suit No. 1 of 1872. By s. 2 of Act III of 1877, which came into force on the 21st April 1877, Act VIII of 1871 was repealed; but by the provisions of the General Clauses Act (Act I of 1868, s. 6), the repeal of that Act does not affect any proceedings commenced before the repealing Act shall have come into operation. The consequence is that these proceedings having commenced before Act III of 1877 came into operation, must be governed by the provisions of the Act in force at the time when they were instituted,—namely, Act VIII of 1871. Section 76 of Act VIII of 1871 contains instructions for proceedings of the Court on a petition of a person whose application for registration has been refused, and concludes with these words that no appeal lies from any order under this section. The procedure under the present Registration Act is altogether different from that under the Act of 1871, and we have no doubt that the case must be governed by the former Act. Therefore, the appeal cannot be entertained.

Appeal rejected.

NOTES.

[See our Notes *supra* to 3 Cal., 662 at 3 Cal., 688, where a similar question was decided by the Full Bench.

See also (1889) 16 Cal., 267 F. B.]

[3 Cal. 739]

The 1st April, 1878.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

In the matter of Harasatoollah and othersPetitioners

versus

Brojonath Ghose.....Opposite party.

[1 C. L. R. 517]

Immoveable Property—Sale in Execution of Decree—Dispossession of Third Person—Obstruction to Purchaser—Act VIII of 1859, s. 269—Civil Procedure Code (Act X of 1877), ss. 318, 319, 334, 335—Limitation Act (XV of 1877), Sched II, Art 165.

There is no provision in the Civil Procedure Code, similar to that contained in s. 269 of Act VIII of 1859 which enabled the Court executing a decree to enquire into a complaint made by a person other than the defendant, on the ground of dispossession in the delivery of possession to the purchaser of [730] immoveable property sold in execution of a decree; and, therefore, the only remedy of a person so dispossessed is by regular suit.

A, a decree-holder, purchased certain property belonging to B, his judgment-debtor, at a sale in execution of his decree, and delivery of possession to him was ordered. A stranger to the suit, thereupon, presented a petition to the Court executing the decree, setting up a title to a moiety of the property in question, and prayed for an investigation into his right, and for recovery of possession on the ground that he had been dispossessed by A. Held, that the application could not be maintained.

THE following was the referring order in this case:--

"In execution of a decree obtained by one Brojonath Ghose against one Sumeruddin, the property, which is the subject of the present dispute, was sold as the property of the judgment-debtor, and purchased by the decree-holder himself. The purchaser, as usual, asked the assistance of the Court to be put in possession of the property purchased by him, and delivery of possession was ordered under the due course of law. The applicant thereupon presented a petition setting up a title to a moiety of the property, for an investigation into his rights, and for recovery of possession on the ground of having been dispossessed by the said purchaser. It is contended on behalf of the purchaser that there is no provision in the Civil Procedure Code under which an application like this can be maintained. I think this contention is valid. Under s. 269 of Act VIII of 1859 a complaint made by the purchaser on account of resistance in obtaining delivery of possession of the purchased property, as well as a complaint made by a party other than the

* Small Cause Court Reference, No. 393 of 1878, from the order of Baboo Sreenath Roy Bahadoor, Subordinate Judge, and Judge of Small Cause Court of Hooghly, dated the 23rd February 1878.

† [Sec. 269 :—If it shall appear that the resistance or obstruction to the delivery of possession was occasioned by any person other than the defendant claiming a right to the possession of the property sold as proprietor, mortgagee, lessee, or under any other title, or if in the delivery of possession to the purchaser any such person claiming as aforesaid shall be dispossessed, the Court, on the complaint of the purchaser, or of such person claiming as aforesaid, if made within one month from the date of such resistance or obstruction or of such dispossession, as the case may be, shall enquire into the matter of the complaint and pass such order as may be proper in the circumstances of the case. The order shall not be subject to appeal, but the party against whom it is given shall be at liberty to bring a suit to establish his right at any time within one year from the date thereof.]

defendant on the ground of dispossession in the delivery of possession to the purchaser, could be maintained and enquired into. But, under the new Act of 1877, the former is maintainable under ss. 334 and 335; but the Act is silent with reference to the latter. There is, therefore, no provision in the new Code giving a right to a person dispossessed in delivering possession to the purchaser of the purchased property, for an enquiry into his rights. His remedy is by a regular suit.

"It is contended on behalf of the applicant, that if a party other than the defendant, dispossessed in delivering possession to a decree-holder of the decretal property, can have a summary [731] remedy, it is anomalous to think that a party other than the defendant can have no such remedy when he is dispossessed by a purchaser at an execution-sale. I think this plea is quite fallacious. In the first place, there is an express provision with regard to the first-mentioned point, s. 332, but there is none with reference to the last-mentioned one. In the next place, in the former case, the dispute is between the decree-holder, a party to a pending case, and another, which, if not adjudicated upon, justice cannot be attained; while in the latter case, the dispute is between two strangers, quite unconnected with the case in which the decree was passed or with the execution thereof. It is reasonable, therefore, that such parties should be left to settle their dispute in a case between themselves, and that the Court executing the decree should not be encumbered to try a point foreign to the execution proceedings and without a case to that effect.

"The applicant's pleader then pointed out to me Art. 167 of Sched. ii, div. 3, of the Limitation Act, and argued that, unless an application of the present nature was maintainable, the limitation for such an application would not have been provided for in the Limitation Act. The article under notice runs thus: "Complaining of resistance, etc., to delivery of possession of immoveable property decreed or sold in execution of a decree, or of dispossession in the delivery of possession to the decree-holder or the purchaser of such property." I must confess I do not find my way clear to reconcile this provision with the provisions of the Civil Procedure Code. My query, therefore, is whether the present application is maintainable in the execution department, or the applicant should be told to seek remedy in regular course of law. I reserve judgment in the matter until receipt of the Court's decision on the points."

The parties were unrepresented.

Markby, J. The Subordinate Judge seems to have correctly explained the present state of the law. If the purchaser at a sale in execution of a decree be resisted or obstructed when being put in possession by the Court, as provided for by s. 318 or s. 319 † of the Code of Civil Procedure of 1877, the Court can now act only under s. 334 or s. 335.

* [Sec. 318.—When the property sold is in the occupancy of the judgment-debtor or of some person on his behalf, or of some person claiming under a title created by the judgment-debtor subsequent to the attachment of such property, and a certificate in respect thereof has been granted under section 316, the Court shall, on application by the purchaser, order delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.]

† [Sec. 319.—When the property sold is in the occupancy of a tenant or other person entitled to occupy the same, and a certificate in respect thereof has been granted under section 316, the Court shall order delivery thereof to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or in such other mode as may be customary, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.]

[732] Section 318 provides, for the giving of what is usually termed khas possession to an execution-purchaser, and the Court is empowered to "order delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same." If resistance or obstruction is made by the judgment-debtor or any one on his behalf, the provisions of Chapter XIX of the Code relating to resistance or obstruction to a decree-holder are applicable to s. 334. If, on the other hand, the property sold was not in the khas possession of the judgment-debtor, but is in the occupancy of a tenant or other person entitled to occupy the same, possession by publication of his title is given to the execution-purchaser. And s. 334 provides for a summary enquiry on "resistance or obstruction caused by any person other than the judgment-debtor *not* in possession of the property sold, but claiming a right thereto as proprietor, mortgagee, lessee, or under any other title," if such resistance or obstruction be made the subject of complaint by the purchaser.

No provision is, however, now made if the obstruction or resistance to the possession of an auction-purchaser is caused by a third party, a stranger, claiming to be in actual possession on a title altogether independent of the judgment-debtor.

Section 331 provides for such a case, but only when possession is being given to a decree-holder in execution of a decree; and this does not apply to an execution-purchaser.

Section 269 of the Code of 1859 provided for this case, and we do not understand why it has been omitted from the present Code of 1877, and this omission is the more remarkable because the law of limitation, passed almost simultaneously with the present Code, in schedule II, article 165, seems to contemplate a summary enquiry by the Courts on the application by a person dispossessed of immoveable property and disputing the right of the purchaser at a sale in execution of a decree to be put in possession, since it provides a term within which suit or application by such a person for redress should be made.

[733] In such a state of the law it seems obviously unfair for the Courts, which cannot now summarily determine the relative rights of the parties, to insist on putting an auction-purchaser into possession in spite of the resistance or obstruction of a third party having no connection with the judgment-debtor; and, therefore, it seems to us that, ordinarily, officers should be directed to abstain from any act of dispossession in such a case, leaving the execution-purchaser to his remedy by suit.

NOTES.

[LEGISLATION SUPPLYING THE OMISSION—

The omission pointed out in this decision was rectified by the Legislature in the Amending Act XII of 1879; and Sec. 335 of the Code of 1882 has been substantially reproduced in the C. P. C. of 1908, Sch. I Or. 21, rules 97 to 103.]

*[Article 165 :—

Description of suit.	Period of Limitation.	Time from which period begins to run.
Under the Code of Civil Procedure, by a person dispossessed of immoveable property, and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession.	Thirty days.	The date of dispossession.

[3 Cal. 733]
ORIGINAL CIVIL.

The 1st and 18th June, 1878.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE.

In the goods of Gasper Malcolm Gasper (Deceased).

[-2 C. L. R. 436]

*Ad valorem Duty—Act VII of 1870, sch. i, cl. 11—Act XIII of 1875, s. 6 (19c)—Notification No. 2623 of 24th April 1874.**

Executors obtaining a second grant of probate subsequent to the enactment of the Court Fees Act of 1870 (the first grant having been taken out previously to that enactment) are not exempted from the payment of the *ad valorem* duty chargeable under that Act, although the full fee then chargeable by law had already been paid at the time when the first probate was taken out.

THIS was a reference under s. 5† of Act VII of 1870, made by Mr. Belchambers, the Taxing Master of the Court.

It appeared that one Gasper Malcolm Gasper died on the 5th August 1862, appointing by will one Johannes George Bagram his executor, and directing that each of his sons who attained the age of 21 years should also be joined with him as executors. Johannes George Bagram, in August 1862, applied for and obtained probate of the testator's will and paid the only fee [734] which was at that time leviable under the law in force, viz., a commission fee amounting to Rs. 10. On the 30th April 1878 Johannes George Bagram died, and in May of the same year two of the sons of the testator applied for probate.

* Financial Notification No. 2623, *Gazette of India*, 26th April 1874, Part I, p. 264.

In exercise of the power conferred by s. 35 of the Court Fees Act of 1870, the Governor-General in Council is pleased to make the following reduction and remission :—

(a) Whenever a grant of probate or letters of administration shall have been made in respect of any property forming part of an estate, the amount of fees then actually paid under the said Act shall be deducted when a like grant is made in respect of property belonging to the same estate identical with or including the property to which the former grant relates.

(b) Whenever a grant of probate or letters of administration shall have been made in respect of any property belonging to an estate, no fees shall be chargeable under the said Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate.

(c) This notification applies to the whole of British India.

† [Sec. 5 :—When any difference arises between the officer whose duty it is to see that any fee is paid under this Chapter and any suitor or attorney, as to

the necessity of paying a fee or the amount thereof, the question shall, when the differences arise in any of the said High Courts, be referred to the taxing-officer, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court, or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf.

Procedure in case of difference, as to necessity or amount of fee.

The Registrar was of opinion that an *ad valorem* duty of 2 per cent. was chargeable on the value of the unadministered estate under cl. 11 of the 1st Schedule of Act VII of 1870.* In support of this view he cited the case of *In the Goods of Chalmers* (6 B. L. R., App., 137), the Financial Notification No. 2623 of 24th April 1874, and s. 19 of the Court Fees Act, read with s. 6 (19c) of Act XIII of 1875.

Mr. G. Gregory for the executors.—The duty claimed here is not payable under Act VII of 1870, or Act XIII of 1875; those Acts can only apply to cases where the testator dies after those Acts have come into operation. To apply the provisions of the Court Fees Act to the present case would be to give a retrospective effect to the Act. In cases of this description the Courts have always been averse to construe Acts in that manner; see Maxwell on the Interpretation of Statutes, p. 192, and the case of *Hart Cornwallis* (25 L. J., Ex., 149; s. c., 11 Ex., 580). To put a retrospective construction on the Act would be, in the present case to subject the estate to a heavy duty under an enactment the provisions of which do not expressly apply, the duty leviable at that time when the first probate was taken out having already been paid; and further there is no express provision in the Act applicable to cases of wills admitted to probate before the Act came into force.

The Advocate-General (Mr. Paul) for the Crown.—Act VII of 1870 expressly requires that *ad valorem* duty shall be paid upon any grant of probate, and the amending Act, Act XIII of 1875, s. 6 (19c), merely states, "that when the full fee chargeable under the Court Fees Act has been once paid, no fee shall be chargeable under the same Act on any further grant [735] made in respect of the whole or any part of the same property belonging to the same estate." Now the probate duty payable under the Court Fees Act has never in this case been paid before. The only fee that has been paid is a commission fee of Rs. 10, payable under the law in force when the first probate was taken out. So, clearly, the exemption claimed under s. 6 (19c) of Act XIII of 1875 does not apply to the present case. The case of *In the Goods of Chalmers* (6 B. L. R., App., 137) is exactly in point.

The opinion of the Chief Justice was as follows:—

Garth, C. J.—I think it is quite clear that the *ad valorem* duty must be paid upon the present grant of probate. At the time when the first grant of probate was made to one of the executors named in the will, no *ad valorem* duty was payable. The only sum charged was a commission fee of Rs. 10. That executor has died, and the other two executors now wish to prove the will. Act VII of 1870 requires the *ad valorem* duty to be paid upon any grant of probate, and I find no provision exempting these executors from payment of the duty. In fact, but for the official notification made under the provisions of the Act, dated the 24th of April 1874, the *ad valorem* fee would be payable a second time upon any second grant of probate. But here no injustice is done, because the duty has never been paid upon this property.

* Cl. 11 of Act VII of 1870:—

Number.	<i>Ad valorem</i> fee.	Proper fee.
Probate of a will or letters of administration with or without will annexed.	If the amount or value of the property in respect of which the probate or letters or certificate shall be granted exceeds one thousand rupees.	Two per centum on such amount or value.]

The case of *In the Goods of Chalmers, deceased* (6 B. L. R., Apx., 137), decided by Sir R. COUCH is in point, and is entirely in accordance with the view which I take of this question.

The English case to which my attention has been called by Mr. Gregory — *In re the Executors of Lord Cornwallis* (25 L. J., Ex., 142; s. c., 11 Ex., 580) — will be found to have no application to the present. That case merely decided that the Succession Duty Act of 1853 did not apply to annuities granted before the passing of that Act.

Attorney for the executors : Mr. Zorab.

Attorney for the Crown : The Government Solicitor.

NOTES.

[See also *In the Goods of March* (1879) 4 Cal., 725 (duty paid in England) *contra* 21 Bom., 139 (at 150). The proviso to Art. 11 of Sch. I of the Court Fees Act, 1870, was added by the Succession Certificate Act VII of 1889 repealing and re-enacting the Probate and Administration Act, 1881, s. 153.]

[736] *The 29th April, 1878.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE.

In the Goods of Rushton (deceased).

Probate -- Ad valorem fee -- Annuity charged upon property of testator.
Court Fees Act (Act VII of 1870), sched. 1, cl. 11.

Where it appeared that property disposed of by a will was bequeathed to the testatrix subject to the payment thereof of an annuity for life to a person who survived her held, that the *ad valorem* fee prescribed by sched. 1, cl. 11, of the Court Fees Act ought to be levied upon the value of the property, less the capitalized value of the annuity.

THIS was a reference under s. 5 of Act VII of 1870, made by Mr. Belchambers, the Taxing Master of the Court : —

“ In this case a grant of probate of the will of the deceased has been obtained by her husband as the sole executor.

“ The facts material to the present question are, that the property disposed of by the will of the deceased was bequeathed to her by her late father, subject to the payment thereof of an annuity of Rs. 600 per annum for life to her brother, who is still living, and is now of the age of 50 years.

“ Upon the facts it is submitted, on behalf of the executor, that the *ad valorem* fee prescribed by No. 11, sched. 1 of the Court Fees Act, 1870, ought to be levied, not upon the apparent value of the estate, but upon its actual present value, to be estimated after making an allowance in respect of the annuity payable thereout.

“ To provide for the payment of this annuity, Rs. 15,000, at 4 per cent., would be required.

“ It appears from a volume of actuaries' tables, to which I have been referred by the executor's attorneys, that the present value of £1, payable at the death of a person aged 50 at 4 per cent., is 10s. 7d. At that rate the present value of

£1,500 (the equivalent of Rs. 15,000) payable at the death of a person aged 50, at 4 per cent., would be £793 15s., or Rs. 7,937-8-0.

"The *ad valorem* fee is chargeable on the amount or value of the property in respect of which the probate, or letters, or certificate shall be granted,—that is, on the amount or value at [737] the time of the grant, and not at some future time; see the *Attorney-General v. Partington* (1 H. & C., 457), affirmed in error (3 H. & C., 193).

"The actual present value of the property in the present case cannot be arrived at without deducting the value of the annuity.

"Proceeding upon the basis of the figures already given, the difference between Rs. 15,000 and Rs. 7,933-8-0, viz., Rs. 7,066-8-0, is the value of the annuity, and ought to be deducted from the total amount of assets. The balance after such deduction will represent the actual present value of the estate upon which the *ad valorem* fee is leviable.

"The value of an annuity of £60 per annum held on a single life, if calculated according to the tables in the schedule annexed to the Succession Duty Act (16 and 17 Vict., c. 51) would be £745. 15s. 8d., equivalent to Rs. 7,457-13-0, or Rs. 359-5-0 in excess of the value arrived at as the result of the calculation made according to the actuaries' tables.

"As the question is one of general importance, it is referred for final determination to the Honourable the Chief Justice, as required by s. 5 of the Court Fees Act, 1870."

No Counsel appeared to argue the point.

The opinion of the Chief Justice was as follows :—

Garth, C.J.—It appears to me that Mr. Belchambers is perfectly right, and that the value of the property must be the value at the present time, less the capitalized value of the annuity.

NOTES.

[See also Sch. III to the Court Fees Act, 1870, added by XI of 1899.]

[738] *The 8th May, 1878.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MARKBY AND
MR. JUSTICE ROMESH CHUNDER MITTER.

Joykisto Cowar.....One of the Defendants

versus

Nityyanund Nundy and others.....Plaintiffs.

[3 C.L.R. 440]

Hindu Law—Ancestral trade carried on for benefit of Infants—Liability of Infant—Contract Act (IX of 1872), s. 247—Decree on appeal—Act VIII of 1859, s. 337—Act X of 1877, s. 544.

* Where the ancestral trade of a Hindu was carried on after his death for the benefit of his infant children by their guardian, and debts were incurred by the firm in the course of business,—*Held*, that the guardian of a Hindu minor is competent to carry on an ancestral

trade on behalf of the minor, and that, following the analogy of the rule laid down by s. 247 * of the Contract Act, as to the liability of a minor admitted by contract into a partnership business, the minor is not to be held personally liable for the debts incurred in such trade, but that his share therein is alone liable.

The Court of Appeal has power under s. 337 † of Act VIII of 1859 corresponding with s. 544 of Act X of 1877, to draw up what would be a fair decree as regards all the parties to a suit, although some of them may not have appealed.

Petum Doss v. Ramdhone Doss (Tay., 279), *Ramal Thakursidas v. Lakhmichand Muniram* (1 Bom. H.C.R., App., 71) and *Johurra Bibee v. Sree Gopal Misser* (I.L.R., 1 Cal., 470) followed.

THIS was a suit to recover the balance of an account for goods sold and delivered. It appeared that, on the 17th of March 1871, one Anundo Chunder Cowar died, leaving two sons, Nobokisto Cowar and Joykisto Cowar, the defendants, infants, and two widows. Anundo Chunder Cowar carried on business as a merchant and had repeated dealings with the plaintiffs, to whom he was indebted at the time of his death. After that time the widows, as the *kutrees* of the joint family, carried on the business and gave a power of attorney to manage it to one Harradhone Roy. The defendant, Nobokisto, after he came of age, managed the business jointly with Harradhone Roy. The plaintiffs continued to have dealings with the firm, and on the 12th April, Harradhone Roy, on behalf of the firm, signed a fresh hatchitta bringing forward a balance due from [739] the defendants to the plaintiffs, which was slightly reduced in the course of further dealings between the parties, and for this balance the plaintiffs sued.

MACPHERSON, J., decreed the plaintiffs' claim out of the property of Anundo Chunder Cowar. From this decree the infant defendant, Joykisto appealed.

Mr. Bonnerjee and Mr. Pault for the Appellant.

Mr. Branson and Mr. Allen for the Respondents.

Garth, C.J.—It appears that Anundo Chunder Cowar, the father of the appellant, who is an infant, died on the 19th March 1871. Anundo Chunder, up to the time of his death, carried on business as a trader, and had dealings with the plaintiffs' firm. He died leaving him surviving the appellant and his elder brother Nobokisto, both then infants under the age of 16 years, and two widows. The sons and widows, after Anundo's death, lived as members of a joint Hindu family. The ancestral trade was carried on under the management of the widows.

The widows being purdanasheen women could not take the management of the ancestral trade directly into their own hands, but employed their son-in-law, one Harradhone, for that purpose; and it was under the direct supervision

* [Sec. 247 :—A person, who is under the age of majority according to the law to which he is subject, may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm.]

One of several plaintiffs or defendants may appeal and obtain a reversal of the whole decree if it proceed on a ground common to all.

† [Sec. 337 :—If there be two or more plaintiffs or two or more defendants in a suit, and the decision of the lower Court proceed on any ground common to all, any one of the plaintiffs or defendants may appeal against the whole decree, and the Appellate Court may reverse or modify the decree in favour of all the plaintiffs or defendants.]

and management of Harradhong, that the business was carried on. It is also proved that the appellant's elder brother Nobokisto, after he came of age, took part in the management with his brother-in-law Harradhong.

During the sole management of Harradhong, and also during the joint management of Nobokisto and Harradhong, dealings with the plaintiff's firm continued; and in the course of these transactions, the defendants became indebted to the plaintiffs in the sum of Rs. 4,605-11-3. This debt entirely arises out of transactions connected with the ancestral business carried on by the defendants' family after Anundo Chunders' death.

[740] The plaintiffs brought a suit to recover the amount, and Mr. Justice MACPHERSON has decreed the claim with this reservation, that the amount decreed is to be realized out of the property of the deceased father, Anundo Chunder Cowar. Against this decree the infant, Joykisto, has alone appealed.

The questions that we have to determine are, whether the infant appellant is at all liable for this debt; and, if so, to what extent? It seems to us that, on the authority of decided cases—*Petum Doss v. Ramdhone Doss* (Tay., 279), *Ramlal Thakursidas v. Lakmichand* (1 Bom. H.C.R., App., 71), *Johurra Bibee v. Sree Gopal Misser* (I.L.R., 1 Cal., 470)—the guardian of a Hindu minor is competent to carry on an ancestral trade on behalf of the minor, consequently the contention raised in this appeal, that the infant appellant is not liable to any extent for the debt in question, is not well founded.

On the other hand it seems to us only reasonable, as well as in accordance with legal principles, that a minor on whose behalf an ancestral business is carried on ought not to be held personally liable for the debts incurred in that business.

There must be some defined limit to the minor's liability.

The limit apparently laid down by Mr. Justice MACPHERSON is, that all the ancestral property is to be rendered liable. But there may be instances in which this limit would be found manifestly inadequate and unsuited to reach the justice of the case. For example, petty trade in the time of an ancestor might expand after his death into a large flourishing business in the hands of a manager for infants. Debts arising out of this business would naturally become proportionately large, and it would seem unreasonable to hold that such debts should be recoverable from ancestral property only.

On the other hand the trade might not prosper, and in this case the minor ought not to be liable to account for trade losses out of any property unconnected with the assets of the business, which he may have received from his ancestor.

In the case of a minor being admitted into partnership in the ordinary way, s. 247 of the Contract Act (IX of 1872) [741] provides, that for "any obligation of the firm," the share of the "minor in the property of the firm is alone liable."

We think that this limit of the infant's liability, which has been adopted by the Legislature in the case of a minor being admitted by contract into a partnership business, ought to be adopted in such a case as the present. On principle there ought not to be any difference between the nature of the liability of an infant admitted by contract into a partnership business and that of one on whose behalf an ancestral trade is carried on by a manager.

The elder brother Nobokisto has not appealed against Mr. Justice MACPHERSON'S order, nor on the other hand have the plaintiffs appealed upon the ground that Nobokisto should have been made personally liable in the ordinary way.

We ought not, under ordinary circumstances, to make a decree which would have the effect of altering his liability, when neither he on the one hand nor the plaintiffs on the other have appealed against the decree in the Court below.

But under s. 337 of the Code of Civil Procedure (Act VIII of 1859, corresponding with Act X of 1877, s. 541) we are empowered, in a case like the present, to draw up what would be a fair decree as regards both defendants.

We propose, therefore, to make an order, that unless the defendants admit partnership assets sufficient for the payment of the debt, there should be the usual decree for an account of the partnership property, and a direction that the debts be paid out of that property.

It will be the duty of the plaintiffs to serve Nobokisto with a copy of this judgment; and if within three weeks from the date of Nobokisto receiving a copy of this judgment neither the plaintiffs nor Nobokisto make any application to alter the terms of our proposed decree, the decree will be drawn up accordingly; but either party will be at liberty to apply within that time.

The minor defendant is entitled to the costs of the appeal.

Decree varied.

Attorney for the Appellant: *Mr. Dover.*

Attorneys for the Respondents: *Messrs. Swinhoe, Law & Co.*

NOTES.

[See Notes to 1 Cal., 470.]

[742] APPELLATE CRIMINAL

The 30th April, 1878.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

In the matter of Troyloktanath Biswas and Ram Churn
Biswas.....Petitioners.*

Inquiry into Cause of Death—Report by Magistrate—Privileged

Communication—Judicial Proceeding—Finding—Coroner's

Inquest—Criminal Procedure Code (Act X of 1872),

Act ss. 127, 133, 135, 296—Evidence

(I of 1872), s. 124.

Where the Magistrate of a division held an inquiry, under s. 135 † of the Criminal Procedure Code, into the cause of the death of a person found dead under suspicious circumstances, and, without making a specific charge against any person, drew up a report embodying the result of his inquiry, and sent the report to the Magistrate of the district, and subsequently proceedings were taken against one of the witnesses, which ultimately resulted

* Criminal Reference, No. 35 of 1878, from an order of H. B. Lawford, Esq., Sessions Judge of Nuddas, dated the 12th March 1878.

† [Sec. 135 :—The nearest Magistrate duly authorized may hold an inquiry into the cause of any such death, either instead of or in addition to the investigation held by the Police Officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence, although no specific charge has been made against any person. The Magistrate holding such an inquiry shall record the evidence taken upon it in any of the manners hereinafter prescribed, according to the circumstances of the case.]

in an acquittal—*Held*, by the High Court, that there being nothing in the language of s. 135 requiring the Magistrate holding such an inquiry either to make a report or to come to a finding, the report actually sent could not be considered as part of a judicial proceeding, and that therefore the High Court had no power to send for it under s. 296 of the Criminal Procedure Code.

No analogy exists between a Coroner's Inquest and an inquiry into the cause of death under the Criminal Procedure Code.

IN this case, the facts of which are sufficiently stated in the judgment of Mr. Justice MARKBY, a rule had been obtained calling upon the Magistrate of Nuddea to show cause why he should not send up a certain report containing the results of an inquiry by Mr. Skrine, the Magistrate of the division, under s. 135 of the Criminal Procedure Code, into the death of one Ramgotti Biswas; and why, in the event of the Court holding the report to be a judicial proceeding, the proceedings should not be quashed under s. 297 of the Code.

The *Advocate-General* and Mr. *Kilby* for the Magistrate of Nuddea, showed cause—The question is entirely one of principle. If such a document as this is to be considered as part of a judicial proceeding or record, subordinate officers will no longer be able to furnish confidential reports to their superiors. (MARKBY, J.—There are three points to be considered: (1) whether, under s. 135 of the Criminal Procedure Code, it was imperative on Mr. Skrine to make a report? (2) Supposing that it was not imperative, still whether he was not at liberty to make one? (3) Whether this report was made under s. 135, or whether it was independent?) The law makes no provision for such a report as was made. There is not one word in s. 135 of the Criminal Procedure Code which says that the Magistrate is to put down in writing the conclusion at which he arrives. The omission is intentional. That appears from the provisions of ss. 127* and 133.† These two sections

*[Sec. 127.—The investigation shall be completed without unnecessary delay, and as soon as it is completed the Police officer making the same shall forward to the Magistrate having the jurisdiction, a report in the form prescribed by the Local Government, setting forth the names of the parties, the nature of the complaint, and the names of the persons who appear to be acquainted with the circumstances of the case, and shall also send to such Magistrate any weapon or article which it may be necessary to produce before him.
The Police officer shall state whether the accused person has been released on bail or on his own recognizance. If the accused person be detained in custody, the Police officer shall state the fact and the cause of his detention.]

†[Sec. 133.—The officer in charge of a police station, on receiving notice or information of the unnatural or sudden death of any person, shall immediately give intimation thereof to the nearest Magistrate duly authorized, and shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and report the apparent cause of death, describing any mark of violence which may be found on the body and stating in what manner or by what weapon or instrument such mark appears to have been inflicted.

The report shall be signed by such Police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the Magistrate of the district or to the Magistrate of the division of a district.

When there is any doubt regarding the cause of death, the Police officer shall forward the body, with a view to its being examined, to the nearest Civil Surgeon or other Medical Officer appointed in this behalf by the Local Government if the state of the weather and the distance admit of its being so forwarded without risk of putrefaction on the road.

In the presidencies of Madras and Bombay the head of the village may also in like manner make the investigation and report to the nearest Magistrate duly authorized.]

provide for investigations and reports by Police-officers. These reports have to be sent to the Magistrate of the district. Section 135, which relates to investigations by a Magistrate, does not require him to send in a report. Mr. Skrine acted under this section, and therefore, as he was not directed or required under the law to make a report, the report which he did make must have been made under rules of the service, and does not form part of the proceedings. The fourth section of the Criminal Procedure Code defines a judicial proceeding as "any proceeding in which any judgment, sentence, or final order is passed." It may be one which culminates in an order or not. This report is neither a judgment, sentence, nor final order. It is in the form of a letter to the Magistrate of Nuddea with certain appendices. These were sent up to the High Court for its assistance, as some portion of the letter is illegible. They form no part of the record. The character of the report is not judicial. There must be an intention in order to make a judicial report. This is a letter, and nothing more than a letter, to the Magistrate. [MARKBY, J.—Mr. Ghose in applying for the rule argued that the document spoke for itself and relied on the first line.] The last five paragraphs show that this was not a judgment, but was a private letter. That which may be evidence of a fact is not necessarily part of a record or judicial proceeding. Suppose a Magistrate tries a case summarily, he is [744] not bound to write a judgment, and no evidence is recorded. Suppose that the prisoner subsequently indicts a witness for perjury, the notes on Counsel's brief made during the hearing before the Magistrate would not be a part of the record. There is no "case" under s. 297 of the Code. A "case" is a proceeding against some one. This report is not a proceeding. It cannot be said that there has been "a material error" in a judicial proceeding. Even supposing that Mr. Skrine had not written this report, no inquiry could be ordered, for the proceedings were purely optional; and there is nothing upon which the Court could pass any judgment, order, or sentence. The rule requires Mr. Stevens to show cause why these proceedings should not be quashed. What is there to quash? No one is affected by the proceedings. There is merely an opinion, that cannot be quashed; there is no judgment, order, or sentence. Finally, this is a confidential letter from Mr. Skrine, both in form and matter. It recites things which had transpired, that does not make it a judicial proceeding. If the Court orders this report to be given up, it will be doing more in a criminal case than it could in a civil case. Suppose this to be a special appeal, would the report be considered as a letter or as a judgment? The Government think that this is a communication privileged under s. 124 of the Evidence Act. It cannot form part of the record. A record should be kept in the office of the Magistrate together with other records of proceedings. Letters of this kind belong to the executive department, not to the judicial.

Mr. M. M. Ghose and Mr. Pault in support of the rule. As to the first question we submit that it is imperative on the Magistrate to come to a finding or report. Section 135 provides for two cases: the Magistrate may hold a judicial inquiry, and he may either stop the Police or he may adopt their proceedings. [MARKBY, J.—Suppose a Police-officer makes a report, must the Magistrate come to a finding?] If he makes an inquiry he must. The Legislature could not have intended to allow a Magistrate who enters upon such an inquiry as this to decline to come to a finding. It cannot have intended to allow the proceedings to be abortive. Suppose a Magistrate in case after [745] case, refused to come to a finding after taking evidence, would not the Court have power to make him? When a case is of such a description that the Magistrate would exercise power under the section, then the proceedings become

of a judicial nature, and the High Court has jurisdiction to inquire into them. Here the Magistrate arrested persons, discharged them, made inquiries, and embodied the result in a document which he describes as his official report. This is a judicial document, for it was imperative on Mr. Skrine to come to a finding. Even if it was not imperative, still the finding that he came to was judicial. True there are passages in the report which are not in the form of a judgment: but, taking it as a whole, it is judicial. Mr. Skrine never intended to treat it as confidential. [MARKBY, J.—On the question of intention, we should consider ourselves bound by Mr. Stevens's statement refusing to send up the report on the ground that it was confidential. Mr. Skrine's intention is immaterial.] I do not say that his intention is material. Mr. Stevens's opinion does not conclude the matter. His statement is a mere matter of opinion on his part, not a matter of fact within his knowledge. Where the law declares that proceedings shall be judicial, a mistake on the part of an officer does not alter their nature. Suppose a suit was brought against him, he could plead that he was acting in a judicial capacity and therefore protected. The form of the report will not help us in deciding this question. Some parts of it do not appear to be judicial, and it is in the form of a letter. But this is the only document which embodies the result of the inquiry; the fact that irrelevant matters are contained in it does not alter its character. It has been argued that the report was made by Mr. Skrine in his executive capacity. But Magistrates in deciding judicial questions have no executive functions, and there is nothing to make them police-officers; the distinctions are perfectly clear. All the Magistrate's powers are judicial, except some few which are declared by s. 518 of the Criminal Procedure Code to be non-judicial. The word "judgment" is not defined in the Code. [PRINSEP, J.—Have you looked into chap. xxxiv of the Code? That chapter merely says what the judgment in a trial is to contain. This report [746] is a "proceeding" of which my clients would be entitled to a copy under s. 276, as they were "affected" by it. This section has been amended by Act XI of 1874, which made it much wider. The report directs the prosecution of all the witnesses but two, and under that direction my clients were prosecuted. [PRINSEP, J.—The paragraph you refer to merely suggests the prosecution. It would be a sanction. [PRINSEP, J.—To whom?] There would be a sufficient sanction to any one who liked to prosecute. It does not matter what this document is called, so long as it is judicial under the law. It may contain extraneous matter, there may be irregularities, but the judicial character is not taken away. It has been argued that counsel's notes in a summary trial would not form part of the record. But suppose that the Magistrate, though not bound to do so, takes down evidence, would not that be part of the record? and would he not be bound to produce it?

Markby, J.—The short facts of the case, so far as it is necessary to state them for the purpose of disposing of the present rule, are that, on the 10th June last, a man named Ramgotti Biswas was found lying dead at no great distance from the factory of Lokenathpur. Under the circumstances in which he was found, I think that there was no possibility of doubt, or at any rate there was very good reason to suppose, that the man had either committed suicide or had been murdered. It was therefore a proper case for the institution of an inquiry under s. 135 of the Code of Criminal Procedure, and accordingly, as we must take it now, the Magistrate of the division proceeded to hold this inquiry. Those proceedings lasted a considerable time, and ultimately they were communicated to the Magistrate of the district. The final conclusion to which the Magistrate who held this inquiry came was, that the man had committed suicide, and that he had purposely committed suicide under such

circumstances as might raise a suspicion that the factory people or some persons connected with the factory had caused his death. Subsequently some proceedings, which arose out of this inquiry, were taken against one of the petitioners now before us, and those proceedings went on appeal before the Sessions [747] Judge of Nuddea. The Sessions Judge of Nuddea acquitted the petitioner, but he desired to see the proceedings taken under s. 135, and he accordingly sent for those proceedings; but the Magistrate of the district in whose hands they were at that time, thinking that the proceedings under s. 135 were not judicial proceedings at all, declined to send them. The Sessions Judge of Nuddea reported the matter to this Court, and another Bench of this Court, after having heard the Legal Remembrancer on the subject, came to the conclusion that the proceedings taken by Mr. Skrine, the Magistrate who held the inquiry, were proceedings under s. 135, and that they were judicial proceedings. They did not, however, order the proceedings to be sent to the Sessions Judge of Nuddea, but sent for those proceedings themselves, and an order was issued that the record of the proceedings under s. 135 should be sent up to this Court. The Magistrate of Nuddea in answer to that order sent up certain papers but he intimated at the same time that he was in possession of a report by Mr. Skrine, and he informed this Court that he did not send that report as that was written by Mr. Skrine as a confidential report to him.

In that stage of the proceedings the case was transferred from the Bench which issued the original order to this Bench, and as the matter then stood, the only point for our consideration was whether or no the Magistrate of Nuddea was right in the view which he took, viz., that the report of Mr. Skrine did not form part of the proceedings under s. 135. In the meantime, however, before we came to any conclusion upon that, the present application was made, specially requesting that we should send for this report, and that, after obtaining that report, we should quash it.

Now a good many questions would have to be considered before granting such an application. There may be some doubt whether Troyloktanath Biswas, the only one of the petitioners who had ever been put upon his trial, having been acquitted, the petitioners had any *locus standi* at all. There may be considerable doubt, even putting all other questions out of the way, whether this Court would, at the instance of persons standing in the position of the petitioners, quash a finding under s. 135; [748] and there is still a further objection taken by the *Advocate-General*, which is really not answered, viz., that as the inquiry under that section is optional, this Court has no power to order fresh proceedings to be taken, and unless fresh proceedings can be taken, there is but little use in our interfering at all. But it is not necessary to go into these questions, for on another ground I think that this application must fail.

The reason why, notwithstanding these objections, we thought it desirable without further considering them that this rule should issue, was this:—It was absolutely necessary for us in the way the case came before us to consider whether the Magistrate of Nuddea had duly complied with the order of this Court. The proceedings having been sent for, the report was not sent, and I understand the course taken by Mr. Stevens to have been to submit to the decision of this Court, whether or no he was bound to send up that report. I may say in passing that the course so taken by Mr. Stevens shows that he acted with perfect propriety in the matter. But it was necessary to decide the question which he submitted to us quite independently of the present application. For my own part also I strongly desired to have the assistance

of the advisers of the Crown in a discussion of this character. The question is of considerable importance, and one which may in some cases be of very serious consequence, whether the result of an enquiry under this section is such that, without the possibility of using any discretion in the matter, the Magistrate is bound to make it public. I therefore thought it desirable to issue a rule in order to bring in the Crown and have the question discussed. Accordingly I issued a rule in order to have the benefit of the argument of counsel for the Crown upon the construction of this section.

The matter has now been argued, and we have to determine what is the true construction of this section. But before I enter into that question I wish to say one word as to what I understand to be the object of the petitioners in this case. I may say at once that, if there was the slightest indication that there was an intention of opening up a charge against any individual whatsoever by these proceedings, I would not have been a party for a single moment to any discussion in the matter. [749] I would not by issuing a rule have given the least semblance of encouragement to such proceedings. But I fully understood Mr. Ghose from the first, as he has also represented now, that that is not the object of these proceedings. I understand the real object of these proceedings to be to clear the memory of the deceased man from an imputation which has undoubtedly been cast upon him. Whether we can arrive at that result under the law as it stands is a different matter; but I am bound to say that I consider that the object, if it can be attained by law, is a perfectly legitimate object. No one can doubt that it must be a matter of great pain to persons connected with this unfortunate man that this statement, viz., that he had committed suicide under such circumstances as the Magistrate supposes, should have been made. It may, no doubt, sometimes be the duty of public officers to make statements which are painful to others, but there is nothing objectionable if persons affected by those statements try by any legal means in their power to get rid of those statements; and I go one step further, I think that the relatives of this deceased person were not rash in their inference, when they found a document of this kind printed and published, that it was intended to be put forth as the judicial result of a judicial inquiry. It commences thus: "From F.H. Skrine, Esq., Officiating Joint Magistrate on special duty, to the Magistrate of Nuddea. I have the honour to submit a report embodying the results of my inquiry into the cause of the death of Ramgotti Biswas." Reasonably enough the way in which it struck them was, that this was not merely an opinion of an individual formed upon the best materials that he could get together by any means in his power, and reported confidentially to his superior officer; but that it was an opinion of a judicial officer formed upon evidence and in a judicial manner. Although they were misled in supposing that it was a document of this nature, I think that they were very reasonably justified in assuming that it was so. I may also say that if this document had been of that character, and one therefore under our control, I should not have hesitated for a moment, if the law would allow, me, in setting it aside. I think that it is of the utmost importance to keep a clear distinction between [730] judicial and executive proceedings; and if this report was before me as a judicial proceeding, I should feel bound to say that it was a very unsatisfactory one. I think that it is impossible to read this document without seeing that this is not the result of an inquiry by Mr. Skrine himself, but of Mr. Skrine assisted by a variety of persons of inferior position. That might be a most useful thing for an ulterior object, but, would not be an inquiry which ought to go forth to the world as a judicial proceeding by a Magistrate. I think it, therefore, right to say that if this had been a

judicial proceeding, I should have treated it very differently from what I am now doing, and I hope that if it be once understood that this is not a judicial proceeding, it will be deprived of very much of its injurious effect.

Now with regard to what is the more immediate subject for us now to consider. I am free to admit that, during the course of the argument, I have had some doubt as to what the intention of the Legislature was when introducing this section. I think that it may be fairly argued that *prima facie* when a Magistrate holds a judicial inquiry and has power to take evidence, we should expect that it was intended that some result should be arrived at. But though that is so at first sight, I think, on further consideration, it is by no means clear, even upon a general view of the Act independently of the exact language of the section itself, that that was the intention of the legislature. The object of these inquiries may be three-fold. The object may be to calm any alarm that had been created in the mind of the public on the occurrence of a violent or unnatural death, and to allay any unfounded suspicion; or the object may be to put in force the law against a particular individual; or it may be merely to gain information to be used by the authorities according to their discretion. Now, looking at the general character of this section and the sections which precede it, I cannot myself see that, merely for the purpose of putting the law in force against any particular individual, there was any necessity for the section at all. As far as I can see, the powers of a Magistrate under the law, if he suspects any person of having committed any particular offence, are ample without having any recourse to this section. Therefore the inquiry, or inquest as it is sometimes [751] called, must be to inform either the officers of Government or the public at large as to what has really occurred or is suspected to have occurred. Now I am by no means prepared to say that, as a matter of policy, more would be gained than lost by the publication of the result of the inquiry. We may no doubt imagine cases in which it is very desirable that the result should be published, but we may also imagine cases in which it would be most injurious, even to private individuals, if the result were published. I only say this to show that I approach the consideration of the language of this section without being able to discern any strong reasons of policy in favour of either one construction or the other; and, therefore, though we may look to the policy of an Act as one of our guides in its construction, there is really nothing here to indicate what that policy is. The language of the section is this: "The nearest Magistrate duly authorized may hold an inquiry into the cause of any such death, either instead of or in addition to the investigation held by the Police officer; and if he do so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence, although no specific charge has been made against any person. The Magistrate holding such an inquiry shall record the evidence taken upon it in any of the manners hereinafter prescribed according to the circumstances of the case." Now Mr. Ghose argued that the language of the section at once pointed to the provisions of s. 133, and that the inquiry held by the Magistrate was to be either supplemental to, or, if he thought proper, substituted for the inquiry held by a Police officer under s. 133, and he quite rightly indicated to us that under s. 133 a report is required, for that section says, that the Police officer shall make an investigation and report the apparent cause of death, and so on. That argument which struck me at first seems to me to fail, because, whilst the Police officer necessarily has some superior to whom he can report, it is by no means always so with the Magistrate. The Magistrate of the district holding an inquiry under s. 135, has, under the Code of Criminal Procedure, no

executive superior to whom he can report at all. It is not impossible for him to report to the Judge or to the Commissioner, or to Government; but I may say [782] that it would be entirely out of the ordinary course of proceeding in this country if he were, judicially and not executively, to make a report either to one or to the other. At any rate, I feel sure that if it had been intended that the Magistrate should report judicially either to the Sessions Judge or to the Commissioner, or to Government, this would have been stated expressly in the Act.

Then Mr. Ghose says, that although the Magistrate is not bound to report he must come to a finding. That also clearly was not the intention of the Legislature, because, under s. 133, although there is to be a report to the Magistrate, which is clearly not a finding, there is no person ordered to come to any finding at all. I can see nothing which gives any support to the argument that if there is not to be a report, there must still be a finding as distinguished from a report. The language of the section does not require a report, nor does it require a finding; and it seems to me that if we were to say that, under this section, the Magistrate who holds an enquiry is bound to make a report or come to a finding, we should be making an unjustifiable addition to the language of the Legislature.

Some comparison has been made between a Coroner's inquiry and the inquiry under s. 135. As far as I can see, the only semblance of any basis for that comparison arises out of the word "inquest," which is used, not in s. 135, but in the earlier sections, where the Legislature apportions the various duties of Magistrates. I think that we ought not to introduce an analogy which does not really exist. The proceedings of a Coroner are in their nature regular criminal proceedings having a distinct result, and a result upon which, if it affects any particular person at all, ulterior proceedings can be taken against that person. I think also I am speaking correctly when I say that even in some cases where no particular person was affected, still the result of the verdict of a Coroner's jury might be to effect a forfeiture of property to the Crown. No doubt some of these results do not exist now and have fallen into disuse; but we must, I think, remember what the Coroner's inquest originally was when we are asked to consider why it results in a finding.

[783] On the whole, therefore, I think that this rule ought to be discharged upon the ground that the report sent up by Mr. Skrine to the Magistrate of Nuddea was not part of a judicial proceeding.

Prinsep, J.—I altogether agree in the view of the law in s. 135 of the Code of Criminal Procedure which has just been laid down by Mr. Justice MARKBY, and in holding that the report submitted by Mr. Skrine, the Magistrate of the Division of Chooadanga, to the District Magistrate, Mr. Stevens, is no part of any judicial proceedings held under that section. It seems to me quite clear that the form of an inquiry under s. 135 is directed more to elucidate the facts of a violent or unnatural death before there is any reasonable suspicion of the commission of any offence, and that when such grounds do exist, the inquiry comes under another portion of the Code.

As regards the form in which the present application is made to us, I must say that I have always entertained serious doubts as to the *locus standi* of the petitioners, and it was, as has already been stated in the judgment which has been just delivered, on account of the importance of deciding the position of the Magistrate with regard to this particular report and the proceedings taken by him that led me to agree in the course taken.

Whatever grounds the relations of the deceased may have to complain of the terms of the report in the form in which they produce it before us and the aspersions that it may cast on the memory of the deceased Ramgotti Biswas, I think that the observation of the learned *Advocate-General* in the course of his argument completely disposes of any objection that they may take to the terms in which that report mentions Ramgotti. That report was never published, until through some injudicious agitation of the friends or advisers of the petitioners a pressure was brought to bear on the Government, which induced the latter to consent to the publication of that report in the expurgated form in which it has been laid before us. Had this course not been taken on behalf of the petitioners, that report would never have been published or been made known except to the officials immediately concerned. We have no power to [754] quash that report as we are asked to do, nor has it been suggested that any good result would ensue in the ends of justice by any re-opening of the enquiry, since it is admitted that nothing is forthcoming or likely to be elicited which would throw any fresh light on the circumstances attending the death of Ramgotti Biswas.

NOTES.

[ENQUIRY UNDER S. 135 OF X OF 1872 (-S. 176 OF Y OF 1898) NOT JUDICIAL—

So it cannot be revised under s. 435 of V of 1898:—3 Cal. 742; *Rat. Un. Cr. Cases*, 843.]

[3 Cal. 754]

The 30th April, 1878.

PRESENT:

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Sufferuddin

versus

Ibrahim.*

[- 2 C. L. R. 263]

*Jurisdiction—Bench of Magistrates—Criminal Procedure Code**(Act X of 1872), ss. 50, 530.*

A Bench of Magistrates has no power to deal with cases coming under s. 530 of the Criminal Procedure Code. A Bench may be empowered under s. 50 of the Code "to try such cases or such class of cases only and within such limits" as the Government may direct." The definition of the term "trial" shows that it refers to trials for offences, and these do not come within the miscellaneous matters mentioned in s. 530.

THE reference in this case was as follows:—

"There is a dispute between Ibrahim and Sufferuddin concerning the possession of some lands. The former claims the land as being in his own cultivation as his howlah lands subordinate to the brahmatur tenure of Gobinda Chandra Banerjee in Kismut Kistokate. The latter sets up a *burga* right (tenure for which rent is paid in kind), and claims to be in direct possession. Subsequently, on the application of Ibrahim, the Magistrate of the district took up the matter under s. 530 of the Criminal Procedure Code, and made the case

* Criminal Reference, No. 26 of 1878, by H. C. Sutherland, Esq., Sessions Judge of Backergunge, dated the 16th April 1878.

over for trial to Baboo Trailokhya Nath Sen, Deputy Magistrate exercising second-class powers, with directions to try it in the Bench over which he presided with first-class powers. The Bench, consisting of the Deputy Magistrate with the Honorary Magistrate, Baboo Chundra Nath Sen, took the case up and examined all the witnesses on behalf of Sufferuddin and two of the important witnesses on behalf of Ibrahim. But at a later stage a Bench, consisting of the same Deputy Magistrate [755] and another Honorary Magistrate, Moulvie Mahomed Fazil, examined the rest of the witnesses, finally disposed of the case, and directed that Ibrahim should retain possession of the land until ousted by due course of law.

"It is first urged in this case that the evidence has been improperly received, inasmuch as the witnesses were heard, some by one Bench, and others by another Bench of Magistrates. It appears from the record that the witnesses for the second party were all examined by a Bench consisting of the Deputy Magistrate with an Honorary Magistrate, Babu Chundra Nath Sen, who also examined two of the most important witnesses,—viz., Shita Nath and Nobin, to prove relinquishment on behalf of the first party. At a later stage of the case three witnesses were examined for the first party by a Bench consisting of the same Deputy Magistrate and an Honorary Magistrate, Moulvie Mohamed Fazil, and that the final order was passed by this last Bench of Magistrates. Now this proceeding is altogether illegal, Moulvie Mohamed Fazil, who decided the case, knew nothing whatever of the case for the second party, and his knowledge of the case for the first party was very imperfect.

"It is next urged that there is no evidence to support the order. This, I think, is pretty clear from the Deputy Magistrate's explanation, who says that more stress was laid on the Sub-Inspector's report than on the evidence of the witnesses. The Sub-Inspector's report is no evidence at all. Had he been examined, it would have been a very different thing altogether.

"I think that the order ought not to stand, and under the circumstances, stated above, recommend that it be set aside."

Prinsep, J.—In addition to the reasons stated by the Sessions Judge, we are of opinion that it was not competent to a Bench of Magistrates to deal with a case under s. 530. A Bench may be empowered under s. 50 "to try such cases or such classes of cases only and within such limits as the Government may direct." The definition of the term "trial" shows that it refers only to trials for offences, and not to miscellaneous matters such as those coming within s. 530. So that in this view of the law also the order passed was illegal: it is accordingly set aside.

NOTES.

[I. TRIAL—MEANING OF—

See for various definitions:—(1878) 3 Cal. 754 -2 C.L.R. 263; (1896) 25 Cal 863: - 2 C.W.N. 465; (1903) 27 Mad. 510=1 Weir 787.

II. TRIAL BY ONE BENCH OF MAGISTRATES ON EVIDENCE PARTLY RECORDED, BY ANOTHER—

Held to be illegal and the proceedings were set aside.—

See (1883) 13 C.L.R. 212 where one Magistrate was absent while important evidence was being taken even though he signed the final order afterwards.

See also (1895) 18 Mad. 394; (1886) 12 Cal. 558; (1893) 20 Cal. 870; (1895) 23 Cal. 194.]

[756] The 30th April, 1878.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

In the matter of Chumman Shah and another.*

[=2 C. L. R. 317]

Confession--Attestation when unnecessary—Criminal Procedure Code, (Act X of 1872), ss. 324, 346.

The attestation required by s. 346 of the Criminal Procedure Code is unnecessary when a confession is made in Court to the officer trying the case at the time of trial.

THE only question in this case was whether a conviction of a prisoner by a Deputy Magistrate, based mainly upon a confession made by the prisoner in Court to such Deputy Magistrate, ought to be quashed on the ground that the record of the confession had not been attested as required by s. 346 of the Criminal Procedure Code †

The Deputy Magistrate had convicted the prisoner under s. 411 of the Indian Penal Code, and sentenced him to one year's rigorous imprisonment.

The Sessions Judge doubted whether this conviction could stand, and referred the matter to the High Court, which ruled as follows :

Prinsep, J. (MARKBY, J., concurring).—It was unnecessary for the Magistrate to record any "confession" of Chumman Shah, since he was competent on the admission of Chumman to sentence him without any further record (s. 324, Code of Criminal Procedure).‡

NOTES.

[Sec. 364 of V of 1898 is applicable to confessions under sec. 164 of the Act.]

* Criminal Reference by F. Cowley, Esq., Officiating Sessions Judge of Monghyr, dated the 24th April 1876.

† [Sec. 346 :—Whenever an accused person is examined, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, and shall be shown or read to him, and he shall be at liberty to explain or add to his answers.

When the whole is made conformable to what he declares is the truth, the examination shall be attested by the signature of the Magistrate or Sessions Judge, who shall certify under his own hand that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person.

In cases in which the examination of the accused person is not recorded by the Magistrate or Sessions Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the vernacular of the district, or in English, if he is sufficiently acquainted with that language; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall be annexed to the record. If the Magistrate or Sessions Judge is precluded from making a memorandum as above required, he shall record the reason of his inability to do so.

The accused person shall sign or attest by his mark such record.

If the examination be taken in the course of a preliminary inquiry, and the Court of Session find that the provisions of this section have not been fully complied with, it shall take evidence that the prisoner duly made the statement recorded: Provided that if the error does not prejudice the prisoner, it shall not be deemed to affect the admissibility of the statement so recorded.]

Accused may be convicted on his own plea.

‡ [Sec. 324 :—If an accused person admits the commission of an offence before a Court competent to try him for such offence, such Court may convict him on his own admission.]

[757] The 24th June, 1878.

PRESENT :

MR. JUSTICE AINSLIE AND MR. JUSTICE BROUGHTON.

The Empress

versus

Nurul Huqq and another.

[---22 C.L.R. 408]

Recognizance—Power of High Court to interfere when forfeited.

The High Court has no power to reduce the amount of recognizances which have been forfeited, but in a case of hardship the matter should be referred to Government.

IN this case Nurul Huqq and Bissember Mitter were, in April 1877, bound under penalties of Rs. 700 each to keep the peace for a year. On the 31st December 1877 they were convicted by the Assistant Magistrate of Khoolna of committing mischief in respect of some cocoanuts, and sentenced to a fine of Rs. 20 each. This sentence was confirmed by the Officiating Magistrate of Jessore on appeal.

On the 2nd of May 1878 the Assistant Magistrate of Khoolna ordered that the penalty (Rs. 700) mentioned in their security-bond should be realized. The Magistrate, to whom an appeal against this order was made, was of opinion that, considering the position of the defendants, who were peons in the cutcherry of a zemindar and earning probably not more than Rs. 7 or 8 a month, a penalty of Rs. 700 each in the form of forfeited security in addition to the fine in the case of mischief was far heavier than was necessary, and reported the proceedings for the orders of the High Court under s. 296 of Act X of 1872.

Upon this reference the following **order** was made by

Ainslie, J.—In the case of *Nilmadhuh Ghosal* (19 W. R., Cr. Rul., 1), a Bench of this Court held that we have no power to reduce the amount of recognizances which have been forfeited. The Bombay High Court has expressed the same opinion.

The papers must be returned. The Officiating Magistrate should refer the matter to Government, if he thinks the amount of the recognizances was excessive.

NOTES.

[STATUTORY CHANGES—

Under the new Code of 1898 (V of 1898), ss. 514 and 515, the Magistrate himself has power to reduce the forfeited recognizance and such order may be taken in appeal to or revised by the High Court.

The cases which followed this case (3 Cal. 757), viz., 1 Bom. H. C. R. Cr. 138 ; 8 C. L. R., 72 ; 19 W. R., 1 (Cr.) ; Rat Un Cr. Cases 20 ; 2 P. R. 1883 (Cr.) are no longer good law.]

* Criminal Reference, No. P-132 of 1878, from an order of W. H. Page, Esq., Officiating Magistrate of Jessore, dated the 18th June 1878.

[758] *The 5th June, 1878.*

PRESENT :

MR. JUSTICE AINSLIE AND MR. JUSTICE WHITE.

The Empress

versus

The Municipal Corporation of the Town of Calcutta.*

[—2 C. L. R. 530]

*Reference—Municipal Commissioners—Public Servant—Act IV of 1877
(Presidency Magistrates' Act), ss. 39, 240—Indian Penal Code,
ss. 11, 21, Description 10, Illustration 1.*

A Municipal Corporation is not a public servant within the meaning of s. 39 † of Act IV of 1877, and may, therefore, be prosecuted under the Penal Code without the preliminary sanction of the Government required by that section.

THE Corporation of the Town of Calcutta was indicted, at the instance of Osmond Beeby and others, under ss. 268, 269, 270, and 290 of the Indian Penal Code, for keeping a night soil depôt in such proximity to the houses of the complainants in the neighbourhood of Shureef Dufftree's Lane in the Town of Calcutta as to cause a public nuisance.

On the day fixed for the hearing, the Chief Magistrate doubted whether he could entertain the charge, inasmuch as he considered the Municipal Commissioners to be public servants, and as such privileged from prosecution, except under the sanction of the Government as provided for by s. 39 of the Presidency Magistrates' Act.

He thereupon, under s. 240 ‡ of the same Act, referred the point for the opinion of the High Court, and gave in his letter of reference the following reasons for his views :—

1st. --Section 39 of Act IV of 1877 provides that no public servant who is not removeable from his office without the sanction of Government shall be

* Reference No. 177 of 1878, from J. G. Charles, Esq., Officiating Chief Magistrate of Calcutta, dated 29th May 1878.

† [Sec. 39 :—A complaint of an offence of which any Judge or any public servant not removeable from his office without the sanction of the Government is accused as such Judge or public servant, shall not be received by any Presidency Magistrate, except with the previous sanction or under the direction

- (a) of the Government, or
- (b) of some officer empowered in this behalf by the Government, or
- (c) of some Court or other authority to which such Judge or public servant is subordinate, and whose power so to sanction or direct such complaint has not been limited by the Government.

No such Judge or public servant shall, unless with the previous sanction of the Government, be prosecuted for any act purporting to be done by him in the discharge of his duty.

The Government may, in any case or class of cases, prescribe the person by whom, and the manner in which, the prosecution is to be conducted, and may specify the Court before which the trial shall be held.

In this section, the expression "Government" means either the Local Government, or the Governor-General in Council, and the expressions "Judge" and "public servant" have the meaning assigned to them respectively by the Indian Penal Code.]

‡ [Sec. 240 :—A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which may arise in the hearing of any case in which he has jurisdiction; or may give judgment in any such matter subject to the decision of the High Court on such reference; and pending such decision by the High Court, may either commit the accused person to jail or release him on bail to appear for judgment when called upon.]

prosecuted for any act purporting to be done by him in the discharge of his duty without the previous sanction of Government.

2nd.—That the illustration to s. 21 of the Penal Code declares that a Municipal Commissioner is a public servant; and under [759] s. 11 of the same Code the word person is said to include a body of persons.

3rd.—And that therefore a Municipal Corporation as a body was entitled to the same privileges as the individual Municipal Commissioners who composed it.

Mr. *Phillips* for the Complainants.—Section 39 does not apply to the present case. In the first place, the sanction only applies where Government has some control over the dismissal of a public servant from his office. Here the Government has no such control, the Corporation of Calcutta being a body created by the Legislature, holding no office, and consequently incapable of being dismissed therefrom, and only capable of extinction by an Act of the Legislature. It was never intended that when Government had no means of affording redress by sanctioning the dismissal of the offender, it should have the power of prohibiting a prosecution. This point is entirely overlooked by the Magistrate.

In the second place the Corporation is not a public servant; the Magistrate infers that the Corporation is a public servant, but he does not profess to find that it comes within any of the clauses of the definition of a public servant in s. 21 of the Penal Code. His reasoning appears to be, that as a single Municipal Commissioner is a public servant, therefore the whole body of Municipal Commissioners must be public servants; and as he considers the Corporation to be the equivalent to the whole body of existing Municipal Commissioners, he holds that the Corporation is a public servant: he also, without adverting to the point above noticed, holds that if a single Municipal Commissioner is protected from prosecution, the whole body must be equally protected.

Now the Corporation is not the same as the whole body of existing members; it is a thing distinct from all its existing members, and includes all past and future members; hence nothing can be inferred as to its being a public servant from the fact that all its members are so. Again, there is the same fallacy in the Magistrate's further reasoning that the Corporation must be protected, if all its members are. The individual member requires [760] such protection, for he may be made to suffer in person and pocket; but a Corporation cannot be imprisoned, nor can its members be made to suffer individually; it can only be reached by distraining its property or be made to pay out of its corporate funds.

The very nature of a Corporation is, therefore, a sufficient protection, and the ground for the Magistrate's inference is thus cut away. Besides, such a protection as is afforded by s. 39 of the Presidency Magistrates' Act being against common right, is not to be extended by inference.

Mr. *Piffard* on behalf of the Corporation.

Ainslie, J.—The question referred by the Presidency Magistrate is, whether the protection extended by s. 39 of Act IV of 1877 to certain individual public servants extends equally to a Municipal Corporation prosecuted under the Indian Penal Code for being guilty of a public nuisance.

By s. 11 of the Penal Code, the word "person" is defined to include a body of persons whether incorporated or not; and therefore the word "person" in s. 21 may be read as a body of persons incorporated. The words "public

servants" in that section may consequently denote a body of persons incorporated falling under any of the descriptions given therein. It is not necessary to refer to any except the tenth. The illustration in the tenth description, says that a Municipal Commissioner is a public servant; but it does not therefore follow that a Corporation such as that created by Act IV of 1876 (B.C.) is also a public servant within the meaning of that section.

The words "every officer" in the 10th clause seem rather to point to an individual than to an incorporated body; but assuming, for the purposes of this reference, that the Municipal Corporation of Calcutta is a public servant within the meaning of s. 21 of the Penal Code, still it seems to me that it does not come within the provision of s. 39 of the Presidency Magistrates' Act. By that Act no such Judge or public servant as is described in that section shall, unless with the previous sanction of Government, be prosecuted for any act purporting [761] to be done by him in the discharge of his duty. The class of public servants referred to consists of those who are "not removable from office without the sanction of Government." It appears to me that this description must be read in its entirety, and that the words "not removable from office" cannot be separated from the following words "without the sanction of Government."

But if the whole be read as describing the class exempted from prosecution except with the previous sanction of Government, the description can only be applied to a class not removable from office at all by dropping the words "without the sanction of Government," which have no meaning as applied to such public servants.

The right to prosecute any person, or body of persons, by whom one may have been injured, is a common right which can only be limited by special legislation; and in considering whether the right has been taken away, we must see that it is taken away by express words, or by necessary implication. It does not seem to me that it must necessarily be implied that, by the words "not removable from office without the sanction of Government," it was the intention of the Legislature to include those who are not removable from office under any circumstances at all.

I see no reason to suppose that the Government must have meant to extend the same protection to a body, such as the Municipal Corporation of Calcutta, which cannot be taken under a warrant, or sentenced to imprisonment, which it thought fit to extend to certain individuals in the service of that Corporation, who no doubt are protected by s. 32 of the Calcutta Municipal Act and s. 39 of the Presidency Magistrates' Act.

The answer which I would therefore give to the question referred to us by the Magistrate is, that the protection does not extend to a Municipal Corporation prosecuted under the Indian Penal Code.

White, J.—I am of the same opinion. The question submitted to us by the Presidency Magistrate turns entirely upon the meaning and true construction of s. 39 of the Presidency Magistrates' Act.

[762] It is not disputed, nor could it be disputed, that unless that section applies to the Corporation of the Town of Calcutta, it is liable under the Penal Code to be prosecuted for a nuisance in the same way as if the offence had been committed by an ordinary individual. A Corporation may be proceeded against criminally, as well for a misfeasance as for a non-feasance—*Reg. v. The Birmingham and Gloucester Railway Company* (3 Q. B. Rep., 223), *Reg. v. Scott* (3 Q. B. Rep., 547), and *Reg. v. The Great North of England Railway Company* (9 Q. B. Rep., 315).

Section 39, as regards a Judge or any public servant not removable from office without the sanction of the Government, exempts them from prosecution for an offence except with the previous sanction of the Government. The word "Government," as used in the section, means the Government acting in its executive capacity. It is contended that the Calcutta Corporation falls within the category of a public servant not removable without the sanction of the Government. I think it is open to much doubt whether the Corporation, as distinct from its individual members, is a public servant at all, as these words are defined by the 21st section of the Penal Code, which is incorporated with the 39th section of the Act under consideration. Assuming, however, for the purpose of the argument, that that point is decided in favour of the defendants' contention, it seems to me clear that the Calcutta Corporation does not come within the description of a public servant irremovable from office without the sanction of Government.

The Corporation is created by Act IV of 1876 (B. C.). By the 4th section of that Act certain persons, to the number of 72, who are styled Commissioners, and of whom 48 are elected by the rate-payers and 24 appointed by the Government, are incorporated by the name of the Corporation of the Town of Calcutta. The Corporation is to have perpetual succession, a common seal, and by its corporate name to sue and be sued.

There is no provision in the Act for putting an end to the Corporation, or for removing or dismissing it, either with or [763] without the sanction of Government, which means, as I have said, the Executive Government.

It can only cease to exist by an Act of the Legislature, and until and unless the Legislature interferes, its corporate life must continue. The words "public servant not removable without the sanction of Government" are wholly inappropriate to describe the legal position of such a corporation.

Again, if it were necessary to go beyond the Corporation and consider the position of the 72 members comprising it, they appear to be equally without the particular description of public servant mentioned in s. 39 of the Presidency Magistrates' Act.

By s. 22 they are elected for a term of three years, and continue in office during that term. Section 23 enumerates the circumstances under which, and the only circumstances under which, they cease to be members of the Corporation. Those circumstances are death, resignation, or disqualification; the disqualification being that which may arise from their becoming bankrupt or interested in a contract with the Corporation, or being absent from Calcutta for six consecutive months, or being sentenced to a term of imprisonment; so that looking behind the Corporation, if I may so say, to the members who constitute it, it cannot be said of them, any more than of the Corporation, that they are persons who are not removable without the sanction of Government.

Mr. Piffard has argued that the words in s. 39, which we are now considering, are intended to embrace two classes of public servants, —(1) those who are not removable from office at all, and (2) those who are removable only with the sanction of Government. But I am unable to agree with him that that is the true construction of the words in question.

They appear to me to point to one class, and one class only, of public servants, viz., that class which is removable only with the sanction of Government. The words are satisfied by applying them to that class, and whereas,

here a privilege is created in favour of certain persons, the meaning of the words creating the privilege should not be extended beyond their plain and natural sense. Mr. Piffard's contention would require us to construe the section as if its language had been "any public servant not [764] removable from his office, or if removable, not removable without the sanction of Government."

In fact, to warrant the construction contended for, some additional words would have to be introduced, and this circumstance, I think, is fatal to the argument.

I agree with my brother AINSLIE, that if we look to the reason of the privilege conferred by the 39th section, there is a marked distinction between the case of a public servant whose removal required the sanction of Government, and that of a Corporation in the position of the Calcutta Municipality. The Government may have an interest in protecting the former from prosecution without their previous sanction, but no interest in protecting the latter from the consequences of their own acts; moreover, the Corporation if convicted cannot be punished by imprisonment, but only by fine. The Legislature must have thought it a matter of importance that no public servant whose removal requires the sanction of Government should be subjected to imprisonment without its sanction, but the same reasons for requiring Government sanction do not apply when the result would be merely the infliction of a fine, which must ultimately be paid by the rate-payers of the Town of Calcutta.

I concur, therefore, in the opinion that the question which has been submitted to us by the Presidency Magistrate must be answered in the negative.

[765] *The 10th May, 1878.*

PRESENT:

MR. JUSTICE R. C. MITTER AND MR. JUSTICE MACLEAN.

The Empress

versus

Mohim Chunder Rai and another.*

Assessors—Trial by Jury of a case properly triable with Assessors—Appeal on facts—Act VIII of 1871, s. 80—Criminal Procedure Code (Act X of 1872), s. 233.

Per MACLEAN, J. (MITTER, J., dubitante).—The trial by a jury of an offence triable with assessors is not invalid on that ground, but an accused who would have been entitled to an appeal on the facts, if the case had been tried with assessors, is not debarred from that right merely by the fact that the trial by jury is not invalid.

* Criminal Appeal, No. 182 of 1878, against the order of W. H. Verner, Esq., Officiating Additional Sessions Judge, 24-Pargannas, dated the 14th February 1878.

IN this case the petitioners, who had been charged with an offence under s. 80^c of Act VIII of 1871, had been tried by the Sessions Judge of the 24-Pargannas with the aid of a jury, and convicted.

Bahoo Doido Nath Dutt, for the petitioners, contended, among other things, that the petitioners having been tried and convicted of an offence to which trial by jury had not been made applicable by the Government notification of January 1862 (*Calcutta Gazette*), and who ought, therefore, to have been tried by the Judge with the aid of assessors, such trial and conviction was, under the circumstances, invalid, and, if not, the accused were entitled to an appeal upon facts in the same way as they would have been if their trial had been conducted in the manner prescribed by law.

The Government Pleader Baboo Juggadanund Mookerjee, *contra*.

The following judgments were delivered by the Court, which, however, confirmed the sentences passed upon the prisoners, being of opinion that the lower Court's decision upon the facts was correct.

[766] Maclean, J.—The appellants have been convicted by the Sessions Court of the 24-Pargannas of an offence under the Registration Act, VIII of 1871, and as the trial was held with a jury, the petition of appeal filed on 13th April was directed to show certain errors of law, such as defects in the Judge's charge to the jury. By a subsequent petition of 17th April, the prisoners claim to be heard against the conviction on questions of fact as well as law, as the offence of which they have been convicted is not one of those to which trial by jury has been made applicable by the Government notification of January 1862 (*Calcutta Gazette*, 8th January 1862, p. 87).

It has been contended before us by the Government Pleader that the Sessions Judge was competent to try the prisoners with a jury notwithstanding that the offence charged is not included in the Government notification referred to, and therefore the prisoners are not entitled to appeal against their conviction except upon matter of law; but it is not necessary for the purposes of this appeal to decide that question. The trial by a jury of an offence triable with assessors is not invalid on that ground (s. 233, Criminal Procedure Code—Explanation)[†]; but it appears to me that the prisoners, who would have been

Penalty for certain other offences.

Making false statements before registering officer.

Delivering false copy or translation.

False personation.

Abetment of offences under this Act.

Local Government may order trials before Court of Session to be by jury.

* [Sec. 80.—Whoever commits any of the following offences shall be punishable with imprisonment for a term which may extend to seven years or with fine, or with both:—

(a) intentionally makes any false statement, whether on oath or not, and whether it has been recorded or not, before any officer acting in execution of this Act, in any proceeding or enquiry under this Act,

(b) intentionally delivers to a registering officer in any proceeding under section nineteen or section twenty-one a false copy or translation of a document, or a false copy of a map or plan,

(c) falsely personates another, and in such assumed character presents any document, or makes any admission or statement, or causes any summons or commission to be issued, or does any other Act in any proceeding or enquiry under this Act, or

(d) abets within the meaning of the Indian Penal Code anything made punishable by this Act.]

† [Sec. 233.—The Local Government may order that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury, in any district and such Local Government may from time to time revoke or alter such order. Orders passed under this section shall be published in Official Gazette and in such other manner as the Local Government from time to time direct.

Explanation.—If an offence triable with assessors is tried by a jury, the trial shall not on

entitled to an appeal on the facts, if the case had been tried with assessors, are not debarred from that merely by the fact that their trial by jury is not invalid. An error of procedure not affecting the merits of the case ought not to affect the prisoner's right of appeal.

Dealing, however, with this appeal as an appeal upon the facts, I consider the conviction of the prisoners a proper one, and I would dismiss the appeal.

Mitter, J.—I concur; but I do not desire to express any opinion as to whether the prisoners are entitled to appeal on questions of fact. But assuming that they have this right, I concur with my learned colleague that the conviction of the prisoners is fully supported by the evidence. We accordingly dismiss the appeal.

Appeal dismissed.

NOTES.

[RIGHT OF APPEAL ON FACTS WHEN OFFENCE TRIABLE BY ASSESSORS IS TRIED BY JURY—

There is a conflict of opinion on this question.

The following cases hold that there is appeal on facts also.—

24 W.R. 30 (Cr.); MACLEAN, J., in 3 Cal., 765; Rat. Un. Cr. C., 961; 15 W. R., 59 (Cr.); BENSON, J., in (1902) 26 Mad., 243; (1895) 26 Mad., 243(n). 1 Weir 432; (1898) 22 Mad., 15.

But the following, on the other hand, hold *contra*:—

MITTER, J., in 3 Cal., 765; 4 C.L.R., 105; (1898) 25 Cal., 555, (1899) 23 Bom., 696; 3 Bom. L.R., 278 F.B., BHASHYAM AYYANGAR, J, in (1902) 26 Mad., 213; 2 Weir 463.]

[767] APPELLATE CIVIL.

The 16th June, 1878.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE JACKSON, AND
MR. JUSTICE AINSLIE.

Anonymous.

Vakalatnama—Act VII of 1870, art. 10, sched. II—Act XVIII of 1869, sched. II.

A vakalatnama authorizing a pleader to receive during the course of a suit which he has been empowered to conduct, money or documents receivable by his client in the ordinary course of such suit, or in consequence of the order or decree of the Court in such suit, does not require a stamp under Act XVIII of 1869.

REFERENCE made to the High Court by the Officiating Secretary to the Board of Revenue, North-Western Provinces, under s. 41 of Act XVIII of 1869.

The question referred was as follows.—

Whether a Court of Justice would, ordinarily, be acting regularly in directing a public officer to pay money or make over valuable documents

that ground merely be invalid. If an offence triable by a jury is tried with assessors, the trial shall not on that ground merely be invalid, unless objection be taken before the Court records its finding.]

* Reference from the Board of Revenue, North-Western Provinces, under s. 41 of Act XVIII of 1869.

to a pleader who has been empowered to conduct a case by a vakalatnama stamped under article 10th sch II of the Court Fees Act, but who has not been authorized by a power-of-attorney bearing the stamp prescribed in schedule II of Act XVIII of 1869 to receive on behalf of his client such money or valuable documents.

No one appeared to argue the point.

The **opinion** of the Court was delivered by

Garth, C. J.—Upon the question addressed to this Court by the Board of Revenue of the North-Western Provinces on the 29th of March last, we are of opinion that if a pleader is authorized by the vakalatnama under which he acts to receive moneys or documents for his client in the course of the cause, which he is empowered to conduct, or as a consequence of the decree or any order of the Court in such cause, a Court of Justice might [768] legally and with propriety direct a public officer to pay money or make over valuable documents to the pleader, provided that such money or documents have become receivable by the client in the ordinary course of the suit, or in consequence of the order or decree.

The receipt of money or documents under such circumstances is one of those ordinary duties which pleaders are continually called upon to perform for their clients, and a vakalatnama properly framed generally contains a power to perform such duties.

If, therefore, the Legislature had intended that in every such case a general or special power-of-attorney should be necessary to enable the pleader to receive the money or documents, it may be assumed that they would have said so in express terms.

NOTES.

[Compare (1855) 9 Mad., 116 at 148; (1886) 9 Mad., 358.]

* [Art. 10:—

Number.	Fixed fees.	Proper fee.
Mukhtarnama or Vakalat-nama.	When presented for the conduct of any one case—	
	(a) to any Civil or Criminal Court, other than a High Court, or to any Revenue Court, or to any Collector or Magistrate, or other executive officer, except such as are mentioned in clauses (b) and (c) of this number...	Eight;
	(b) to a Commissioner of Revenue, Circuit or Customs, or to any officer charged with the executive administration of a Division, not being the chief revenue or executive authority...	One rupee.
	(c) to a High Court, Chief Commissioner, Board of Revenue, or other chief controlling revenue or executive authority ...	Two rupees.]

[3 Cal. 768]

The 25th April, 1878.

PRESENT:

SIR RICHARD GARTM, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Mohima Chunder Dey Sircar and others..... Defendants

versus

Hurro Lall Sircar and others.....Plaintiffs.*

•• [- 2 C. L. R. 364]

Limitation—Title—Possession—Acts of Ownership—Evidence of Title—Grant of Potta.

Where land, the right to which is disputed, has been uninhabited and uncultivated and no acts of ownership by any person can be proved to have been exercised over it, it is often necessary, for the purpose of deciding the question of limitation, to rely upon slight evidence of possession, and sometimes possession of the adjoining land, coupled with evidence of title such as grants or leases, and the Courts are justified in presuming, under such circumstances that the party who has the title has also the possession.

But where the land has been occupied, it is generally proper, for purposes of limitation, to deal with the question of possession as distinct from the question of title, for while the title may be in one person, a twelve years' possession may have barred that title.

THIS was a suit for the possession of 1 biga 7 cottas of land which the plaintiffs claimed as appertaining to their osut talook, situated in talook Ram-gobind Aitch, which again was said to be situated in Parganna Simlabad. The plaintiffs alleged that they had let the land in howla to certain of the defendants, but [769] that the principal defendant ousted them in Magh 1281; that the howladars brought a suit for possession of the land, but that their suit having been dismissed, they gave up possession of the land to the plaintiffs. The defendants pleaded limitation, and stated that the land appertained to a different estate. The Munsif made a decree in favour of the plaintiffs establishing their right to the lands in dispute. This decree was reversed by the First Subordinate Judge, but was affirmed on appeal to the High Court by AINSLIE, J.

From this last decision the defendants appealed under s. 15 of the Letters Patent to the High Court.

Baboo Borkonto Nath Doss for the Appellants.

Baboo's Kali Mohun Doss and Doorga Mohun Doss for the Respondents.

Garth, C. J.—We think that there is no sufficient ground in this case for adopting the judgment of the Munsif to the exclusion altogether of that of the Subordinate Judge.

Assuming that the latter has committed an error of law, it appears to us to amount to this, that he has failed to attribute proper weight to the potta which has been produced by the plaintiffs; and that neither he, nor the Munsif, has dealt quite properly with the plea of limitation.

These errors, we think, would only afford a ground for remanding the case to the lower Court for reconsideration; and we, therefore, propose to take that course, with the following remarks:

The question of limitation, as it seems to us, has not been sufficiently distinguished in either of the lower Courts from the question of title. In some cases, as for instance where grants or leases have been made of waste or jungle

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice AINSLIE, dated the 7th of December 1877, in Special Appeal No. 499 of 1877.

lands, and the right to those lands is disputed, it is often impossible to give evidence of acts of ownership or possession over the property because it is uninhabited and uncultivated, and no acts of ownership by any one have been exercised over it. In such cases it is often necessary, for the purpose of deciding the question [770] of limitation, to rely upon very slight evidence of possession, and sometimes possession of the adjoining land, coupled with evidence of title, such as grants or leases, and the Courts are justified in presuming, under such circumstances, that the party who has the title has also the possession.

But in a case like the present, where the land in question appears to have been occupied, it is generally proper to deal with the question of possession, for purposes of limitation, as distinct from the question of title. It very frequently happens that the title to land is admitted to be in one person,* whilst a twelve years' possession by another person has barred that title; and in this case it may well be that the potta under which the plaintiffs claim is a perfectly genuine instrument; but that the defendants or their tenants have, by adverse possession for twelve years, excluded the plaintiffs from their right.

If the land in question is capable of occupation and has been actually occupied, as we presume to be the case, the question of limitation may and ought to be dealt with separately from the question of title.

Then, again, in dealing with the question of title, it must be borne in mind that the potta of 1821, although proved to be genuine, would, as against the principal defendants, be no evidence, unless it were shown that the plaintiffs or their predecessors in title, at some time or other since 1821, had been in possession under it.

The potta is merely a lease granted by the owners of an estate to the plaintiffs' ancestors of a piece of ground including the land in dispute; but this grant would be no evidence of title to that land as against the owners of an adjoining estate, unless possession under it were proved: coupled with possession the potta would add great strength to the plaintiffs' evidence.

Then, as regards the proof of the potta, if it can be shown to have been for thirty years in the custody of the plaintiffs or their predecessors in title, and was produced by them at the trial, the Court might presume that it was duly executed by the person or persons who professed to have done so: and the fact that it was produced in the former suit in 1848 would be [771] evidence of its authenticity, although *per se* no evidence of title as against the defendants.

From these remarks it will appear that the evidence of the plaintiffs' possession ought carefully to be investigated and weighed, both on the question of title and also on that of limitation.

The Subordinate Judge, if he thinks fit, may receive further evidence of possession on either side. The costs in all the Courts will follow the result of the trial on remand.

Case remanded.

NOTES.

[POSSESSION AND TITLE—

See also *Ram v. Kusu*, 3 C. L. R., 481; 21 Mad., 53 (waste land in towns); 6 Bom., 388.

This subject is dealt with *in extenso* in our notes to 9 Cal., 744 in the 'LAW REPORTS' REPRINTS.]

The 27th November, 1877.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE BIRCH.

Hem Lotta.....Plaintiff

versus

Sreedhone Borooa and another.....Defendants.

Certificate Proceedings under Bengal Act VII of 1868--Jurisdiction of Civil Court to enquire into legality of—Grant of Potta after Certificate issued.

In a suit for arrears of rent it appeared that the plaintiff claimed under a potta granted by the owner of land, after a certificate had been issued against him out of a Collector's Office under Bengal Act VII of 1868. The defendants had purchased the land in question at a sale held under the Act. The plaintiff alleged that the certificate had not been served, and that no notice before the certificate was issued was served upon the grantor as required by s. 18 of the Act. And he contended that as the Collector's proceedings were irregular, the potta was valid. The District Judge held that the Civil Court had no power to inquire into the Collector's proceedings and must, as nothing appeared to the contrary, assume that they were regular, and dismissed the suit.

Held, that the Judge was bound to examine the proceedings of the Collector to see that they were legal and regular so as to constitute a legal bar to the grant of the potta, and that the Judge was not at liberty to make any presumption in favour of their legality or correctness.

THIS was a suit to recover arrears of rent. The plaintiff alleged that she held possession of the land out of which the rent issued, by virtue of a patni granted by one Doorga Mohun Kanaye. The potta was granted subsequently to the issue out [772] of a Collector's Office of a certificate under Bengal Act VII of 1868 against the grantor. The defendants purchased the land in question at the sale held under the Act, and now pleaded that Doorga Mohun Kanaye had no power to grant the potta after the certificate had been served. The witnesses called to prove service of the certificate were disbelieved by the Munsif, and it also appeared at the trial before him that no notice was served upon Doorga Mohun Kanaye under s. 18 of the Act before the certificate was issued. Under these circumstances the Munsif held that the potta was good, and gave the plaintiff a decree. Upon appeal the District Judge considered that a Civil Court could not say that the procedure followed by the Collector was irregular, and that the entire proceedings were null and void and must, as nothing appeared to the contrary, assume that they were regular, and that if the parties were aggrieved, they could try the correctness of the Collector's proceedings by a regular suit; and reversed the Munsif's decision. This decree was upheld on appeal to the High Court by Mr. Justice LAWFORD. The plaintiff now appealed under s. 15 of the Letters Patent.

Baboo Mohini Mohun Roy for the Appellant.

Baboo Srinath Doss for the Respondents.

Garth, C. J. (BIRCH, J., concurring).—We think that the District Judge has made a mistake in this case, which the learned Judge in this Court has not thought fit to rectify.

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice LAWFORD, dated the 26th July 1877, in a Special Appeal No. 2636 of 1876.

The District Judge appears to have considered, for some reason or other, that it was not competent for the Civil Court to question the validity of the proceedings of the Collector.

The question arose in this way—

The plaintiff claimed rent from the defendant by virtue of a *patni* which had been granted to her by Doorga Mohun, and under which Doorga Mohun's rights as the defendant's landlord had been conveyed to him (the plaintiff).

The defendant's case was, that the *patni* was invalid, because Doorga Mohun had no right to grant it.

Now, *prima facie*, Doorga Mohun had of course a right by law to grant the *patni*. But the defendants alleged, that certain proceedings had been taken by the Collector, the legal [773] effect of which was to prevent Doorga Mohun from transferring his interest in the tenure; which proceedings consisted of a certificate, which was intended to operate as a judgment against Doorga Mohun, and a notice given to him of the issue of that certificate.

Now it was absolutely necessary in order to answer the plaintiff's case effectually, that the defendants should prove those proceedings in a regular way; and it is clear, that the plaintiff was at liberty, if she could, to question the legality of those proceedings, and to show that they were irregular and ineffectual.

But the Judge says: "This Court cannot say that the procedure followed by the Collector was irregular, and that the entire proceedings are null and void;" and further on he says: "I hold that this Court cannot in this suit examine the proceedings of the Collector under Act VII, and must, as nothing appears to the contrary, assume that they were regular."

In this we think that the Judge was clearly wrong. He was bound to examine the proceedings of the Collector; he was bound to see that they were legal and regular, so as to constitute a legal bar to Doorga Mohun's transferring his interest to the plaintiff; and the Judge was not at liberty to make any presumption in favour of their legality or correctness.

The case must go back to the Judge to try the question of the legality of the Collector's proceedings. The Munsif tried this question, and it will be for the Judge now to ascertain whether the proceedings were regular and effectual so as to prevent the transfer of the tenure by Doorga Mohun to the plaintiff.

If necessary, additional evidence may be given by either party for the purpose of determining that question.

The judgment of this Court and of the District Judge will be reversed, and the case will be remanded to the District Judge for retrial in accordance with the views expressed.

If further evidence is necessary, the Judge can give the parties an opportunity of adducing it. The costs will abide the result.

Appeal allowed.

NOTES.

[As regards the conclusive effect of the certificate with reference to service of notice, etc., see (1880) 9 Cal., 271; (1893) 21 Cal., 350; (1904) 31 Cal., 1036; see also (1884) 14 Cal., 1 for the point of Court's jurisdiction to go behind the certificate.]

[775] *The 1st May, 1878.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE
MCDONELL.

Tirthanund Thakoore.....Plaintiff

versus

Mutty Lall Misser.....Defendant.*

*Transfer of a portion of Occupancy Holding—Custom—Right of
Zemindar—Ejectment.*

The existence of a custom in a particular district by which rights of occupancy in such district are transferable, will not justify the holder of such a right of occupancy in sub-dividing his tenure, and transferring different parts of it to different persons ; and in case of such transfer the zemindar is entitled to treat the transferees as trespassers, and eject them.

THIS was a suit by the zemindar of certain lands to eject the defendant from a certain jote. The lands in suit originally formed a moiety of a tenure held under occupancy rights by one Pursajha, who sold them to the defendant. The Court of First Instance, finding as a fact that occupancy rights were transferable according to the custom of the district in which the lands in question were situate, dismissed the suit. This decision was reversed by the Lower Appellate Court without going into the evidence in the case on the preliminary ground, that even admitting that the alleged custom which authorized the transfer of occupancy rights had been well proved, still such custom could not be taken to extend the right to transfer portions of an occupancy holding without the consent of the zemindar.

The defendant preferred a special appeal to the High Court, which was heard by BIRCH, J., sitting alone, the value of the property in suit not exceeding Rs. 50. The learned Judge remanded the case for a decision on the evidence, being of opinion that the sale of half the jote did not necessarily work a forfeiture of the rights of the original occupancy ryot, and that the remedy of the zemindar lay rather against such occupancy ryot, and not against his transferee.

The plaintiff thereupon preferred an appeal under s. 15 of the Letters Patent.

Baboo Taruck Nath Dutt for the Appellant.

Baboo Nil Madhub Sen for the Respondent.

[775] Garth, C.J. (MCDONELL, J., concurring).—We have not the least doubt about this case, and the time of the Court has been unnecessarily occupied by the respondent's pleader attempting to urge a point, which has been decided against him by the learned Judge of this Court, and against which decision he has not thought fit to appeal.

The only question is, whether it is necessary or proper that there should be a remand ; and the appeal is made to us upon the ground that the learned Judge was wrong in ordering a remand, when it had not been proved that there was any right by custom in the defendant, the occupancy tenant, to divide his tenure and transfer it to different persons.

An issue was raised distinctly by the Munsif, at the instance of the defendant, whether an occupancy ryot had a right by custom to transfer his tenure to different persons.

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice BIRCH dated the 11th of February 1878, in Special Appeal No. 1272 of 1877.

The Munsif found that occupancy ryots had a right in that locality to transfer their tenures generally. Whether he was justified, upon the evidence, in arriving at that conclusion, appears very doubtful. But assuming him to have been right in that finding, he did not go on to find, nor was there a particle of evidence upon which he could properly find, that an occupancy ryot had a right to divide his tenure and to transfer different parts of it to different people.

Under these circumstances, the defendant, who took, and who professed to take, a portion of the tenure under a transfer of this kind, was a mere trespasser.

It has been suggested that the original tenant would under such circumstances remain liable for the rent. But the original tenant has not paid any rent since the transfer; and when a suit was brought against him, he repudiated the tenure, and said that he had transferred it to different persons, of whom the defendant is one. If then the tenant could not transfer the tenure by custom, the zemindar had a right to treat the defendant as a trespasser, and to eject him.

The District Judge has come to a just conclusion, and we think that, under the circumstances, it would not be proper to remand the case. The judgment of Mr. Justice BIRCH will, [775] therefore, be reversed, and the judgment of the District Judge will stand.

The appellant ought to have his costs of both hearings in this Court.

Appeal decreed.

NOTES.

[TRANSFER OF PORTION OF TENURE BY OCCUPANCY RYOT—

In the following cases decided with reference to the Bengal Tenancy Act VIII of 1885, the question was as regards the consequences of such transfer :—(1899) 26 Cal., 613; (1892) 20 C. W. N., 590; 1 C. W. N., 158; (1894) 1 C. W. N., 160; (1896) 1 C. W. N., 1621.]

[3 Cal. 776]

The 14th September, 1877.

PRESENT :

MR. JUSTICE AINSLIE AND MR. JUSTICE LAWFORD.

Ram Lall Singh and others.....Defendants

versus

Lall Dhary Muhton.....Plaintiff.

Maintenance of bunds—Prescriptive right—Escape of water—Injury to neighbouring properties—Vis Major.

Where a defendant shows a prescriptive right to maintain a bund, and uses all reasonable and proper precautions for its safety, he cannot be made liable for damage caused by the escape or overflow of water on to the lands of others and the consequent injury of the crops thereon, if the escape or overflow be caused by the act of God, or *vis major*.

THIS was a suit brought by a ryot of one village against the owner of another for damages caused by the penning back of water, on the ground that

* Special Appeals, Nos. 618, 619., 620, 621, 622 and 623 of 1877, against the decree of E. Grey, Esq., Officiating Judge of Zilla Patna, dated the 22nd of December 1876, reversing the decree of Moulvi Abdool Azeem, Munsif of Behar, dated the 29th of July 1876.

the plaintiff had a right to cut the bund of the defendants under certain circumstances, and that the defendants wrongfully restrained him from exercising that right, whereby his (the plaintiff's) lands became submerged, and thereby caused him damage.

The defence set up was, first, that the complaint ought to come from the proprietor, and not from individual ryots of the estate; and, secondly, that the bund was one which the defendant had, for a long series of years, maintained for irrigation purposes; that they had acquired a prescriptive right to maintain it; that it was unchanged; and that there was no right in the plaintiff to cut it down at any time.

It was proved by the evidence that the bund was a long-established one, and it was not said that any change in its condition had been recently made. Evidence was offered by the plaintiff that he had, for two continuous years, entered and cut the bund, but this the Munsif disbelieved.

[777] On the 29th July 1876 the Munsif decided that the bund had been long established, and that there had been no change in its condition; that the plaintiff had entirely failed to prove his right to cut the bund, and even a right to regulate its height; and accordingly dismissed the plaintiff's suit. On this the plaintiff appealed to the District Judge, who reversed the Munsif's decision. Whereupon the defendants appealed specially to the High Court.

Mr. Branson (with him Mr. M. L. Sandel and Baboo Chunder Madhub Ghose) for the appellant contended that the defendants had acquired a right to interfere with the natural stream in the nature of an easement, and claimed a prescriptive right to such easement: *Gale on Easements*, ss. 202, 203. Further, that the right of penning back the waters of a natural stream so as to overflow the land of the higher riparian proprietors might be acquired by prescription—*Angell on Water-courses*, s. 372; the extent of the right being determined by user commensurate with the actual enjoyment—*Angell on Water-courses*, ss. 379, 380; that the defendants claimed nothing further than their original right to maintain the bund at its original height; *Steeles v. Hookes* (7 Cowen, 266). The learned Counsel further, on the authority of the *Madras Railway Company v. The Zemindars of Carvatenagarum* (L. R., 1 In. App., 364) and *Nichols v. Marsland* (L. R., 2 Ex. D., 1), argued that the defendants could not be held responsible for the overflowing of the watercourses by the acts of others, or caused by any unforeseen circumstances, as was the case in the present suit; and that it was for the person who complained of the bund being detrimental to his interest to show a prescriptive right to come in and interfere with it.

Mr. Piffard (with him Moonshee Mahomed Yussuf) for the respondent contended that the respondent had a prescriptive right to regulate the height of the bund; and, moreover, that it was an interference with the flow of the stream above his lands to such an extent as to injure them and entitle him to bring a suit for damages, or to enter and abate the nuisance: *Blackstone's Commentaries*, Vol. III. That the case of the *Madras Railway Company v. The Zemindars of Carvatenagarum* (L. R., 1 I. A., 364) did not apply, inasmuch as that case related to artificial reservoirs, whereas the present case dealt with a natural stream; and the question of right to be decided, therefore, here related, not to the owner of an artificial reservoir, but to the riparian proprietors—*Broome's Commentary*, p. 83, 3rd edition; and that the respondent having given evidence in the Munsif's Court that the bund had been for two continuous years cut by him, the defendants, if they ever possessed a prescriptive right to maintain the bund, had lost it; and cited *Chumroo Singh v. Mullick*

Khyrut Ahmed (18 W. R. 525) as showing that, unless the defendants could prove a prescriptive right, they had no right to interfere with the flow of the water to the injury of others.

The judgment of the Court was delivered by

Ainslie, J. (who, after stating the facts of the case, continued):—There is no evidence to show that, by agreement or otherwise, the accumulation of water is limited to a certain quantity; and that when the water rises to a given height, the defendants, or the plaintiff, or the plaintiff's zemindar, is bound or entitled to open a passage for the escape of the surplus.

The Munsif found that the plaintiff had entirely failed to prove any right to cut the bund: and we must say that, in our opinion, it would require very strong evidence to establish such a claim as that put forward here, not on the part of the zemindar acting on behalf of the cultivators of his estate, but on behalf of each individual ryot according to his own judgment, to cut down the bund of a neighbouring zemindar, seeing that it is well known that the consequence of so doing would be that, when the water once begins to flow over the bund, the bund must give way, and the accumulation of water, which is absolutely necessary for the cultivation of land, must be lost.

The Judge has gone off from the facts of the case, and has based his judgment upon a construction of law derived entirely from English text-books. Now, the law as laid down in English text-books is, no doubt, a very useful guide; but it must not be [779] taken to override the customs of this country—customs arising from the extreme necessity of preserving water and thereby preserving the means of cultivating large tracts of land which would otherwise lie waste.

In the present case we have a long-established bund unchanged in its condition with certain outlets for excess water. *Primâ facie* the defendants have a right to maintain the bund in its usual condition, and the right of the plaintiff to cut that bund down is one which we think must be proved most unmistakably. The Judge does not go upon proof at all, but merely upon his view of the law. Now, that view of the law, as it will presently appear, cannot be supported.

The case of the *Madras Railway Company v. The Zemindars of Carvate-nagarum* (L. R., 1 In. Ap., 364), decided by the Privy Council, was a case the converse of the present. It was for damage done by the bursting of an artificial reservoir. The principle, however, is the same. Their Lordships there held that storing of water in this country is an act of necessity; that it was not for the benefit of the proprietor of the land only, but also in order to enable a large body of cultivators to live by the cultivation of that land. They further held, that the damage which was caused by an unusual flood and the consequent bursting of the embankment of the tank by which the railway was washed away was not one for which the owner of the tank could be charged.

In addition to this, there is a recent case, *Nichols v. Marsland* (L. R., 2 Ex. D., 1). This was a case perhaps much stronger in point, because it was not even a case in which water was preserved for the benefit of a large section of the public, but merely for the pleasure of a particular owner, who had formed an ornamental piece of water by embanking a stream passing through her own lands, and then through the lands of the plaintiff. Eventually on an unusually heavy storm occurring, and a great rush of water coming into this reservoir

the banks proved insufficient to support the pressure, and the lands of the plaintiff, which lay lower down the stream, were injured in consequence. It was held there by the Court of Appeal that the case was distinguished from that of *Rylands v. Fletcher* (L. R., 3 H. L., 330)—also cited in the Madras case before the Privy Council in 1 Indian Appeals, page [780] 384—in this, that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening *vis major* of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous) causes the disaster.

They also came to the conclusion that, as the jury had found that all reasonable precaution had been taken, the defendant was not responsible for the damage done.

This case seems to us to apply distinctly to the present. It appears from the judgment of the Judge, that the damage in the present instance was caused by an unusual inundation, which he describes as bringing down four times the ordinary quantity of water. It must be taken that the damage was caused by the act of God, and not by the act of the defendants, who are not shown to have failed in making provision for properly dealing with such quantities of water as might reasonably be expected to accumulate.

The suit must therefore be dismissed. We reverse the judgment of the Judge and restore that of the Munsif with costs.

Special Appeals, Nos. 619 to 623, will be governed by this judgment.

*Appeal dismissed **

NOTES.

[WHEN BRINGING WATER ON TO ONE'S LAND, ETC., BECOMES ACTIONABLE.]

1. THE RULE IN *RYLANDS v. FLETCHER*, (1866) 3 H. L. 330.

The person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default: or, perhaps, that the escape was the consequence of *vis major* or the act of God. . . . But for his

* A rule for a review of judgment was obtained by the appellants on 12th January 1878, on the ground that plaintiff had a prescriptive right to regulate the height of the bund; that although the Munsif disbelieved the evidence, there was still a regular appeal open to the petitioner upon the facts and law, and he did so appeal, and the Judge's decision was in his favour. If, therefore, the Lower Appellate Court had, according to its view of the law, failed to pronounce an opinion on such evidence, that, although a good reason for remand, was no reason for the dismissal of the plaintiff's suit.

• The rule came on for hearing on 15th April (Mr. Branson appearing to show cause against the rule; Mr. J. D. Bell in support of it), and was discharged on 17th April 1878, the Court (AINSLIE, J.) being of opinion that the defendants' right to maintain the bund had been proved and that, inasmuch as the plaintiff had not attempted to go into evidence on the point of the plaintiff having regulated the height of the bund, in the Lower Appellate Court, and as there had been no finding on this point, and he had accepted the evidence as found by the first Court, and was content with the Lower Appellate Court's decision on the law in his favour, and took no objection to the evidence of no finding on this point in special appeal, and did not file a cross-appeal, the case could not be remanded now to enable him to do so.

Rule dismissed.

act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this, we think, is established to be the law, whether the things so brought be beasts, or water or filth or stenches, *per* LORD BLACKBURN quoted with approval by Lord CAIRNS in *Rylands v. Fletcher*, L. R., 3 H. L., 330.

II. CASES TO WHICH IT IS NOT APPLIED—

This rule is not applied *inter alia*

(1) where the injury is due to act of (flood, etc., supervening, and the storing of water, etc., is not wrongful and does not of itself cause injury, unlike the case in *Rylands v. Fletcher*; *Nichols v. Marsland*, L. R., 2 Ex. D., 1.

(2) even though the previous storage accelerated the action of the flood:—*ibid.*

(3) where the storage is sanctioned by usage as tanks in India:—

Madras Railway Co. v. Zemindars of Carvetenagarum, (1874) 1 I. A., 364.

or by statute:—*Hammersmith Ry. Co. v. Brand*, L. R., 4 H. L., 171.

Government's position in respect of irrigation works is analogous to this:—(1906) 28 Mad. 78; (1909) 32 Mad., 142.

(4) (a) Where the act complained of (such as pumping water) is done in the natural lawful exercise of proprietary rights, such as working mines—such damage as was done before the extraordinary occurrence being due to ordinary gravitation and percolation, etc., *Wilson v. Waddell*, L. R., 2 A. C., 95; *West Cumberland Iron Co. v. Kenyon*, 11 Ch. D., 72; (1912) 16 C. W. N., 875 (lowering level to make land culturable); (1904) 28 Bom., 472 (digging trenches for foundation for building).

(b) But it is otherwise where water is thrown up which would not ordinarily come to the land, *Baird v. Williamson*, 15 C. B. N. S., 376, (quantity affected); *Young v. Bankier Distillery Co.* (1893) A. C., 691 (quality affected).

(5) Where the collection and impounding on one's land by another of water or any other dangerous element is done not for the purposes of the owner of the land but for the purposes of such other:—*Whitmores, Ltd. v. Stanford* (1909) 1 Ch., 427 (438).

(6) Where the act is for common benefit:—*Gill v. Edouin* (1898) R. 118: affirmed 72 L. T., 579 C. A., rain water drainage.

(7) Where the act had the assent of the injured party:—*Carstairs v. Taylor*, L. R., 6 Ex., 217.

III. BUT IT IS ACTIONABLE NEGLIGENCE,

(1) If the supervening act could have been anticipated and provided against:—

Harrison v. G. N. Ry. Co. 33 L. J., Ex., 266 (repairing drains)—“The storm though unusual and extraordinary in a sense, yet as happening once in a year or in a few years was not unusual” (*per* POLLOCK, C. B.)

Cf. Blyth v. Birmingham Water Co., L. R., 11 Ex., 781 (not liable for pipes bursting through extraordinary frost).

(2) or if such act is not excepted by the contract or the statute:—

River Wear Commissioners v. Adamson L. R., 2 A. C., 704 *per* Lord CAIRNS.

(3) Where there had already been negligence on the defendant's part:—*Nitro Phosphate Co. v. London Docks* 9 Ch. D., 921 (not maintaining to prescribed level; though that level could not have prevented floods).

(4) in case of works authorised by statute or law or usage:—

(a) where by reasonable exercise of the powers under statute or common law in case of authorised works, the damage could have been prevented:—*Geddis v. Bann Reservoir*, L. R., 3 A. C., 430 failure to cleanse where empowered to do so.

But compare *Broughton v. M. & G. W. Ry. Co.*, Ir. R., 7 C. L., 369 (where there were no such powers).

- (b) where there is a non-injurious mode of exercising the authority to erect or maintain works :—(1904) 28 Mad., 72 (Government's right to construct calingula so as to flood plaintiff's land, denied); *West v. Bristol Tramways* (1908) 2 K. B., 14 though defendant did not know of it.
- (c) Where the authority given by statute is qualified by the requirement not to commit nuisance :—*Price's Patent Candle Co. v. London County Council* (1908) 2 Ch., 526 (sewers).

N.B.—No liability where under statutory duty water—gates were to be opened :—*Dixon v. Metropolitan Board of Works* (1881) 7 Q.B.D., 418.

IV. PROTECTIVE MEASURES—

Protective measures may be taken to prevent floods, but not so as to injure other's rights :—*Orr Ewing v. Colquhoun*, L. R., 2 A. C., 839.

against other sorts of nuisances also :—(1906) 29 Mad., 539.

against common danger, reasonable selfishness permitted :—*Nield v. L. & N. W. Ry. Co.*, L. R., 10 Ex., 4 (barricade against floods)

otherwise where no common danger :—*Whalley v. L. & Y. Ry. Co.* (1884) 13 Q. B. D., 131, And when a right has been acquired by prescription, it stands on a different footing :—(1903) 30 Cal., 1077.

V. TENANT'S RIGHT TO MAINTAIN SUIT—

With reference to the doubts expressed in this judgment on this point, see *Jones v. Llanrwst Urban Council* (1911) 1 Ch., 893.]

[781] *The 25th March, 1878.*

PRESENT :

MR. JUSTICE AINSLIE AND MR. JUSTICE McDONELL.

Lal Sahoo.....Defendant

versus

Deo Narain Singh and another.....Plaintiffs.

[== 2 C.L.R. 294]

Holdings not liable to enhancement (Guzastha Kasht)—Suit for removal of Buildings—Occupancy rights not transferable—Bengal Act VIII of 1869, ss. 3, 4, 6.

The statutory right of occupancy under Bengal Act VIII of 1869 cannot be extended so as to make it include complete dominion over the land, subject only to the payment of a rent liable to enhancement. The landlord is still entitled to insist that the land shall be used for the purpose for which it was granted; and although the Court in such cases will be disposed to place a liberal interpretation on the rights of the tenant, it will not sanction a complete change in the mode of enjoyment.

IN this suit the plaintiffs, as owners of the land, sued the defendant to enforce the removal of the foundations of a certain house and to abstain from further building thereon. The plot of ground on which these

* Special Appeals Nos. 965 and 966 of 1877, against the decree of Moulvie Mahomed Moval Hossain, Subordinate Judge of Shahabad, dated 23rd February 1877, affirming the decree of Moulvie Adeelcoodeen, Munsif of Arrah, dated 1st July 1876.

foundations were laid was alleged to have been originally held, 'together' with other lands, by the second defendant, Nuro Panday, from the plaintiffs, as a *guzastha kashit*,—i.e. a holding on a rent not liable to enhancement. On the 21st September 1875 the second defendant sold to the first defendant that portion of the holding upon which the first defendant had begun the erection of a building, the subject of the present suit. The defendants contended that, according to the custom of the village, the sale by the second defendant passed to the first defendant the same rights in the land as those previously enjoyed by the vendor; and that the first defendant could, therefore, erect the building on the land without the consent of the superior landlord. The Court of first instance gave the plaintiffs a decree, finding on the facts that the rights possessed by the second defendant in the land held by him from the plaintiffs were only those of an occupancy ryot; and, failing proof that according to the custom of the [782] village such occupancy rights were transferable, declared the sale to the first defendant invalid. It would appear that the witnesses for the defence left the Court without permission, and had not been examined. No steps were taken to bring them back for examination, but the Munsif instituted proceedings against them in the Criminal Court. On appeal the Lower Appellate Court, affirming the decision of the Court below, held, that, even assuming that the second defendant possessed any transferable occupancy rights, 'he, as a mere cultivator, could not either himself build, or transfer to the first defendant the right to erect a house on any part of the land comprised in his holding. *Juggut Chunder Roy Chowdhry v. Eshan Chunder Banerjee* (24 W. R., 220) was quoted in support of this view. It also found that no custom authorizing the transfer of occupancy rights without the consent of the landlord had been established, and that the defendant's complaint before it that his witnesses who would have proved the custom of alienating occupancy rights had not been examined, was immaterial in the view it took of the matter. The defendant, accordingly, presented this special appeal to the High Court.

Mr. Evans (with him Baboo Mohesh Chunder Chowdhry) for the appellant.

Baboo Hem Chunder Banerjee and Kalkishen Sen for the respondents.

Mr. Evans.—The plaintiffs simply sought to restrain the first defendant from building a house on land in his possession, and as ejectment was not sought, no question as to the rights of transfer in Nuro Panday could be considered in this suit. The judgment of the Court should have proceeded on the sole question whether or not the plaintiffs were likely to sustain damage by the erection of the house on the defendant's land. The case of *Juggut Chunder Roy Chowdhry v. Eshan Chunder Banerjee* (24 W. R., 220) was remanded for decision on this very point. An opportunity was not afforded to the defendants to examine all the witnesses summoned on their behalf.

[783] Baboo Hem Chunder Banerjee.—It is not denied that the defendant bases his title on Beng. Act VIII of 1869. The operation of this Act is confined solely to agricultural holdings; it may, therefore, be taken, that, in letting the lands, the plaintiffs only intended them to be used for purposes of cultivation.

The judgment of the Court was delivered by

Ainslie, J. (who, after stating the nature of the suit and the finding of the Court of first instance, continued):—On appeal the Subordinate Judge affirmed the finding that the holding is not protected from enhancement, and also held that no custom of transfer of occupancy rights without the consent of the landlord had been established. This last finding is irrelevant, as ejectment is not sought. He went on to hold that Nuro Panday had no

right to build, and consequently could give no such right to his vendee. He assumes it to be an established rule that a lessee cannot build on land held by him for cultivation, and supports this view by a reference to the case of *Juggul Chunder Roy Chowdhury v. Eshan Chunder Banerjee* (24 W. R., 220). In that judgment the Court said: "It may well be that, in particular places, ryots having rights of occupancy in land for agricultural purposes may, by custom, have the right to transfer it to any person to hold for the same purpose; but that will not carry with it the proposition that a person who may be desirous of erecting a large house in the midst of an agricultural mehal, can buy up the tenures and rights of several cultivators and convert the land which they formerly occupied into a dwelling-house and appurtenances." These observations, however, are qualified by what follows. The Court did not dispose of the case simply on this view of the law, but remanded it for enquiry, among other things, whether any and what express injury resulted to the plaintiff from the acts complained of. It must, however, be borne in mind that, in this case the defendant was co-sharer in the estate.

[784] It is complained that the Subordinate Judge ought not to have affirmed the decree in favour of the plaintiff without enquiring whether any injury would result to the plaintiffs from the building commenced by the defendant, and without allowing him to give further evidence to establish the *guzasth* rights of Nuro Pandav. (The learned Judge having referred to the defendant's witnesses not being examined, and the Subordinate Judge's finding thereon, continued.) Reference has been made by the respondent to what is called the *issumnavisee* of witnesses. This, I think, is of no importance. A party is not tied down to any particular line of enquiry indicated in a list of his witnesses, but the fact that his complaint to the Lower Appellate Court was based on the exclusion of evidence on a particular point is sufficient to tie him down to that point in special appeal.

As to the other objection, I think we must hold that a ryot who relies upon an occupancy right must be taken as thereby admitting that the letting was of such a character as is contemplated in Beng. Act VIII of 1869: and it has been held that this law only applies to agricultural holdings. If then we take it that the land was let on the understanding that it was to be used for cultivation, the fact the ryot has acquired a right of occupancy does not alter any of the terms of the letting, except the conditions (if any) fixing a term for the tenancy.

The statutory right of occupancy cannot be extended so as to make it include complete dominion over the land, subject only to the payment of a rent liable to be enhanced on certain conditions. The landlord is still entitled to insist that the land shall be used for the purposes for which it was granted, and although a liberal construction may be adopted, it cannot extend to a complete change in the mode of enjoyment.

The appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[CONVERSION OF HOLDING TO OTHER PURPOSES—

Where the holding is converted to building purposes with the consent of the landlord the position is different:—(1881) 10 C. L. R., 25.]

[785] The 5th April, 1878.

PRESENT :

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Ram Tarrun Koondoo.....Plaintiff

versus

Hossein Buksh.....Defendant.

[2 C. L. R. 385]

Causes of Action, Joinder of—Splitting Demands—Amendment—Relinquishment—Act VIII of 1859, s. 7—Act X of 1877, s. 43.

Where a plaintiff originally sued for a certain sum upon his khatta-books, and an objection was taken by the defendant that he ought to have sued upon a certain hatchitta, whereupon the plaintiff amended his plaint by suing for the amount admittedly due upon the hatchitta, in addition to the amount he claimed upon his khatta-books,—*Held*, that when the plaintiff amended his plaint by suing upon the hatchitta, his causes of action, which, when the suit was originally framed, were distinct, became united; that there was no "relinquishment" in the original suit within the terms of Act VIII of 1859, s. 7 (with which s. 43,† Act X of 1877, corresponds), and that the plaint was rightly amended.

Mohammed Zahoor Ali Khan v. Thakooranee Rutta Koer (11 Moore's, L. A., 468) followed.

THIS was originally a suit for the recovery of the sum of Rs. 650-12 brought in the Court of the Munsif of Sealdah, on account of the price of khesaree due on a khatta-book balance. The plaintiff also brought another suit in the Sealdah Small Cause Court to recover the sum of Rs. 164 on account of the balance of the price of grain sold by him to the defendant. The defendant in the Small Cause Court objected that the suit instituted there could not proceed, inasmuch as he had given a hatchitta to the plaintiff, which would show that the two accounts were not separate, but were one account, and that there was a splitting up of the cause of action. The Judge of the Small Cause Court held the objection to be valid, and struck off the case under Act VIII of 1859, s. 7. Thereupon the plaintiff filed a supplemental plaint in the Munsif's Court enhancing his claim by Rs. 164. The defendant pleaded that the plaintiff having at first omitted to sue for this sum could not include it in the present suit. This plea

* Special Appeal, No. 777 of 1877, against the decree of Baboo Kishto Mohun Mookerjee, Officiating Second Subordinate Judge of the 24-Pargannas, dated the 6th of April 1877, modifying the decree of Baboo Dwarka Nath Mitter, Munsif of Sealdah, dated the 19th February 1877.

† [Sec. 43:—Every suit shall include the whole of the claim arising out of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Relinquishment of part of claim. If a plaintiff omit to sue for, or intentionally relinquish, any portion of his claim, he shall not afterwards sue for the portion so omitted or relinquished.

A person entitled to more than one remedy in respect of the same claim may sue for all or any of his remedies, but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

Illustration.

A lets a house to B at a yearly rent of Rupees 1,200. The rent for the whole of the years 1874 and 1875 is due and unpaid. A sues B only for the rent due for 1875. A shall not afterwards sue B for the rent due for 1874.]

[786] was overruled by the Munsif, who gave the plaintiff a decree for the whole amount claimed. On appeal the Subordinate Judge, considering that the plaintiff's claim as regarded the Rs. 164 was barred by s. 7 of Act VIII of 1859, modified the order of the lower Court, and gave the plaintiff a decree for Rs. 650-12. From this decree the plaintiff appealed to the High Court.

Bahoo *Poorga Doss Dutt* for the Appellant.

Bahoo *Golap Chunder Sirkar* for the Respondent.

Markby, J.—It is impossible to distinguish this case from the decision in *Mohunmad Zahoor Ali Khan v. Thakoorenee Rutta Koer* (11 Moore's, I. A. 468). There the suit, as originally brought against nine persons, was held by the Privy Council to have been wholly misconceived; but they, nevertheless, thought that there was in all probability a good cause of action against one of those defendants upon a bond, and thereupon they make this order. They say: "they have come to the conclusion that the fairer course is to do what the Judge of the Court of First Instance might, under the Code of Procedure have done at an earlier stage of the cause,—namely, allow the appellant to amend his plaint so as to make it a plaint against Rutta Koer alone for the recovery of money due on a bond." That is precisely what has been done here. The plaintiff originally sued upon his khatta-books. There was an objection by the defendant that the plaintiff ought not to have sued upon his khatta-books, but that he ought to have sued upon the hatchitta. Whether that was a valid objection or not, we need not now consider, nor need we consider whether it was that objection which induced the plaintiff to take the course he did. What he did was this, he asked the Court to be allowed to sue upon the hatchitta. The Munsif, as he was clearly entitled to do under the authority of the decision I have referred to, allowed the suit to proceed upon the hatchitta, and the Subordinate Judge was wrong when he expressed an opinion that the Munsif was prevented from doing this by the provisions of s. 7 of the Procedure Code. [787] Section 7 applies to a totally different state of things, and in no way prevents the Munsif from making this order.

The judgment of the Lower Appellate Court must, therefore, be set aside and that of the Munsif restored. The case will stand decreed upon the hatchitta for the sum of 814 rupees and 12 annas. The special appellant will get his costs of this appeal and of the Courts below.

Prinsep, J.—The error of the Subordinate Judge seems to have been caused by his taking the causes of action to have been irrevocably united by the execution of the hatchitta; as the suit was originally laid, the causes of action were distinct. When, however, the plaintiff sued on the hatchitta, they became united, and therefore, as the suit was originally laid, there was no relinquishment within the terms of s. 7 of the Code of Civil Procedure as has been held by the Subordinate Judge.

Appeal allowed.

[3 Cal. 787]

The 13th May, 1878.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE BROUGHTON.

Khoob Lall and another.....Defendants

versus

Jungle Singh.....Plaintiff.

[— 2 C. L. R. 439] , ,

Insufficiently stamped document—Act XVIII of 1869, s. 20—Admission by Court—No right of appeal.

The question of the admissibility of an insufficiently stamped document once admitted as evidence by a Court can form no valid ground of appeal.

Enayetoolah v. Shaikh Meajan (16 W. R., 6) followed.

THE plaintiff, the present respondent, brought a suit to recover Rs. 999-5-9 on a *teep* executed by the defendants on the 5th Kartick 1283 F. S. (17th October 1875).

The defendants objected to the *teep* being received in evidence as being insufficiently stamped, and further denied its execution. The lower Court held that the *teep* was not a promissory note, but a letter of agreement as defined by art. 11, [788] sched. ii of Act XVIII of 1869, and admitted the document in evidence on payment of the penalty prescribed by s. 20 of Act XVIII of 1869. The question as to execution of the document was decided against the defendants.

The defendants appealed, and the Judge upheld the decision of the lower Court. Thereupon the defendants appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and *Chunder Madhub Ghose* for the respondent, on the case being called on, took the preliminary objection that the appeal would not lie, inasmuch as the document was received in evidence in the first Court, and having once been received its admissibility could not afterwards be questioned on appeal. They referred to *Enayetoolah v. Shaikh Meajan* (16 W. R., 6), *Roy Luchmeepat Singh v. Shaikh Moshurruff Ali* (25 W. R., 80), *Currie v. Chatty* (11 W. R., 520), *Lalljee Singh v. Akran Ser* (12 W. R., 47) and *Showdaminee Dossee v. Ram Roodro Gangooly* (8 W. R., 367) and contended that whether the document was a promissory note or an agreement would make no difference in the case.

Mr. C. Gregory for the appellant.—The instrument in question is a promissory note as defined by cl. 25, s. 3 of Act XVIII of 1869, and being insufficiently stamped ought not to have been received in evidence, and being a promissory note, s. 20 of Act XVIII of 1869 was inapplicable.

McDonell, J. (BROUGHTON, J., concurring).—The plaintiff sued to recover 994 rupees 5 annas 9 pie principal, with interest, under a *teep* executed by the defendants. Both the lower Courts have decreed the plaintiff's claim. In special appeal it is urged that the Courts below should have held that the *teep* on which the plaintiff relies is a promissory note and being insufficiently stamped as such is inadmissible in evidence.

* Special Appeal, No. 1691 of 1877, against the decree of R. J. Richardson, Esq., Judge of Zilla Tirhoot, dated the 2nd of May 1877, affirming the decree of Baboo Dwarka Nath Bhatnagarjee, Munsif of Mozufferpore, dated the 16th of September 1876.

* On the appeal being taken up a preliminary objection was raised that no appeal lies in this case, inasmuch as where a document is admitted by the first Court as not requiring a stamp, its inadmissibility cannot be questioned in appeal. Various [789] rulings of these Courts have been cited in support of this objection; and it appears to us that the ruling in *Enayetoolah v. Shaik Meajan* (16 W. R., 6) is on all fours with the present case. Therefore, following that ruling, we hold that the preliminary objection must prevail.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

I. STATUTORY PROVISION—

To set at rest the doubts that were entertained, Act 1 of 1879 provided by s. 34 (3) what is substantially in the present Stamp Act, 1899, as s. 36, whereby "where an instrument has been admitted in evidence such admission shall not, except as provided in s. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped." Section 61 provides for the "revision of certain decisions of Courts regarding the sufficiency of stamps."

II. CASES.

This case was approved of in (1889) 13 Bom., 449; see also (1893) 18 Bom., 737; (1897) 8 M. L. J., 66.

The document once admitted cannot be set aside:—(1889) 13 Bom., 449; (1882) 5 Mad., 220.

But an appeal lies where the first Court *rejected* the document as insufficiently stamped:—(1879) 5 Cal., 311. If the Appellate Court admits it, there should be proof of tender in the lower Court:—(1895) 20 Bom., 791.]

[3 Cal. 789]

The 21st March, 1878.

PRESENT:

MR. JUSTICE MARKBY AND MR. JUSTICE PRINSEP.

Gopee Mohun Mozoomdar.....Plaintiff

versus

Hills.....Defendant.

Res judicata, Suit for rent.

The plaintiff sued the defendant in the year 1873 for arrears of rent at a certain rate per biga. The defendant pleaded that the land had been held by him at an uniform rent for more than twenty years, and this contention was supported by the Court. The plaintiff then gave the defendant notice of enhancement, and sued to recover rent for two years at the rate stated by the defendant, and for one year at an increased rate. To this suit the defendant raised substantially the same defence. *Held*, that the decision in the previous suit was not a bar to the present suit, there being two questions for consideration—one, whether there had been an uniform payment of rent for twenty years, and, if so, whether the presumption, which the law directs to be drawn from an uniform payment of rent for twenty years, had been rebutted by the plaintiff; neither of which questions was concluded by the previous decision.

* Special Appeal No. 1915 of 1877, against the decree of A. J. R. Bainbridge, Esq., Judge of Zilla Moorsheadabad, dated the 5th of June 1877, affirming the decree of Babou Bebro Dass Chatterjee, Munsif of Azeemunge, dated the 15th March 1877.

THE plaintiff in the year 1873 sued the defendant for arrears of rent due on a certain jote, alleging that it was an ootbundee tenure, and that the defendant was liable to pay rent at the rate of Re. 1 for every biga found by measurement annually. The defendant, among other things, pleaded that the jote was a kaimce tenure, and held by him at a uniform rent of Rs. 16 for more than twenty years, and this contention was supported by the Court. The plaintiff then gave the defendant notice of enhancement for increase of area found by measurement and holding below the prevailing rates, and now sued to recover rent for two years at the rate of Rs. 16, and for one year at an [790] increased rate upon a larger area. The defendant made substantially the same defence as in the previous suit. The Court of First Instance decided that the judgment in the first suit was no bar to the institution of the second suit, and held on the facts that the plaintiff had failed to establish a right to enhancement of rent for the year claimed, but gave the plaintiff a decree for arrears of rent for the three years at the rate of rent which, according to the admission of the defendant, the land had hitherto been liable. The Lower Appellate Court reversed the decision, on the ground that the present suit was *res judicata*. The plaintiff appealed to the High Court.

Bahoo Gooroodas Banerjee for the Appellant.

Bahoo Bipro Das Mookerjee for the Respondent.

The judgment of the Court was delivered by

Markby, J.—We think that there must be a remand in this case. There were two questions for consideration: one was whether there had been an uniform payment of rent for twenty years, and, if so, whether the presumption which the law directs to be drawn from an uniform payment of rent for twenty years had been rebutted by the plaintiff. The previous decision is not conclusive upon either of these two points. One of these questions was not and could not be gone into in the previous suit. It has nothing whatever to do with the former case whether the landlord received different rates of rent at some earlier period. No doubt the Court in that former case did express an opinion that, for twenty years, rent had been paid at an uniform rate; but even that was not a question in issue in the former suit, and in such a manner as to make the decision in the former suit conclusive upon that point. The District Judge will have to consider the case upon the evidence on the record, and determine whether or not he agrees with the Munsif, who has found in favour of the defendant, that this is a tenure the rent of which cannot be enhanced.

Case remanded.

NOTES.

[RES JUDICATA—RENT DECREE—

The finality of the rent decree as regards title or rate of rent will depend on the facts of the case, whether these were fully determined in the first suit or not:—see (1879) 4 C.L.R., 443 and 2 C. W. N., *ccxiii* and (1897) 4 C. W. N., 43, 161; (1893) 21 Cal., 236; (1890) 19 Cal., 656.]

[791] *The 23rd May, 1878.*

PRESENT :

MR. JUSTICE R. C. MITTER AND MR. JUSTICE MACLEAN.

• Brojendro Coomar Ray and others.....Plaintiffs
versus
 Rakhal Chunder Ray and others.....Defendants."

Limitation—Arrears of Rent—Pendency of Enhancement Suit—Bengal Act VIII of 1869, s. 29.

4 sued for enhancement of rent of certain lands for a specified year. On the dismissal of this suit A, more than five years after the rent fell due, sued for arrears of rent for the same year. *Held*, that A was not entitled to deduct the time occupied in the conduct of his enhancement suit from the period which elapsed since the rent first fell due in order to bring his case within the period of limitation prescribed for such last-mentioned suits by s. 29 of Bengal Act VIII of 1869.

THIS was a suit for arrears of rent for the year 1276, B.S. (1869-1870). The plaint was filed on the 19th January 1876, and alleged that the plaintiffs had previously, on the 24th Assar 1277, B.S. (7th July 1870), sued the defendants for arrears of rent for the same lands and the same year (1869-1870), but at an enhanced rate; and that such suit had been finally dismissed by the High Court on the 2nd of June 1873, on the ground that the notice given by the plaintiff was illegal. On these facts the plaintiffs contended that the ordinary law of limitation did not apply, and that in calculating the period of limitation he was entitled to exclude the period during which his enhancement suit was pending. The defendants pleaded limitation, and denied the plaintiffs' right to make any such deduction.

The Court of First Instance, on the principle alleged to have been laid down by the following decided cases—*Ranee Surnomoyee v. Shoshee Mokee Hurmonia* (11 W. R., P. C., 5); *Eshan Chunder Roy v. Khajah Assanoolah* (16 W. R., 79); *Dindayal Paramanik v. Radha Kishori Debi* (8 B. L. R., 536; s. c., 17 W. R., 415) *Mohesh Chunder Chakladar v. Gungamonee Dossee* (18 W. R., 59); *Huronath Nath Roy Chowdhry v. Goluck Nath Chowdhry* (19 W. R., 18)—[792] was of opinion that the plaintiffs' suit was not barred by limitation, and gave them a decree for the amount claimed. The Lower Appellate Court reversed the decision of the Court below on the ground that the plaintiffs' enhancement suit in no way affected their right to sue for arrears of rent. Such suit might have been brought at any time within the period fixed by s. 29 of Beng. Act VIII of 1869. The plaintiffs having failed to do this, their suit was barred, and the plaintiffs thereupon appealed to the High Court.

Baboo Doorga Mohun Dass and Baboo Sreenath Dass for the appellants.

Baboo Mohesh Chunder Chowdhry and Baboo Kali Mohun Dass for the respondents.

The judgment of the Court was delivered by

Mitter, J.—In this case we think that the Lower Appellate Court has taken a correct view of the law of limitation applicable to the facts about which there is no dispute between the parties.

* Special Appeal, No. 2189 of 1876, against the decree of Baboo Bhugwan Chunder Sen, Subordinate Judge of Zilla Backergunge, dated the 26th July 1876, reversing the decree of Baboo Kadar Nath Mozumdar, Third Munsif of Barisal, dated the 24th April 1876.

The rent claimed is of the year 1276 (1869-1870), and the present suit has been brought in Magh 1282 (January 1876), so that if the rent claimed became due in the year 1276 (1869-1870), the present suit not having been brought within three years from the last day of that year, is clearly barred under s. 29 of the Rent Act.

It has been said that it did not become due in that year, because in 1275 (1868-1869) a notice for enhancing the rent of the defendants' tenure was issued, and a suit for the recovery of enhanced rent mentioned in the aforesaid notice was brought in Assar 1277 (July 1870); that this suit was finally decided against the plaintiffs by the High Court on the 19th Jaist 1280 (2nd June 1873). The plaintiffs' contention is, that the rent of the year 1276 (1869-1870) at the old admitted rate became due on the dismissal of the enhancement suit. We do not think that this contention is correct. It is clear that, notwithstanding the notice of enhancement, the plaintiffs, if they chose to do so, could have successfully sued the defendants in [793] the year 1273 (1870), and recovered the rent claimed in this suit. Therefore, it follows that the rent claimed in this case became due in 1276 (1869-1870).

The decision of the Lower Appellate Court is correct, and the special appeal is accordingly dismissed with costs.

Appeal dismissed.

NOTES.

[LIMITATION—PENDENCY OF SUIT.]

1. This case is similar to that reported in (1903) 27 Mad., 143; 8 C. W. N., 1. P.C., where the claim for arrears of rent for a year in a suit for *enhancement of rent*, which was ultimately decreed, being dismissed on the ground that it was premature, the pendency of the suit saved limitation. See also (1877) 3 Cal., 6 and (1878) 3 Cal., 817, which was affirmed by the Privy Council in (1882) 9 Cal., 255.
2. The general principle has been re-stated thus by the Privy Council in (1903) 27 Mad., 113 overruling (1894) 19 Mad., 21, where the pendency of a suit for acceptance of pottah was held to save limitation:—

“The point of time from which, under the Limitation Act, the period of limitation is to run is that at which the arrear became due. In most cases no doubt the point of time at which rent becomes due is the close of the period in respect of which it is to be paid. But this is not necessarily always the case in India and the Limitation Act is an Act for all India. *Legislation or custom or express contract or the special circumstances of any case may make rent become due at a point of time different from the close of the period in respect of which it is to be paid.* The case of *Mussional Rance Surmo Monee v. Shoshree Mokhee Burmonia*, (1468) 12 M. J. A., 244 heard before this Board is an example of a suit for rent, governed by a law of limitation substantially the same as that now before their Lordships in which the date at which the rent became due was held to be an entirely different date from the close of the period in respect of which that rent was payable. The object of a Limitation Act is presumably to compel people who have actionable claims to sue upon them with due promptitude or to forfeit the right to do so at all. In such an Act the falling due of rent naturally means the falling due of an ascertained rent which the tenant is under an obligation to pay but which the landlord can claim, and, if necessary, sue for.”]

[3 Cal. 793]

The 16th April, 1878.

PRESENT:

MR. JUSTICE JACKSON AND MR. JUSTICE TOTTENHAM.

Petambar Baboo and another.....Plaintiffs

versus

Nilmony Singh Deo and others.....Defendants.*

Limitation—Grant in lieu of maintenance—Right to resume.

Although a grant of a mokurrari lease in lieu of maintenance may be resumable by the grantor and his heirs, yet, if the grantor or any of his successors receives distinct notice of a claim on the part of the grantee to hold in perpetuity and not subject to resumption, and allows twelve years to go by without contesting such claims, he (such grantor or successor) will be barred for the time of his own enjoyment.

THIS was a suit instituted by the plaintiff as talookdar of Belouja, Pargunna Khaspul, under the defendant Nilmony Singh, Raja of Chuckla Panchkote, to recover khas possession of Mouza Kururya, in Pargunna Khaspul, from the defendants (other than the defendant Nilmony Singh). These defendants alleged that a permanent mokurrari settlement of the entire Mouza Kururya had been granted long ago at a fixed annual rental, not subject to abatement or enhancement, to their great-grandfather, Anunta Lal Sekur Baboo, by the then Raja of Chuckla Panchkote, who was his brother-in-law (wife's sister's husband); that this grant had been confirmed to their grandfather, Shohun Sekur Baboo, by a sanad given about the year 1802 by the then Raja of Chuckla Panchkote; that they and their predecessors had ever since remained in possession of Mouza Kururya upon the terms of the original grant; and that the suit of the plaintiff was now barred by limitation. The defendant Nilmony Singh supported the claim of the plaintiff, and pleaded that the grant to the ancestor of the other defendants [794] having been a grant in lieu of maintenance was, like all grants in lieu of maintenance, resumable at the will and pleasure of the Raja of Chuckla Panchkote. In support of the defendants' plea of limitation evidence was given that, in a suit instituted some time previous to the 3rd of August 1862, by the then talookdar of the village against these defendants, these defendants had succeeded in making out their right to hold the mouza as a mokurrari holding at the annual rent of Rs. 132, and no more. It also appeared that on failing to obtain an enhancement of the rent payable by these defendants, the then talookdar had, on the 3rd of August, 1862, sued the then Raja of Chuckla Panchkote, upon the ground that the then defendants having set up and proved their right to hold the mouza at a mokurrari rent of Rs. 132, his (the Raja's) assurances in respect of the gross rental of the talook had proved unfounded to that extent, and that the talookdar was consequently entitled to a corresponding reduction of the talook rent paid by him; and that the talookdar had succeeded in this suit. The Court of First Instance made a decree in favour of the plaintiff, being of opinion that the allegation of the defendants in the suit between them and the talookdar that their holding was a mokurrari one was not necessarily a setting up of a title adverse to the Raja, as the word *khorphosh*, or maintenance, was superadded to whatever was said about mokurrari, so as to leave it to be supposed that the tenure was only

* Regular Appeal, No. 157 of 1875, against a decree, of Major E. F. Walcott, Assistant Commissioner of Zilla Manbhoon, dated 13th March 1876.

mokurrari because the tenure was a maintenance grant. It might be "mokurrari" and "kaimi" so long as the grant in lieu of maintenance continued, and yet came to an end on the resumption of the grant. From this decree the defendants other than Nilmony Singh appealed.

Baboo Troylock Nath Mitter for the Appellants.

Baboo Mohini Mohun Roy, Baboo Bhowani Churn Dutt and Baboo Golap Chunder Sircar for the Respondents.

The judgment of the Court was delivered by

Jackson, J.—It appears to us that the decision of the Court below on the issue of limitation is erroneous. It appears that [795] in July 1865 a suit was brought by a person, who was then talookdar, against the defendants for arrears of rent, and in the plaint in that suit it was recited that previously this talookdar had sued the zemindar for a reduction of the talook rent on the ground that the present defendants had alleged their rent to be mokurrari, Rs. 132, whereas the talook rent had been assessed on the allegation of the zemindar that the rent was higher. That is the account given in the judgment of the Court below, and we understand what took place was this. The previous talookdar there spoken of had, in the first instance, sued these defendants for rent at a rate higher than Rs. 132, and these defendants had then made out their right to hold the mokurrari at Rs. 132, and no more; thereupon the talookdar, being defeated, sued the superior landlord upon the ground that the defendants having set up and proved their right to hold the mokurrari at Rs. 132, his assurances in respect of the assets of the estate had proved unfounded to that extent, and it seems that reduction of their rent was accordingly allowed. Now, in that way it was not merely a setting up of the mokurrari, but it was set up in such a manner as affected the raja zemindar with a loss *pro tanto* of his rent in consequence of this mokurrari. It was manifestly, we think, such an allegation as put upon the raja the necessity of attaching this mokurrari within twelve years. The Court below seems to think that the mokurrari in its fullest sense was not pleaded, because the tenure was described as one granted for maintenance. That seems to me merely to indicate the origin of the grant, and does not amount to any real difference in the nature of it.

Then it is said that, by the custom of this raj, grants for maintenance by the raja of the time being are liable to revocation at the instance and at the discretion of succeeding rajas, and this contention no doubt is supported by a decision of the Judicial Committee of the Privy Council in the case of *Anund Lal Singh Deo v. Maharaja Gurrood Narayun Deo Bahadur* (5 Moo. I. A., 82). But I think it clear that if the right of resumption exists in such cases at the option of each raja at the time of his succession, [796] and if he has notice of a claim to hold such mokurrari, and allows twelve years to go by without taking steps to get rid of it, he at least is barred for the time of his enjoyment. That being so, it appears to me that limitation barred the present suit, and that it ought to have been dismissed. The judgment of the Court below is reversed with costs.

Appeal allowed.

NOTES.

• LIMITATION—TENANT—ADVERSE POSSESSION.

1. This decision appears to be in conflict with the Privy Council's decision in (1899) 27 Cal., 136 P. C. where the facts were very similar.

2. Even the fact of receipt of rent under the old pottah was held (of its own force) not to confer better interest than tenancy-at-will; "on his accession, Sir Pershad Singh might have resumed the mouzah or have made a fresh grant either on the terms of the pottah or otherwise, or have allowed Ram Golam to remain in possession paying a rent. But as the pottah was void as against him and not voidable only, the mere receipt of rent by him though of the same amount as that fixed by the pottah would not have the effect of confirming the pottah in its entirety. If matters rested there, there could be no doubt that whatever was the interest which the pottah purported to grant, Ram Golam was in fact a mere tenant-at-will of the Maharajah, and could not set up the pottah against him, except for the purpose of showing the amount of his rent"—*ibid.*
3. From other circumstances, a life tenancy was inferred in the case, and it was also held that a tenant during his tenancy cannot by adverse possession enlarge the duration of his tenancy. On this point see (1902) 25 Mad., 507.
4. This decision of 3 Cal., 793 is also opposed to the Privy Council decision in (1885) 12 Cal., 484 reversing 9 Cal., 411 in which this case was cited, and was thereby presumably brought to the notice of their Lordships.]

[3 Cal. 796]

PRIVY COUNCIL.

The 23rd, 24th, 27th, 28th and 29th November, 1877.

PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH AND
SIR R. P. COLLIER.

Radha Proshad Singh.....Plaintiff

versus

Rani Coomar Singh and others.....Defendants

Radha Proshad Singh.....Plaintiff *

versus

The Collector of Shahabad.....Defendant.

[1 C. L. R. 259]

*[On Appeal from the High Court of Judicature at Fort William in Bengal.]**Diluviated Lands—Adverse Possession—Doctrine in Lopez's Case.*

The doctrine in *Lopez's Case** that diluviated lands, re-forming on their old site, remain the property of their original owner, does not apply to lands in which after their re-formation an indefeasible title has been acquired by long adverse possession, or otherwise.

Where a plaintiff relies on an alleged adverse possession of lands for more than twelve years after their re-formation, the question to be decided is whether he has had such possession for twelve years.

THESE were appeals from a decision of a Division Bench of the Calcutta High Court, dated the 10th June 1874, which reversed a decision of the Judge of Shahabad of the 29th July 1872.

* *Lopez v. Muddun Mohun Thakoor*, 13 Moo. I. A., 467 ; S. C. 5 B. L. R., 521.

The suits in which these decisions were passed were two out of a number instituted by the father of the appellant to obtain possession with mesne profits of a tract of alluvial land in the Shahabad district, which he claimed as belonging to his estate named Nowrunga, and to which the several defendants laid claim as land, which had re-formed on the site of land which had been submerged, and which before its submersion had belonged to them.

[797] The decision of the Division Bench from which these appeals were brought will be found printed at pp. 238--245 of the 22nd volume of Sutherland's Weekly Reporter. Earlier judgments of the High Court in connection with the same litigation will be found at pp. 389--393 of the 11th volume of Sutherland, when the claim was held not to be barred by limitation, and was remanded for trial on the merits; and at pp. 109 and 110 of the 16th volume of Sutherland, when, on the 28th June 1871, the case was remanded a second time for trial on the following issues:—

"*First*.—How long has the land now in dispute or its several parts been in existence, and how was it formed?

"*Second*.—When and how did the river recede to the north of the land, the subject of this suit? When and how did the river cease to flow between these lands and the lands in Shahabad, which admittedly belong to the defendants' estate?

"*Third*.—Was the plaintiff in possession of the land claimed, or any, and what portion of it in 1265; and was he then, or at any other, and what time, and how, dispossessed by the defendants?

"*Fourth*.—If the plaintiff had possession till 1265, or till dispossessed by the defendants, what was the nature of that possession, and when and how was it acquired? And had it existed for more than twelve years?"

The Judge of Shahabad, trying the cases on these issues, in the suit in which Ram Coomar Singh and others were defendants, gave a decree in favour of the plaintiff for a portion only of the land claimed. In the other suit, in which the Collector of Shahabad was made a defendant, the whole of the land claimed by the plaintiff was decreed to him. By the judgment of the High Court now appealed from, the decisions of the Judge of Shahabad were reversed and the plaintiff's claim dismissed.

In the appeal in *Radha Proshad Singh v. Ram Coomar Singh and others* (No. 50 of 1874), Mr. *Leith*, Q.C., and Mr. *Doyne* appeared for the appellant, and Mr. *Graham* for the respondents.

In the appeal in *Radha Proshad Singh v. The Collector of Shahabad* (No. 57 of 1874), Mr. *Leith*, Q.C., and Mr. *Doyne* appeared for the appellant, and Mr. *Cowie*, Q.C., and Mr. *Graham* for the respondent.

[798] The material facts of the case are fully stated in their Lordships' judgment, and which was delivered by

Sir J. W. Colvile.—The appeals of which their Lordships have now to dispose are those which the appellant has preferred in two out of seven suits instituted by him in order to recover a large quantity of alluvial land lying now to the south of the Ganges, and accordingly transferred by order of the Government from the Zilla of Ghazee-pore to that of Shahabad. Notwithstanding the great volume of the record, and the number of the proceedings contained in it, the facts essential to the determination of these appeals may be brought within a narrow compass. It appears that, at the time of the perpetual settlement, the river Ganges was not only the boundary, as it is still, between the

two Zillas of Ghazeepore and Shahabad, but also the boundary between the Mouza, Nowrunga, belonging to the plaintiff's ancestor on the left or northern, and a number of mouzas on the right or southern, bank of the then channel of the river, which were settled with other proprietors. Immediately on the southern or Shahabad side of the river, and included in these mouzas, was an area of low soft land, some six miles wide, favourable to the erratic habits of the Ganges, but bounded on the south by higher or harder land, which opposed itself to the further progress or invasion of the stream in that direction. The precise changes in the course of the river have been proved with greater clearness than is usual in cases of this kind, and are delineated in what has been called the ameen's map No. 7. 2. From this and from the evidence it appears that in the year 1839 the river occupied a position considerably to the south of that which it occupied at the date of the settlement, and now occupies; that in 1844 it had travelled to an ascertained channel still further to the south, and in 1857 had for some years reached its southernmost limit, viz., the high or hard bank which has been referred to. It is, moreover, clearly shown that, towards the end of the rains of 1857, the river, when subsiding into its cold-weather channel, made a sudden change of that channel, intersecting the land to the north of its former course, and occupying the position designated upon the ameen's [799] map as "Bhagar 2." Its course, however, in that channel was not permanent; for, either by sudden change or by gradual recession, it travelled still further to the north until it returned to the bed from which it is supposed to have started at some time after the date of the perpetual settlement, being that which it occupied when the decrees under appeal were made.

Upon the sudden change of 1857-58, different persons, claiming to be the owners of some of the villages which had before been diluviated, seem to have taken possession of the land re-formed upon the sites of their old villages, so far as it was then south of the new channel of the Ganges. And when the river went further back, their Lordships presume that other persons similarly claimed and took possession of the additional land that had then become south of the Ganges. The result was that, after some discussion between the authorities of the two zillas, a thakbust was made by the revenue officers of Shahabad in 1864, which apportioned the whole of this disputed land, as re-formation on the sites of the ancient villages, among the representatives of the persons with whom those villages had originally been settled; and confirmed their possession of the plots allotted to them. Between 1858 and this thakbust of 1864 there had been various proceedings before the revenue officers of Zilla Ghazeepore, at the instance of the plaintiff as owner of Nowrunga, under Act I of 1847; but to these it is now unnecessary to advert. After the thakbust of 1864, the plaintiff brought one suit against all the claimants of the disputed land. That was dismissed as improperly framed. He then instituted the different suits, with two of which their Lordships have now to deal. These it will be convenient to call suit No. 2 and suit No. 6, distinguishing them by the numbers whereby the lots claimed in them respectively are described on map No. 7. 2, rather than by the numbers which the suits themselves bore in the Indian Court.* [800] It lies of course upon the plaintiff to prove in each a superior title in order to dispossess the defendants.

* Suit No. 2 was that in which Ram Coomar Singh and others were the respondents, and corresponds with Appeal No. 50 of 1874. Suit No. 6 was that in which the Collector of Shahabad was respondent, and corresponds with Appeal No. 57 of 1874. In Suit No. 2 the plaintiff sought possession of the lands Pursownda and Sohia. In suit No. 6 he sought possession of the Mouza Brespore.

Neither party originally put his case precisely in the form in which, after the decision in *Lopez's Case*,* and the second remand of the suits by the High Court, it assumed.

Their Lordships propose to treat that second remand as a new departure, and the commencement of the litigation upon which they have to form a judgment. And they may at once state that they cannot concur in the final judgment of the High Court in so far as that casts any doubt upon the propriety of directing the third and fourth of the issues for the trial of which the suits were remanded. The doctrine in *Lopez's Case* was doubtless in favour of the defendants in both suits; and if they had in no way lost their rights, would give them a title to the land re-formed upon sites identified by the thakbust proceedings of 1864 as within the boundaries of their original mouzas, which would *prima facie* override a title founded on the principle of the acquisition of that land by the proprietor of the northern bank of the Ganges by means of gradual accretion. Their Lordships conceive, however, that the doctrine in *Lopez's Case* cannot be taken to apply to land in which, by long adverse possession or otherwise, another party has acquired an indefeasible title. In the present suits the plaintiff relies on an alleged adverse possession for more than twelve years of the lands after their re-formation; and therefore the real point to be decided in the suits was whether a title had been thus acquired by the plaintiff, the proprietor of mouza Nowruna.

Now, for the purpose of considering this, which seems to be the only material issue, it will be convenient to travel, as the river originally did, from the north to the south. Their Lordships consider that the point to be determined is whether in 1857 such a new title existed as to all or any of the lands in dispute, because they think it is clearly proved that the change of the river in 1857-58 was a sudden change, which left the rights of the parties as they then existed unaffected thereby. The nature of the change in 1861 is perhaps not so clearly [801] proved. The Zilla Judge certainly found that to have been also a sudden change; for he says that the river began to leave the channel in which it had gone from 1858, in 1267 F. or 1860, and in 1268 F. was found in the place in which it now is—a state of things which implies suddenness of change. Moreover, the evidence on the whole preponderates in favour of this last change having been also a sudden change. Their Lordships, however, do not think it very material to find one way or the other upon that point, because even if the river had receded from the channel, marked as Bhagur 3, gradually, to the place which it now occupies,—if it had passed, for instance, over Mouza Sreepore, submerging that mouza again; the submergence and re-appearance of the land both taking place within the three years,—if that were so, and the question was, who was entitled to the re-formation of the mouza upon that site of Sreepore, upon this second re-appearance, their Lordships conceive that, according to the strict doctrine in *Lopez's Case*, if the plaintiff had previously to 1857 acquired the proprietorship of that land, it would be he and not the original owner of Sreepore who would be entitled to claim the benefit of that doctrine.

Then going back to the application of the principle which has been already laid down to the lands in dispute in this case, their Lordships have to consider first whether the plaintiff had or had not in 1857 acquired such a title as has been described to the land north of the river as it ran in the year 1839; and they think that upon the evidence there can be no doubt he had

* * *Lopez v. Muddun Mohun Thakoor*, 13 Moo. I. A., 467; s. C., 5 B. L. R., 521.

such a title. They rely mainly upon the thakbust proceedings of that year. It appears to them clear upon those proceedings and the maps embodied in them, that the land, down to the north part of the river as it existed in 1839, was then measured as belonging to Nowrunga, and in possession of the plaintiff's ancestor; that the greater part of that land was laid out field by field as land which had been gained by accretion at that time; and that although there was a small portion which is described in the thakbust maps as "registan or sand," that too was measured into Mouza Nowrunga and the Zilla of Ghazee-^[802]poore. No objection or claim seems then to have been preferred on the part of any proprietor on the Shahabad side of the river. And it is clear that the plaintiff and his ancestors were afterwards, and up to 1857 or 1858 in possession of this land; that is, for a period of about eighteen years.

The whole of the land in dispute in Suit No. 6 falls within the boundaries of Nowrunga as thus defined in 1839. In that suit it has been attempted at the bar to raise some contention on the supposed effect of the confiscation of Koer Singh's estate, of which Mouza Sreepore once formed part. But that is a point that never seems to have been raised in the Court below; and, so far as their Lordships can see, there can be no ground for the contention. It seems to them that the whole of this lot must have been diluviated, and that, when left dry as the river receded still further, it was assumed to have become by accretion part of Nowrunga. It was measured as such in 1839; and if the second change of the river in 1861 was a sudden change, that land has ever since 1839 been dry land, and was up to 1861 in the possession of the plaintiff. Again, if the changes in the course of the river between 1858 and 1861 were not sudden, but gradual, the subsequent diluviation and re-appearance of the land could not, as has already been stated, defeat the title to the site which the plaintiff had gained before 1858. These considerations suffice to dispose of the appeal in Suit No. 6.

With respect to the appeal first heard, that in the Suit No. 2, the case is different. In order to substantiate the whole of the plaintiff's claim, it would be necessary to show that in 1858 he had been in possession of this land almost up to the extreme southern boundary for more than twelve years. Now their Lordships have felt no hesitation in concurring with both the Courts in so far as they have found that no such title was established to land beyond the course of the river in 1844. There is no clear evidence how, or in what particular year, that land accreted; and it is impossible to say that there has been a possession for twelve years, or any possession that would be sufficient to defeat what is *prima facie* the superior title of the defendants. Their Lordships have had more doubt as to the land lying between what was the northern bank of the river in ^[803]1839 and that which was its northern bank in 1844; but even if they had been disposed to agree with the Zilla Judge in respect of this land, they could not have concurred in his judgment in so far as it gives to the plaintiff the bed of the river as it existed in 1844, and carries his boundary up to what was then the southern bank of the river. Although in the case of a wandering and navigable stream like this, the bed of the river may be said temporarily to belong to the public domain, that state of things exists only while the water continues to run over the ground; and it clearly appears on the face of the thakbust map of Mouza Sohia, which was made in the course of the survey of 1844 (and these proceedings are the strongest evidence, such as it is, which the plaintiff has given of his possession of the land now in question), that some land which had once formed part of that mouza was then on the northern bank of the river, and consequently that the ground over which the river then ran had also been part of Sohia; and if this be so, when the bed of the river became

dry, the right of the defendants to the new formation on that site would attach, and there is no proof of a length of possession of that re-formation which would defeat their title.

The point upon which their Lordships have felt greater difficulty is whether there was not sufficient proof of possession for twelve years on the part of the plaintiff of the land up to the northern bank of the river as it ran in 1844. It has been argued that the thakbust proceedings of 1844-45 were as strong to prove the possession of the plaintiff or his ancestor of the land north of the river as it then ran, as were those of 1839 to prove his possession of the land within the boundary then laid down, up to the line of the river in 1839. Their Lordships, however, do not think that this is so. The later thakbust proceedings related to Mouza Sohia, and were made in Shahabad, and the river was then the boundary not only of the Zillah of Shahabad, but also of two provinces under distinct Governments, viz., the North-West Provinces and the Lower Provinces of Bengal. The authorities of Shahabad presumably had no authority to carry their thakbust beyond the southern bank of the river as it then ran. Again, upon the face of the thakbust map is the statement already referred to, wherein, after mentioning [804] that the entire area of Sohia had been 2,451 bigas, but that out of that only 400 bigas existed which were under cultivation, (that being, as their Lordships understand, the portion of Sohia that was then on the south side of the river,) it is stated: "The remaining land"—that is, 2,051 bigas—"was washed away by the Ganges, and has now accreted "on the north side of the river Ganges in a small quantity, and consists of "sand " Therefore that which was out of the bed of the river on the northern bank, seems to have then been, according to this statement, waste uncultivated land, over which no acts of ownership had been exercised, and in which the possession or the right of the plaintiff had been positively affirmed by no measurement on the other side of the river. The doubt their Lordships have had is whether there was not other evidence from which it might be properly inferred that cultivation had afterwards been extended and acts of ownership exercised over this land by the plaintiff between 1845 and 1857, without question, so as to establish an adverse possession of it as against the defendants for twelve years. But, upon the whole, looking to the uncertainty of the general evidence as to this strip of land; to the not very clear finding of the Zilla Judge regarding it; and to the fact that much better evidence as to payment of the rent and the like might have been given than was given, they have come to the conclusion that they have not sufficient grounds before them for disturbing the finding of the High Court upon this part of the case. The plaintiff, therefore, must be taken to have failed to have made out a sufficient title to any land which was not north of the river as it ran in 1839.

The result is, that in Suit No. 6, in which all the land claimed lies above the line of 1839, their Lordships must humbly advise her Majesty to reverse the decision of the High Court in that suit, and to affirm the decision of the Zilla Judge, with the costs of the appeal in the High Court. When they delivered judgment they proposed to advise Her Majesty to dismiss the appeal, and to affirm the decision of the High Court in Suit No. 2, inasmuch as they then understood that all the land claimed in that suit lay below the line of 1839. It having, however, been brought to their notice, before the report was [813] drawn up, that, notwithstanding the statement of the Zilla Judge to the effect that no part of the land north of that line was in question in the suit, the maps which are in evidence in the cause, and particularly the ameen's map No. 7. 2. afford ground for believing that a small portion of the land claimed,

being part of that in the possession of the defendants as their Mouza Pursownda, is, in fact, above the line of 1839, the order which their Lordships will recommend Her Majesty to make in this suit is, "that the decree of the High Court be varied, by declaring that the plaintiff is entitled to recover, and ordering that he do recover, so much (if any) of the land claimed by him in this suit as lies to the north of the line delineated in the ameen's map No. 7. 2, as the northern bank of the river Ganges in the year 1839; the amount (if any) of such land to be ascertained, in case of dispute, by proceedings in execution; but that in all other respects the decree of the High Court be affirmed." This order seems to their Lordships calculated to assure to the plaintiff, with the least risk of future litigation, that to which he may be entitled upon the principle laid down by them in their judgment. But, considering the manner in which the question concerning this, at most inconsiderable, portion of the land in dispute has been brought before them, they do not think it would be right to make any order touching the mesne profits of what may be recovered, or to vary the decree of the High Court as to the costs of the litigation. They think also that the plaintiff ought to pay the costs of the appeal to Her Majesty in this suit. The respondents in Suit No. 6 must pay the costs of the appeal in that suit.

In Appeal No. 50 of 1874.

Agents for the Appellant: Messrs. *Burton, Yeates and Hart*.

Agents for the Respondents: Messrs. *Henderson and Co*.

In Appeal No. 57 of 1874.

Agents for the Appellant: Messrs. *Burton, Yeates and Hart*.

Agents for the Respondent: Messrs. *Lawford and Waterhouse*.

NOTES.

[1. THE HEADNOTE—

The headnote is defective. This case is an authority for the following propositions:—

1. Land re-forming on identifiable original site belongs to the owner of site previously to submergence (*Lopes's case*, 13 M. I. A., 467) and a third person will be the owner within this rule who previously to the submergence, had acquired an indefeasible title by adverse possession or otherwise (3 Cal., 796 at 800).
- N. B.—Of the two appeals disposed of in this decision, No. 2 illustrates the original rule and No. 6 the extended meaning of *owner*.
2. In such a case as is last mentioned, even the subsequent submergence and reappearance does not affect the question of ownership, which continues to be in that person (3 Cal., 796 at 801).
3. Once ownership and possession down to the diluviation is established, the party claiming the land on its reappearance by adverse possession should prove the facts constituting such possession (3 Cal., 796 at 803).
4. Submergence lasting only for a period short of the prescriptive period is an immaterial fact in the case of such owner (3 Cal., 796 at 801, 802).
5. Although in the case of a navigable stream the bed of the river may be said temporarily to belong to the public domain, that state of things exists only while the water continues to run over the ground (3 Cal., 796 at 803).

II. OWNERSHIP OF RE-FORMED LAND AND ADVERSE POSSESSION—

This case should be studied with 29 Cal., 518.

The doctrine of *continuity* of possession, in favour of him who is the owner (by whatever title he might have become so) has been re-affirmed by the Privy Council and the converse of it also, laid down and illustrated in *Secretary of State v. Krishnamoni Gupta* (1902) 29 CAL., 518 P. C.

1. The owner on re-formation, by mistake as to his rights, took lease from the Government who claimed to be the owner. In respect of lands where this state of things continued, (a) for the prescriptive period, the real owner's title became barred and extinguished:—*ibid.*

(b) for a period less than the prescriptive period, where the lands again submerged and reappeared, the real owner did not lose the same by prescription (when his claim was within time after re-appearance, but beyond it from the submergence):—*ibid.*

2. Thus, 3 Cal., 796 dealt with the case of the title having become perfect by adverse possession when the submergence took place. 29 Cal., 518 dealt with the case of the title not having perfected then.

3. The following important doctrines were laid down there:—

(a) "The possession of the Government (disseisor) was in fact determined by the submergence of the land which then became derelict: and so long as it remained in that state no title could be acquired against the true owner."—(29 Cal., 535).

(b) "Their Lordships cannot agree in the view that the possession of the trespasser would continue until the true owner resumed possession." "On the contrary, they think that on the dispossession of the Government by *vis major* of the floods, the constructive possession of the land (if anywhere) was in the true owners. *Vis major* has the same effect as voluntary abandonment" by the trespasser, overruling (1881) 7 Cal., 725.

4. In a case like Appeal No. 2 reported here in 3 Cal., 796, the adverse possession should be established from the date of last re-appearance, and the period under water and possession for the period prior to it will not count when the title by adverse possession had not perfected before last submergence.

5. The case of *continuous dispossession* by different trespassers should be distinguished from these cases of *no dispossession* through being under water. Such cases will be governed (probably) by *Perry v. Chissold* (1907) A. C., 73, and similar cases.

III. ADVERSE POSSESSION AND ONUS—

Presumption of continuance of previous ownership after re-appearance:—9 C. W. N., 111. See also the notes to (1883) 9 Cal., 744. F. B. in our 'LAW REPORTS', REPRINTS where this subject is dealt with *in extenso*.

IV. BED OF NAVIGABLE RIVERS—

See the Notes to 13 Mad., 369 and 6 B.L.R., 255 in our 'LAW REPORTS' REPRINTS.]

[806] The 14th March and 13th April, 1878.

PRESENT :

SIR L. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND
SIR R. P. COLLIER.

Dorab Ally Khan.....Plaintiff

versus

The Executors of Khajah Mohesooddeen.....Defendants.

[--18 I. A. 116--Suth. P. C. 519]

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Sale by Sheriff under writ of fieri facias Warrant.

A writ of *fieri facias* issued to the Sheriff authorizes him to seize the property of the execution-debtor which lies within his own territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good.

But if the Sheriff acts *ultra vires*, e.g., if he seizes and sells property not within his jurisdiction, he cannot invoke the protection which the law gives him when acting within his jurisdiction, and he stands in the same position as an ordinary person who has sold that which he had no title to sell.

Since there is not in India the difference between real and personal estate which obtains in England, and moveable and immoveable property there, are alike capable of being seized and sold under a writ of *fieri facias*, the responsibility of the Sheriff in respect of sale in that country is governed by the law relating to chattels, rather than by that relating to the sale of real estate.

A Sheriff, who in his official capacity seizes and sells property, undertakes by his conduct that he has legal authority to do so. When from his having acted beyond the territorial jurisdiction of the Court whose officer he is, the sale becomes inoperative and ineffectual, the purchaser may have a case for relief as against the judgment-creditor, who has received the purchase-money, if it should appear that the Sheriff has acted under his authority and by his express directions.

IN this case the Sheriff of Calcutta, to whom a writ of *fieri facias* had been issued by the High Court directing him to execute a decree of the late Supreme Court, seized and sold landed property in a province not within the territorial jurisdiction of the said Courts, and handed over the proceeds of the sale to the judgment-creditor. The purchaser at the Sheriff's sale, being afterwards evicted by the execution-debtor, brought an action for money had and received against the judgment-creditor, under whose authority and by whose express direction he alleged that the Sheriff had acted. The question of law raised in the case was as to whether the plaint filed disclosed a good cause of action. The facts of the case and the judgments [807] of the Courts below dismissing the action will be found set forth at pages 55 to 73 of the first volume of these reports.

Mr. Leith, Q. C., and Mr. C. W. Arathoon for the Appellants.—The Courts below were wrong in holding that the plaint disclosed no cause of action. The sale by the Sheriff of land pointed out by the execution-creditor was a sale by the execution-creditor himself. The Sheriff acted as his agent and under his special instructions. Oudh not being included in the places enumerated in the writ of *fieri facias*, and not being subject to the jurisdiction of the High Court at Fort William, the sale by the Sheriff of property in Oudh was *ultra vires*. That sale had

been judicially pronounced to be void, and the plaintiff had been ousted. Under these circumstances, he is entitled to have the price paid for the property at the Sheriff's sale returned to him by the execution-creditor, to whom the Sheriff had paid it over. The purchase was made under a mistake. The Sheriff had no power to sell, but all parties were under the belief that he had. There had been a failure of consideration. A Court of Equity will interfere to rescind a contract when the vendor has no interest in the subject-matter at the time of sale, on the ground of mistake—*Hitchcock v. Giddings* (4 Price, 135). [SIR B. PEACOCK.—There the price had not been paid. Does not the rule *caveat emptor* apply here? Had the purchaser looked at the writ, he would have seen that it did not authorize the Sheriff to sell land in Oudh. Had that objection been taken at the time, a copy of the writ might have been sent to the Commissioner of Oudh, and the sale regularly made.] The nature of the proceedings gave no opportunity to purchasers to investigate title. If the money had remained with the Sheriff, we might have sued him. [SIR B. PEACOCK.—The Sheriff, in selling, gives no warranty of title. SIR R. COLLIER referred to Sugden's Vendors and Purchasers, 14th edn., p. 459, as to eviction by a title, to which the covenants do not extend. SIR M. SMITH.—The argument as to warranty goes on the rules of the English law as to the sale of real property, which would not apply in India.] There is a [808] distinction between the present case, where the sale proceeds *in invitum* under the direction of the officer of the Court, and the case of a sale between two private parties. Here the plaintiff could not protect himself by enquiries into title, nor insist on covenants. The defendant might also be held liable in tort having wrongfully put the Court in motion. [SIR R. COLLIER.—All that he did was to point out lands in Oudh, which were not covered by the writ.]

Mr. Corrie, Q. C. (with him Mr. Doyne and Mr. Graham) for the Respondents, supported the judgments of the lower Courts. Assuming the Sheriff to be merely the agent of the judgment-creditor, and the latter to be in point of fact the vendor, the plaintiff had no cause of action against him either in tort or on contract. There was no warranty of title. The principle *caveat emptor* applied. By the bill of sale independent of the writ, the plaintiff had notice that the property was not within the jurisdiction of the High Court. *With that notice he voluntarily paid the purchase-money. Moreover, he had enjoyed substantial possession, having held the property for more than two years; so that in any case an account would have to be taken. As to the contention that the transaction had been brought about by mistake, if there was mistake, it was of law and not of fact. There was no averment in the plaint of mistake either of law or fact. In *Hitchcock v. Giddings* (4 Price, 135), cited for the appellant, the price had not been paid, and the facts in other respects bore no resemblance to those shown in this case.

Mr. Leith replied.

Their Lordships took time to consider their judgment, which was delivered by

Sir J.W. Colville.—This is an appeal against a decree of the High Court of Calcutta, sitting as a Court of Appeal, which, on the 23rd August 1875, affirmed the judgment of [809] Mr. Justice PHEAR, who, in the exercise of the original civil jurisdiction of the same Court, had, on the 22nd April 1875, dismissed the appellant's suit with costs.

The suit was instituted in December 1872 by the appellant, suing as executor of one Dianut-ut-Dowlah, against Khajah Mcheesooddeen, who died after leave

to appeal had been given in India, and is represented by the present respondents. The case was tried in India upon only the first and preliminary issue, viz., whether or not a good cause of action was disclosed in the plaint. It is, however, conceded that the statements in the plaint may be taken to be supplemented by, and to include, any fact stated, or to be inferred by necessary implication from the written statement of the plaintiff, or the documents annexed to and filed with either that or the plaint itself. These are the Sheriff's bill of sale of the 9th October 1866; a petition of Dianut-ut-Dowlah to the Judicial Commissioner of Oudh, and the order thereon; the will of Dianut-ut-Dowlah and the certificate granted to the plaintiff as the executor named therein; the writ of *fi. fa.*, dated the 18th June 1866; and the warrant of attorney to confess judgment in the action in which that writ was issued. For the trial of the issue, which is in the nature of a trial on demurrer, the facts stated or to be implied as above mentioned must be taken to be true.

What, then, are those facts? Taken in chronological order, they are as follows:—In 1856, under the before-mentioned warrant of attorney, judgment was entered up in the late Supreme Court of Judicature at Fort William, at the suit of Khajah Moheesooddeen (the defendant in this action), and one Robert O'Dowda, who was only joined with him as co-plaintiff in order to give the Court jurisdiction, against Wazeer Khan and Khajah Abdoos Samut, for the purpose of securing the repayment of Company's Rs. 70,000, with interest, on the 23rd July 1856. In order to enforce this judgment against Khajah Abdoos Samut, and the representatives of Wazeer Khan, who was then dead, a writ of *fi. fa.* was, on the 18th June 1866, directed to the Sheriff of Calcutta, commanding him to cause "to be levied and made of the houses, lands, debts and other effects, moveable and immoveable, of the said defendants, within the provinces, districts, or countries of Bengal, Behar, and Orissa, or [810] in the province or district of Benares, or in any other factories, districts, and places which then were annexed to and made subject to the presidency of Fort William in Bengal, by seizure, and if necessary by sale thereof," a certain sum therein mentioned. The plaintiff alleged that this writ did not legally authorize the levy of the sum in the writ mentioned by the seizure and sale of immoveable properties in Oudh; but that, nevertheless, the Sheriff, "by the authority of Khajah Moheesooddeen, the execution-creditor, and on the express instructions of his attorney, and professing to act under and by virtue of the said writ," on the 2nd and 20th days of August 1866, seized the right, title, and interest of Abdoos Samut and of Wazeer Khan, then in the hands of his heirs and representatives in a talook and premises within the province of Oudh, and put the property so seized up for sale on the 4th October in the same year; that Dianut-ut-Dowlah became the purchaser of it for the sum of 26,000 rupees; and that the Sheriff afterwards executed to him the bill of sale of the 9th October 1866, which is annexed to the plaint. He further alleged that, before the execution of the bill of sale, Dianut-ut-Dowlah paid the purchase-money to the Sheriff, who, about the 12th October 1866, paid 5,000 rupees, part thereof, to the attorney of the plaintiffs in the suit; and on the 25th October 1867 paid the balance of the purchase-money, less his poundage and charges, to Moheesooddeen himself; that the Sheriff, by his officer, put Dianut-ut-Dowlah into possession of the property, but that such delivery of possession was not legal or operative by the law then in force in Oudh, and that by that law the sale was wholly inoperative, and did not pass the right, title, and interest of the judgment-debtors or of any other person to Dianut-ut-Dowlah; that afterwards and under some proceedings which took place in the Courts in Oudh (the nature whereof, except that they began with a proceeding instituted by Dianut-ut-

Dowlah himself for a partition, does not very clearly appear), the sale was pronounced null and void, and that thereupon, and in the month of August 1868, Dianut-ut-Dowlah was removed from possession of the talook and premises. The plaintiff then admitted that Dianut-ut-Dowlah, whilst in possession, had made collections to the amount of [811] 10,937 rupees, but alleged that after payment of the Government revenue, collection, and law charges, and other necessary outgoings, a balance of only Rs. 446-6-9 remained in his hands, and that such balance was the only profit, benefit, or advantage which he obtained from the purchase; and then, after stating the death of Dianut-ut-Dowlah on the 23rd June 1868, the title of the plaintiff as his executor, a demand by the plaintiff and a refusal by the defendant, the plaint goes on to say:—"The plaintiff sues the defendant for the sum of 26,000 rupees for moneys had and received by the defendant for the use of the said Dianut-ut-Dowlah."

Mr. Justice PHEAR, in the course of his judgment, made some attempt to support the regularity of the seizure and sale of the property under the writ of *fi. fa.* In their Lordships' opinion, the decree under appeal cannot be supported upon any such ground. The illegality of these proceedings is sufficiently alleged, and the objection to them is patent on the face of the plaint. The jurisdiction of the late Supreme Court, and of the Sheriff as its officer, was originally limited by the Charter of Justice of 1774, to the Provinces of Bengal, Behar, and Orissa, and though afterwards extended by the 39 and 40 Geo. III, c. 79, s. 20, was so extended only to the province or district of Benares, and to and over all such provinces and districts as might at any time thereafter be annexed to and made subject to the Presidency of Fort William. "The writ of *fi. fa.*," which was the Sheriff's authority for the seizure, was carefully framed in accordance with this definition of his jurisdiction. If, therefore, he seized property in any place which did not form part of, and had not been annexed to, the Presidency of Fort William, he was as much a trespasser as an English Sheriff who had seized property out of his bailiwick would be. That the Province of Oudh was not, when first annexed to British India, or at the date of the execution, annexed to the Presidency of Fort William, if not one of those historical facts of which the Courts in India are bound, under "The Indian Evidence Act, 1872," to take judicial notice, was at least an issue to be tried in the cause.

The question to be determined was, however, correctly stated in the judgment of the High Court on the appeal. [812] After stating that they must assume it as established that the Sheriff had no right to execute the writ upon property in Oudh, and also, though that was not so clearly stated in the plaint as it might be, that the result of the proceedings before the Commissioner of Oudh was that the sale was declared null and void, and that the plaintiff's testator was thereupon evicted from the property, the learned Judges said: "The question then arises, can the purchaser, at a sale by the Sheriff under a writ of *fi. fa.*, upon being evicted by the execution-debtor, recover the purchase-money which he has paid from the execution-creditor, if it should turn out that the Sheriff had no authority to execute the writ at the place where the property was situate?" If that sentence had stood alone, their Lordships think it would have required to be modified by the addition of some such words as "and that he did so execute it under authority, and by the express direction of the judgment-creditor." They understand, however, that modification to be implied in the next sentence of the judgment, which is in these words:—"We are asked by the appellant to consider and decide the case upon the assumption that the Sheriff in seizing, selling, and conveying the property was the agent of the execution-creditor; that the execution-creditor was in fact the vendor, and as he had no right whatever to deal with

or sell the property, there was a total failure of consideration, and that consequently the money paid to him for the purchase became money had and received to the use of the plaintiff's testator." This assumption seems to be amply justified by the eighth paragraph of the plaintiff's written statement and the letter therein set forth.* The question thus stated, is novel, and not without difficulty.

[813] Their Lordships propose to consider, first, whether, in the circumstance stated, the evicted purchaser can have any remedy against the execution-creditor.

There is no doubt that the authorities cited in the judgment of the High Court, and relied upon at the bar, establish the proposition which is thus stated by Lord St. Leonard's at page 549 of the 14th edition of his work on Vendors and Purchasers "If the conveyance has been actually executed by *all* the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity." This general rule seems by the law of England to govern all sales by private contract between the parties, either of a freehold or of a leasehold interest in land.

Does it, however, govern a case like the present, in which the sale, as regards the owner of the thing sold, is *in invitum*, and made under colour of legal process? The chief reasons for the rule are that the purchaser by private contract has full means of investigating the title of the vendor, and of either satisfying himself that it is good, or of protecting himself against any apparent or latent defect in it by proper and apt covenants. If he fails to do either, his subsequent eviction is the result of his own negligence. But the purchaser at a Sheriff's sale has at best very inadequate means of investigating the title of the judgment-debtor; all that is sold and bought is the right, title, and interest of the judgment-debtor with all its defects; and, the Sheriff who sells, and executes the bill of sale is never called upon, and if called upon, would refuse, to execute any covenant of title. Therefore, the reasons for the rule failing, the rule itself cannot properly be held applicable to sales by the Sheriff, which are governed by rules peculiar to such sales.

Now it is of course perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor. This, however, is because the Sheriff is authorized by the writ to seize the property of the execution-debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good.

[814] The Sheriff, however, if he acts *ultra vires*, cannot invoke the protection which the law gives to him when acting within his jurisdiction. He is in the position of an ordinary person who has sold that which he had no

* Paragraph 8 of the plaintiff's written statement is as follows:—

"That before the execution of the said writ of *ieri facias*, Mr. Nicholas Paliologus, the Attorney of the said Khajah Mohreooddeen, wrote and sent to the then Sheriff of Calcutta the letter following:—

"Sir,—Please to seize such properties of the defendant which will be pointed out to you by the plaintiff, and which are in the actual possession of the defendants or some of them.

Yours obediently,

N. PALIOLOGUS,

Plaintiff's Attorney."

title to sell. And it appears to their Lordships that his responsibility in respect of the sale must be governed by the law relating to the sale of chattels, rather than by that relating to the sale of real estate. There is not in India the difference between real and personal estate which obtains in England; and moveable and immoveable property are alike capable of being seized and sold under a writ of *fi. fa.*

The law of England as to implied warranty of title in chattels sold was until lately, if it is not still, in some uncertainty. The more modern cases are collected by Mr. Benjamin in his work on Sales, 2nd edition, page 51, *et seq.* In *Sims v. Marryat* (17 Q.B., 281), Lord CAMPBELL when commenting on Mr. Baron PARKE'S judgment in *Morley v. Attenborough* (3 Exch., 500) after saying that the law was not in a satisfactory state, observed: "It may be that the learned Baron is correct in saying that on a sale of personal property the maxim of *caveat emptor* does by the law of England apply, but if so, there are many exceptions stated in the judgment which well nigh eat up the rule."

One of the latest expositions of the law on this point is to be found in the case of *Richholz v. Bannister* (34 L.J., C.P., 105; S.C., 17 C.B.N.S., 708), which was decided in 1864. In that case Chief Justice EARLE is reported to have said: "I decide, in accordance with the current of authorities, that if the vendor of a chattel at the time of the sale either by words affirms that he is the owner, or by his conduct gives the purchaser to understand that he is such owner, then it forms part of the contract, and if it turns out in fact that he is not the owner, the consideration fails, and the money so paid by the purchaser can be recovered back." This passage, it is to be observed, although contained in the report in the "Law Journal," is not to be found, *totidem verbis*, in the regular report. The actual decision, however, in which all the Judges concurred, was that on the sale of goods in an open shop or [815] warehouse there is an implied warranty on the part of the seller that he is the owner of the goods, and if it turns out otherwise, the buyer may recover back the price as money paid as on a consideration that has failed.

A rule of this kind cannot, of course, be applied to a sale of goods by the Sheriff under a *fi. fa.*, because what the Sheriff professes to sell is only the right, title and interest, whatever that may be, of the judgment-debtor, and this was the express ground of the decision in *Chapman v. Spiller* (14 Q.B., 621), where the case is treated as an exception to the general rule. It would seem, however, that, even according to the principles laid down in *Morley v. Attenborough* (3 Exch., 500), which, of the modern cases, is the most favourable to the application of the maxim *caveat emptor*, the Sheriff may reasonably be held to undertake by his conduct that he is acting within his jurisdiction. In that case, though it was decided that on the sale by a pawnbroker of an article pawned with him as an unredeemed pledge, there is no implied warranty of the pawner's title, the judgment of Mr. Baron PARKE seems to assume that the pawnbroker does warrant that the article had been pledged with him, and has become irredeemable. The learned Judge says: "In our judgment it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking anything more than that the subject of sale is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it." So too it may be inferred from *Hall v. Conder* (2 C.B., N.S., 22), that although upon the sale of a patent there is no implied warranty that the patent is valid and indefeasible, it would be reasonable to hold that there is an implied warranty that Letters Patent for the alleged invention have been regularly issued under the Great Seal. Their Lordships think that, upon a similar principle, the Sheriff may be held to undertake by his conduct that he has seized and

put up for sale the property sold in the exercise of his jurisdiction, although when he has jurisdiction he does not in any way warrant that the judgment-debtor had a good title to it, or guarantee that the purchaser shall [816] not be turned out of possession by some person other than the judgment-debtor.

In the present case the subject-matter of the sale was the estate of the execution debtor, so that if the Sheriff had had jurisdiction his conveyance would have passed the title. It was solely because he was acting beyond his territorial jurisdiction that the sale became inoperative, and wholly ineffectual. The High Courts have assumed that if the defendant is to be treated as a principal in the transaction (and their Lordships think he ought to be so treated), the case must be governed by the ordinary rules relating to vendors and purchasers upon voluntary sales of immoveable property. This view does not appear to their Lordships to be correct. The defendant directed the Sheriff to sell in his character of Sheriff. He did not profess to sell, nor could he have sold, as for himself. He intended the sale should be, as in fact it was, a sale by the Sheriff as Sheriff, and with the incidents attaching to such a sale. For the above reasons their Lordships are of opinion that the action cannot be properly determined without further investigation into the facts, as they cannot say that the plaint and the other documents on the record do not disclose a *prima facie* case for some relief against the defendant.

There is, no doubt, a further question whether the plaintiff has shown a case which, if proved, would entitle him to recover back the purchase-money as money had and received to his use as upon a total failure of consideration. To that their Lordships think the admitted fact of the possession by his testator for nearly two years of the property in question, and his reception, partial at least, of the rents and profits, might be a fatal objection. It could not, in such case, be said that the consideration wholly failed. But it is not quite clear on the record that this objection arises, since if the sale has been treated as a nullity, the purchaser has been accountable, and may have accounted, for what he received; and in any case the Court in India will be competent to mould the relief according to the facts finally established at the hearing. Their Lordships, of course, offer no opinion whether the plaintiff will ultimately succeed in establishing his right to [817] any relief. It may turn out that his testator, who never made any claim for a return of the purchase-money in his life-time, bought with knowledge of the defect in the Sheriff's jurisdiction, or has, by acquiescence or in some other way, forfeited any right which he might otherwise have had to relief. They only decide that the plaintiff has not wholly failed to disclose a good cause of action on the face of the record; and that the cause ought to be tried upon the other issues that have been, or may be, raised in it. And they will, accordingly, advise Her Majesty to reverse the two decrees of the High Court, and to remand the cause for trial upon any other issues settled or to be settled in the suit. They think that the costs of both parties to this appeal should be taxed, and a certificate of their amount sent to the High Court, in order that they may hereafter be dealt with by that Court as costs in the cause.

Case remanded.

NOTES.

[I. AUTHORITY AFFECTED BY SUBSEQUENT LEGISLATION—

This case laid down the applicability to execution sales of the maxim *caveat emptor*.

1. But the Civil Procedure Code, 1908, Sch. I, O. 21, enacts:—

R. 91.—The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment debtor had no saleable interest in the property sold.

By Rule 92 the sale may be set aside and by R. 93, "Where a sale of immoveable property is set aside under rule 92 the purchaser shall be entitled to an order for repayment of his purchase-money with or without interest as the Court may direct against any person to whom it has been paid."

2. These provisions correspond to sections 313 to 315 of the C.P. C. 1882 and 315, etc., of the C. P. C. 1877.

3. It was held in (1909) 13 C. W. N. 1036 = 10 C. L. J. 588 that this case which had proceeded on the C. P. C. of 1859 was no longer applicable in cases falling within the C. P. C.; (1883) 5 All. 577; (1880) 2 All. 780 were decided under the previous law.

Subject to this legislative provision the rule in this case should be followed:—(1893) 17 Mad. 238; (1901) 23 All. 355.

II. STILL A RULE OF LAW SUBJECT TO THE LEGISLATION—

Save as otherwise provided by the Legislature, the rule in this case as to there being no warranty of title should be followed:—(1893) 17 Mad. 238; (1886) 1 C. P. L. R. 26 (sale by Official Assignee); (1901) 23 All. 355. No remedy lies to purchaser where he bought with notice of defects, 26 Bom. 519; 15 B. L. R. 208.

II. RIGHTS OF PURCHASER—

(a) When relief given—

When what was sold and what was bought at the execution sale was not the entirety, but only a smaller interest—that of the Hindu Mitakshara father alone on the son's objection prevailing,—the purchaser is not entitled to recover proportionate amount from the decree-holder:—(1901) 23 All. 355.

But the decree being on a mortgage made for proper purposes on which the sons would have been liable, their shares were held liable as in a case of *contribution*.—(1901) 23 All. 355.

(b) Subrogation—

It was also stated their shares could be made liable on the ground that the sons would have been liable for (the debt not immoral) of the father, and their shares could have been proceeded against for the portion of the decree remaining *unsatisfied* after the sale of the father's share alone:—(1901) 23 All. 355 (359).

The decree in this case having been *satisfied*, what the Court meant is, in other words, that the purchaser is to be deemed to be *subrogated* to the rights of the judgment-creditor.

See however, (1886) 1 C. P. L. R. 26.

Compare with this the following rule in the **CYCLOPAEDIA OF LAW AND PROCEDURE** (1907) VOL. XXIV, p. 71—

By the prevailing view, when the purchase-money paid on a judicial sale, void because of defects in the proceedings, has been applied to the discharge of debts that were liens upon the property or payable out of an estate, a *bona fide* purchaser will be subrogated to the rights of creditors to the payment of whose claims the purchase-money was applied, and if he has obtained possession of the property he will be entitled to retain it until he has been reimbursed, or if the owner recovers a judgment at law for its possession the defeated purchaser may maintain a bill compelling the owner to make reimbursement before he will be allowed to take possession under his judgment." (American authorities cited in support).

See also **Sheldon on Subrogation** (2nd Edn. 1893) p. 49 *et. seq.*

The sale held without bringing on record the right legal representatives as parties held not a nullity but only irregular:—(1895) 21 Bom. 424.

III. WARRANTY OF AUTHORITY—

With reference to the statement in the text that the sheriff might impliedly warrant his authority to act as such, it would appear that the rule in *Collen v. Wright*, 8 E. & B. 647

might apply, as it has been held by the House of Lords in *Starkey v. Bank of England* (1908) A. C. 444 to apply, to all transactions though not necessarily resulting in contracts.

This was the case of a broker purporting to act under an invalid power of attorney notwithstanding that he believed it to be genuine. This class of cases is distinguished from the cases like *Derry v. Peek*, 14 A.C. 337, where deceit enters as an element.

IV. RIGHTS AGAINST SOLICITOR AND CLIENT—

See 1. *Smith v. Keal* (1882) 9 Q. B. D., client not liable but solicitor for pointing out particular goods without client's authority.

2. *Clissold v. Cratchley* (1910) 2 K. B. 244.

* 3. Sheriff how far agent of execution-creditor:—

Wilson v. Tunman (1843) 6 M. & G. 236; *Woollen v. Wright* (1862) 31 L.J. Ex. 513.]

[3 Cal. 817]

APPELLATE CIVIL.

The 16th May, 1873.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE McDONELL.

Hurro Proshad Roy.....Plaintiff

VERSUS

Gopaul Dass Dutt and others.....Defendants.

[= 2 C. L. R. 450]

Suit for possession dismissed—Subsequent Suit for Arrears of Rent—Limitation—Bengal Act VII of 1869, s. 29.

The ancestors of the plaintiff purchased certain property from Government in 1861, subject to an unexpired lease held by the defendants of the same property. On the expiry of the lease in 1866 the plaintiff endeavoured to obtain possession, but was opposed. He omitted to sue for possession till 1874, when the defendants set up certain chukdari tenures, and the Court found the defendants were entitled to the rights claimed; also finding that the plaintiff's suit was barred by limitation. Plaintiff thereupon, in 1876, brought a suit against the defendants for arrears of rent for the years 1866—72. Held, that as the last rent thus claimed accrued due in 1872, plaintiff's right was barred by s. 29, Bengal Act VIII of 1869.

[818] *Ranee Surnomoyee v. Sooshee Mookhee Burmonia* (11 W. R., P. C., 5) distinguished.

A plaintiff, who, through want of inquiry or mistake, brings a suit which he is unable to establish, will not be allowed, on discovering his error and bringing a suit in which he would have been entitled to recover, had he brought it within time, to take advantage of his own mistake to relieve himself from the law of limitation.

THIS was a suit brought to recover arrears of rent alleged to be due on certain chukdari tenures from the year 1272 to the year 1279 (1866—72).

*Regular Appeal, No. 45 of 1877, against the decree of Baboo Brojendro Coomar Seal, Roy Bahadur, Second Subordinate Judge of Zilla 24-Pargannas, dated the 30th November 1876.

The tenures in question originally belonged to the ancestors of the defendants, but on their making default in payment of the Government revenue, the talook was, in the year 1838, put up to sale under the provisions of Reg. XI of 1822, and purchased by the Collector on behalf of Government. From the years 1838 to 1840 the land was under the direct management of Government, and from the year 1841 to the year 1866 the defendants leased the property from Government. In the year 1861 Government sold its rights in the talook to the father of the plaintiff and in the year 1866, on the expiration of the lease of the defendants, the plaintiff endeavoured to obtain possession of the land, but was opposed by the defendants. The plaintiff, in 1874, then brought a suit for possession of the property, and the defendants set up certain chukdari tenures. The Court in deciding the case held that the defendants had failed to prove the tenure set up by them, but dismissed the plaintiff's suit on the ground that the suit was barred by limitation, inasmuch as defendants' lease ran out in the year 1865, and from that time to 1872 plaintiff had neither sought for rent nor possession. On appeal the High Court found against the plaintiff both points decided by the lower Court and dismissed the appeal.

The plaintiff then brought this present suit against the defendants to recover arrears of rent for the year 1272 to the year 1279 (1866—72). The Court of First Instance, on the ground that the claim was barred by limitation under s. 29 of Beng. Act VIII of 1869, dismissed the suit, and the plaintiff thereupon appealed to the High Court.

[819] *Mr. Anund Mohun Bose, Baboo Bhowani Churn Dutt and Baboo Nil Madhub Bose* for the Appellant.—The suit is not barred by s. 29, Act VIII of 1869, if the principle laid down in the case of *Ranee Surnomoyee v. Sooshee Mokhee Burmonia* (11 W. R., P. C., 5), as extended by this Court, be applied to our case. Following that case, our cause of action did not accrue until the judgment in the possessory suit in 1876 was delivered, also see *Eshan Chunder Roy v. Khajah Assanoollah* (16 W. R., 79), *Dindayal Paramanik v. Radhakishori Debi* (8 B. L. R., 536), *Mohesh Chunder Chakladar v. Gungamonee Doree* (18 W. R., 59).

Mr. Brownfeld and Baboo Radhika Churn Mitter for the Respondents.

The judgment of the Court was delivered by

Garth, C. J.—The only question in this appeal is that of limitation; and, in order to the proper solution of that question, having regard to the authorities to which our attention has been called it is necessary to state the facts with some precision.

The suit is brought to recover arrears of rents of certain chukdari tenures from the years 1272 to 1279.

These tenures are within the limits of Talook Kassinugger, which originally belonged to the defendants' ancestors; but as they failed to pay the Government revenue, the talook was sold in the year 1838 under Reg. XI of 1822, and purchased by the Government.

In 1841 the defendants took a farming lease of it for five years in the name of one Bissonath Dey.

In 1846 that lease was renewed for another twenty years, so that the defendants held the talook in ijara up to 1866.

Meanwhile, in 1860, the Government sold its proprietary right in the talook to the plaintiff's father, who afterwards died, leaving the plaintiff his

heir; and on the expiration of the ijara lease in 1866, the plaintiff endeavoured to take khas possession of the entire talook from the defendants.

[820] The defendants, however, set up certain chukdari tenures extending over a large portion of the lands of the talook; whereupon the plaintiff in the year 1874 brought a suit to recover khas possession of those lands. The defendants pleaded their chukdari rights; and the District Judge, though he decided the question as to those rights against the defendants, decreed the suit in their favour on the plea of limitation.

On appeal, however, the High Court found against the plaintiff upon both points, considering that the evidence established the fact of the existence of the chukdari tenures, it having been proved satisfactorily that before the purchase of the Government rights by the plaintiff's father, the defendants had paid rent for those tenures to the Government, for which they produced receipts signed by the Collector.

The effect of this finding was of course that the plaintiff was not entitled to dispossess the defendants of the lands in question, and that the defendants were held to be tenants to the plaintiff of those lands.

The plaintiff then asked leave of this Court to appeal to the Privy Council, which was refused; but afterwards upon a direct application to the Privy Council he obtained leave, and the case is now pending in that Court.

Meanwhile, upon the basis of the judgment of the High Court, the plaintiff brought this present suit against the defendants to recover the back rents of the chukdari tenures from the years 1866 to 1872.

It is admitted that the last rent thus claimed accrued due in 1872, more than three years before this suit was brought in 1876; but then it is said that the principle of the case of *Ranee Surnomoyee v. Sooshee Mookhee Burmona* (11 W. R., P. C., 5) applies here, and that the cause of suit for these rents did not accrue to the plaintiff until the High Court delivered their judgment in the former suit in the year 1876, confirming the existence of the chukdari tenures.

Our attention has been called by Mr. Bose to several cases in this Court to which the ruling of the Privy Council has been [821] applied; and it has been argued that, although the facts of this case may not quite resemble those of the case of *Ranee Surnomoyee*, this Court has extended the principle of that case, so as to make it applicable to the present.

The Subordinate Judge has held that the principle of that case is not applicable to the present, and we quite agree with him.

In *Surnomoyee's* case a patni was sold for arrears of rent under Act VIII of 1819. This sale was afterwards set aside for irregularity, and the patnidar was restored to possession. The zemindar then sued the patnidar to receive the back rents, and the patnidar pleaded that the suit was barred. The High Court here considered that it was so, but the Privy Council held otherwise, because until the patnidar had recovered possession of the patni the zemindar could not possibly have sued him for the rent. In fact, no rent became due as long as the patnidar was ousted of his rights, but it was only equitable that when those rights were restored to him, he should regain them only subject to the obligation to pay the back rents to the zemindar.

So again, in the case of *Dindyal Paramanik v. Radhakishori Debi* (8 B. L. R., 536), decided by Chief Justice COUCH and Mr. Justice JACKSON in this Court, the plaintiff sued the defendant in the year 1872 to recover the rent

due for the year 1871, and to eject him for non-payment. The litigation lasted till 1876, when the plaintiff obtained a decree for the rent, and also for ejecting the defendant if the rent was not paid within fifteen days. It depended entirely upon the defendant himself whether he paid the rent so decreed or not. If he did not, his tenancy, in the opinion of the Court, would have ceased as from the time when the suit was brought. If he did, then the payment had the effect of restoring the tenancy.

Under these circumstances, the landlord sued in 1876 for the rent of 1872 and it was held that he was not barred, because until the defendant paid the rent, and so restored to himself the tenancy, the plaintiff had no cause of action for the back rent.

[822] In the case decided by Mr. Justice JACKSON and Mr. Justice MOOKERJEE (16 W. R., 79), it does not appear what the facts were; but from the language of the learned Judges, they certainly seemed to consider that the case came strictly within the principle laid down by the Privy Council.

In *Mohesh Chunder Chakladar v. Gungamoni Dossee* (18 W. R., 59), decided by Mr. Justice KEMP and Mr. Justice GLOVER, we certainly have some difficulty in seeing how the Privy Council's decision could possibly have been made applicable; but the facts of that case are so totally dissimilar from those of the present that we do not feel at all bound by that judgment.

Most of these authorities are carefully considered by Mr. Justice MARKBY and Mr. Justice MITTER in the late case of *Watson & Co. v. Dhondra Chunder Mookerjee* (I. L. R., 3 Cal., 13), and we entirely agree with the view which the learned Judges there take of the judgment of the Privy Council.

The judgment, properly understood, is in our opinion wholly inapplicable to a case like the present.

Here the plaintiff, whose ancestor purchased the rights of Government in 1860, ought to have known, when the defendant's ijara came to an end in 1866, what his true position was as against the defendants. The defendants set up against him these chukdari tenures; and if the plaintiff had made proper enquiries, he might have ascertained whether those tenures really existed. But he chose to ignore them, and to sue the defendants improperly (as it has turned out) for khas possession of the talook; and it is not because he has made a mistake, and by that mistake put the defendants to the cost and inconvenience of a long litigation, that he has a right now to claim immunity from the provisions of the Limitation Act.

If that were so any man who mistakes his proper rights and remedies might with equal justice claim exemption from those provisions.

Take the ordinary case of a landlord giving his ryot notice to quit, and at the expiration of that notice bringing a suit to [823] eject him. The ryot sets up a right of occupancy; and the landlord, after a litigation extending over four or five years, is eventually defeated upon that ground: could the landlord under such circumstances sue to recover rent from the ryot which accrued due four years previously, and contend that he was not barred by time because he could not pursue his claim for rent and his claim for ejectment at the same time?

In our opinion, certainly not. Such a case would be entirely different from that decided by the Privy Council. If a landlord could recover back rents under such circumstances, he would be taking advantage of his own mistake to relieve himself from the law of limitation.

* In this case the plaintiff ought to have known in 1866 what his true position was as against the defendants. Instead of treating them as tenants, and claiming from them the rents which they would probably have paid, he brought a suit against them for khas possession. Having failed in that suit, he is now trying to recover the rents as from 1866; we think he is clearly barred. . .

The appeal will be dismissed with costs, including the costs of the application for postponement of the hearing of the appeal.

Appeal dismissed.

NOTES.

[AFFIRMED BY THE PRIVY COUNCIL—

The decision in this case was **affirmed** by the Privy Council in (1882) 9 Cal. 325 P. C. =9 I. A. 82=12 C. L. R., 129. See the notes to that case in our 'LAW REPORTS' REPRINTS.]

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